U-I-295/13
19 October 2016

DECISION

At a session held on 19 October 2016 in proceedings to review constitutionality initiated upon the requests of the National Council, the Human Rights Ombudsman, and the District Court in Ljubljana, and upon the petitions of Tadej Kotnik, Ljubljana, and others, the company Črpalke potnik, d. o. o., Zreče, and others, and VR Global Partners LP Investment Fund, George Town, Cayman Islands, and others, all represented by Miha Kunič, attorney in Ljubljana, Jože Sedonja, Ljubljana, Primoa Kozmus, Brežice, and the company Savaprojekt, d. d., Krško, the PanSlovenian Shareholders' Association, Ljubljana, and others, the company Fax Max, d. o. o., Brezovica, and others, and the company Alpen Invest, d. o. o., Ljubljana, and others, all represented by the Tamara Kek Law Firm, d. o. o., Ljubljana, Tomaž Štrukelj, Trzin, Angel Jaromil, Ljubljana, Luka Jukič, Žužemberk, Andrej Pipuš, Maribor, and Mag. Dušanka Pipuš, Ljubljana, the latter represented by Andrej Pipuš, attorney in Maribor, Marija Pipuš, Slovenske Konjice, Franc Marušič, Solkan, and others, represented by Boštjan Rejc, attorney in Ljubljana, Tomaž Štrukelj, Trzin, Zdenko Fritz, Izlake, and others, Andreja Kogovšek, Ljubljana, and others, Stajka Škrbinšek, Domžale, the latter represented by Tomaž Bromše, attorney in Celje, Igor Karlovšek and Marija Karlovšek, both from Radeče, the company Fondazione cassa di risparmio di Imola, Imola, the Italian Republic, represented by Ilić Law Firm, o. p., d. o. o., Ljubljana, and Janez Gosar, Vodice, and in proceedings to review constitutionality initiated upon an order of the Constitutional Court, the Constitutional Court

decided as follows:

1. Article 350a of the Banking Act (Official Gazette RS, Nos. 99/10 – official consolidated text, 35/11, 52/11 – corr., 59/11, 85/11, 48/12, 105/12, 56/13, and 96/13) was inconsistent with the Constitution.

2. Article 265 of the Resolution and Compulsory Dissolution of Banks Act (Official Gazette RS, No. 44/16) is inconsistent with the Constitution.

3. The National Assembly must remedy the unconstitutionality referred to in the preceding Point of the operative provisions of this Decision within six months of its publication in the Official Gazette of the Republic of Slovenia.

4. Until the unconstitutionality referred to in Point 2 of the operative provisions of this Decision is remedied, proceedings based on the first paragraph of Article 350a of the Banking Act shall be stayed.

5. The statute of limitations regarding claims for damages referred to in the first paragraph of Article 350a of the Banking Act shall begin six months after the entry into force of the law by which the National Assembly responds to the unconstitutionality established in Point 2 of the operative provisions of this Decision.

6. Articles 253, 253a, 253b, 261a, 261b, 261c, 261d, and 261e, the second paragraph of Article 262b, and Articles 346, 347, and 350 of the Banking Act were not inconsistent with the Constitution.

7. Article 41 of the Act Amending the Banking Act (Official Gazette RS, No. 96/13) was not inconsistent with the Constitution.

REASONING

A

1. The National Council, the District Court in Ljubljana, and the Human Rights Ombudsman filed requests for the review of the constitutionality of the challenged provisions. The other subjects listed in the opening part of this Decision filed petitions. The applicants and petitioners allege that they challenge Articles 253, 253a, 253b, 260a, 260b, 261a, 261b, 261c, 261d, 261e, and 262a, the second paragraph of Article 262b, and Articles 346, 347, 350, and 350a of the Banking Act (hereinafter referred to as the BA-1), as well as Article 41 of the Act Amending the Banking Act (hereinafter referred to as the BA-1L). The National Assembly only replied to the request of the National Council and to some petitions, whereas the Government submitted an opinion regarding all the requests and petitions. The Constitutional Court requested that the Bank of Slovenia provide an opinion regarding the majority of the requests and petitions (except those that were filed subsequently and which included no new arguments), and the Bank of Slovenia submitted its opinion as requested.[1] The Constitutional Court served on the parties to proceedings the judgment of the Court of Justice of the European Union (hereinafter referred to as the CJEU) in *Tadej Kotnik and Others v. Državni zbor Republike Slovenije [Tadej Kotnik and Others v. the National Assembly of the Republic of Slovenia]*, C-526/14, dated 19 July 2016, to which some of the parties responded. Although not all applicants and petitioners challenged each and all of the challenged statutory provisions, nor did they challenge them on the

same grounds, the Constitutional Court summarised their allegations as a whole and did not address them separately in order to ensure that the Decision is as transparent and clear as possible. Below, the Constitutional Court uniformly refers to the applicants and petitioners as “applicants”. In the same manner, the Constitutional Court summarised the allegations by which the National Assembly and the Government opposed the arguments of the applicants. The opinions of the Bank of Slovenia are summarised separately.

The Allegations of the Applicants

2. The applicants allege that the challenged regulation, which regulates the compulsory write-off of the eligible liabilities of banks (reduction) and the compulsory conversion of those liabilities into bank shares, directly interferes with their human rights. They drew attention to the fact that such possibility to cover banks’ losses significantly interferes with the contractual relationship between the banks and the holders of eligible liabilities. Allegedly, this holds true in particular with regard to fixed-term subordinated bonds, which were included in the bank’s additional Tier 1 and Tier 2 capital only temporarily, as allegedly the bond prospectuses did not allow for the possibility of using such bonds to cover the bank’s losses, except in the event the bank goes bankrupt. They allege that the buyers of shares and subordinated bonds were informed of the fact that only a bankruptcy of the bank (and, as regards shareholders, also the possible reduction of the bank’s share capital) could affect the rights they had as the holders [of these instruments], as in accordance with Article 318 of the BA-1 it is inadmissible to initiate a compulsory settlement procedure against a bank.

3. The applicants allege that the legislation that was in force before the entry into force of the BA-1L did not envisage the write-off or conversion of eligible bank liabilities. In their assessment, the challenged provisions disproportionately and retroactively interfere with the acquired rights of the holders of eligible bank liabilities. They refer to Decision of the Constitutional Court No. U-I-277/05, dated 9 February 2006 (Official Gazette RS, No. 21/06, and OdlUS XV, 15), in accordance with which also rights that are based on concluded contracts entail acquired rights with regard to which it is necessary to observe the prohibition of retroactive interferences therewith. The right of holders of subordinated bonds to interest based on a predetermined fixed interest rate and the right to repayment of the capital lent are allegedly acquired rights of the holders of subordinated bonds that originate from the concluded legal transaction, which was allegedly based on statutory conditions, risks, and effects that were known in advance, and which was concluded on the basis of a prospectus for the sale of bonds and with the authorisation of the Securities Market Agency. Alternatively, the applicants allege that only the interference with the legal regulation of interest for the future use of the capital could be deemed to be quasi-retroactivity, whereas the interference with the capital and the accrued (or even due, but unpaid) interest entails true retroactivity, as the capital was lent and used in the past. The BA-1L allegedly introduced an

interference by the authorities with the legal and economic position of the investors in the banks, of which they had not been informed at the time of the purchase of the securities.

4. With regard to the above, the applicants believe that what is at issue is true retroactivity and an inconsistency with Article 155 of the Constitution that does not pass the tests of legitimacy and proportionality. Allegedly, the reason for such an inconsistency is the total and permanent revocation of the company-law rights of shareholders and the interference with the concluded legal relations of the holders of subordinated bonds. The applicants allege that in point 4 of the first paragraph of Article 253a of the BA-1 the legislature refers only in general to the prevention of the possibility that the stability of the financial system would be jeopardised, with regard to which it allegedly does not follow from the Draft Act why precisely the challenged extraordinary measure is in the predominant public interest or what the results of an assessment of the potential financial repercussions would be had the challenged regulation not been adopted. The applicants allege that the main, direct interest due to which the challenged extraordinary measure was introduced was to ensure the liquidity and to improve the capital adequacy of banks, which was allegedly the private interest of the owners of the banks, whereas the public interest in the sense of the stability of the financial system came only second. However, protecting a private interest by *de facto* expropriating the holders of eligible bank liabilities is allegedly constitutionally inadmissible. The applicants believe that the challenged regulation is also not based on any requirement of the European Union (hereinafter referred to as the EU) relating to the admissibility of state aid in the context of the Communication from the Commission on the application, from 1 August 2013, of state aid rules to support measures in favour of banks in the context of the financial crisis (OJ C 216, 30 July 2013 – hereinafter referred to as the Banking Communication). They allege that the relevant Directive[2] is not yet in force and that the Banking Communication is not a binding legal act. The entry into force of a law based on EU acts that are non-binding or not even in force allegedly entails arbitrary relinquishment of sovereignty contrary to Article 3a of the Constitution. Furthermore, the applicants submit that among the various possible extraordinary measures, Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ L 125, 5 May 2001 – hereinafter referred to as the Reorganisation Directive) only envisages the possibility of a temporary suspension of payments and executive measures or the reduction of claims, but not the write-off of claims.

5. The applicants deem that the interference with the rights of the holders of eligible liabilities by the conversion or write-off of eligible bank liabilities is not necessary, appropriate, or proportionate. They allege that the interference is not necessary, since already the BA-1, which was in force previously, envisaged four types of extraordinary measures for the reorganisation of banks and at the same time provided for the implementation of an effective and constitutionally indisputable burden-sharing measure. Allegedly, such a measure also allowed banks to improve their capital

adequacy by means of the early repurchase of bonds or their conversion into bond instruments with a lower nominal value on the basis of the voluntary consent of the holders of subordinated bonds. Furthermore, the applicants believe that remedying the capital inadequacy of banks could also have been remedied in some other manner, which is in any event provided for in the Communication and would have been less invasive as regards the holders of eligible bank liabilities. Namely, they allege that the Banking Communication enables the recapitalisation of banks already in the event of a capital shortfall, and it is not necessary to wait until the point of capital inadequacy (Paragraph 43). Such allegedly also entails the possibility of the mere conversion of eligible bank liabilities into capital, not only the possibility of writing them off. The Banking Communication allegedly also allows for the establishment of a holding company wherein the holders of eligible liabilities would have an influence on the future activities of the bank. The applicants stress that the measure providing for the recapitalisation of banks with predominantly public capital should not be considered as constituting state aid within the meaning of EU law, but rather as the fulfilment of an obligation, laid down by law, on the part of the owner, who guarantees to provide resources to the economic entity in the event the latter's capital is inadequate. They believe that the legislature, which adopted the BA-1L, failed to explain why it would not have been possible to achieve the stability of the financial markets by means of a more lenient measure. The extraordinary measures allegedly significantly affected trust in the capital market.

6. The applicants allege that the challenged interference is also not appropriate for achieving the pursued objective, i.e. the financial reorganisation of banks. They refer to the fact that, for instance, the nominal value of the NLB 26 subordinated bonds amounted to only 4% of the necessary recapitalisation of Nova Ljubljanska banka, d. d., Ljubljana (hereinafter referred to as NLB). An interference with the right of the holders of eligible liabilities is allegedly also inappropriate because the measure of the write-off or conversion of eligible liabilities also affected savers with savings in pension funds with a guaranteed yield. The interference of the challenged regulation with the rights of the holders of subordinated bonds is allegedly also not proportionate in the narrower sense. Namely, it is allegedly not evident from the challenged provisions of the BA-1 in which circumstances and under which conditions eligible bank liabilities can be written off and whether the sum of the amount of damage the creditors have sustained is in a reasonable proportion to the objective pursued by the state.

7. The applicants claim that the trust in the law of the holders of eligible bank liabilities, as referred to in Article 2 of the Constitution, is thereby affected. Considering Article 318 of the BA-1 and Article 298 of the Companies Act (Official Gazette RS, Nos. 65/09 – official consolidated text, 33/11, 91/11, 32/12, 57/12, 82/13 and 55/15 – hereinafter referred to as the CA-1), the applicants allegedly relied on the belief that the instruments of the write-off and conversion of eligible bank liabilities into equity shares would not be applied against the creditors of the banks, and, in the event of the bankruptcy of NLB and Nova Kreditna banka Maribor, d. d., Maribor (hereinafter

referred to as NKBM), that the debt instruments of these two banks would be allocated to cover losses only after all bank deposits of the Republic of Slovenia had been used therefor. They believe that the extraordinary measures of the write-off or conversion of eligible bank liabilities constitute a form of a new nationalisation, that they dissuade potential foreign investors, and that there are no objective reasons for such based on the predominant and legitimate public interest that would outweigh the interference with trust in the law. Furthermore, the applicants are of the opinion that the legislature should also have determined a transitional period that would allow the holders of eligible bank liabilities to adapt to the new system. They add that when changing the statutory regulation of property, the legislature must take into consideration the actual positions of such holders regarding ownership and protect trust in the law by means of a transitional regulation or by financial or other compensation, considering the weight of the interference, the number of persons affected (and thus the weight of their "special sacrifice"), the foreseeability of the changes, and the weight of the public interest in favour of the changes coming into effect immediately. The expropriation of monetary assets and of the legitimately expected yields based on a long-term investment is allegedly unacceptable. It allegedly entails the manifestation of risks that the applicants did not consent to at the time of purchasing the financial instruments. The applicants state that when purchasing these instruments the buyers thereof only consented to the risk of a more disadvantageous ranking of their entitlements in the order [of the repayment of investments] in a bankruptcy [procedure]. Those applicants who were shareholders of banks underline that they were deprived of their participation rights that they had had as the owners of the banks. In view of the audited financial statements and the perceived security of national banks, the investors in banks justifiably considered their investments to be reliable, as well as safe and secure. Since the legislature determined, by Article 41 of the BA-1L, that the challenged regulation would enter into force on the day following its publication in the Official Gazette of the Republic of Slovenia, also Article 41 of the BA-1L is allegedly inconsistent with the principle of trust in the law, as determined by Article 2 of the Constitution.

8. The applicants believe that the challenged regulation disproportionately and contrary to the third paragraph of Article 15 of the Constitution limits their right to private property determined by Article 33 of the Constitution in conjunction with the social function of property determined by Article 67 of the Constitution. Allegedly, the challenged regulation also violates Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, Nos. 33/94, MP, 7/94 – hereinafter referred to as the ECHR). The applicants are of the opinion that the challenged regulation entails an unauthorised interference with private property that is not based on a legitimate or objectively justifiable purpose and does not pass the test of proportionality for the reasons stated above in Paragraphs 5 and 6 of the reasoning of this Decision. As to the necessity of the measure, the applicants draw attention to the fact that, on the basis of the challenged regulation, the Bank of Slovenia is under no obligation to balance the public interest [against such interference] or to substantiate an extraordinary measure of expropriation. The

constitutional guarantee of the right to private property allegedly also extends to the right to decide when private property will be sold. The applicants see a number of possibilities in the BA-1 and in the CA-1 for ensuring the capital adequacy of banks that do not so radically curtail the entitlements deriving from eligible liabilities. The challenged statutory provisions and the decisions adopted on their basis allegedly directly affect the contractual relationship between the clients and the banks. The applicants believe that the challenged provisions of the BA-1 provide the basis for nationalisation without any compensation. They draw attention to the fact that, as they form the basis for expropriation, the BA-1 unjustifiably proceeds from the assumption that the companies are a gone concern. The Republic of Slovenia was allegedly under no obligation to adopt the challenged regulation, which, moreover, is allegedly neither necessary nor proportionate.

9. The possibility of the Bank of Slovenia issuing, on the basis of point 1 of the first paragraph of Article 261a of the BA-1, the measure of the write-off eligible liabilities, allegedly *de facto* enables the expropriation of the holders of subordinated bonds, for which there is no basis in the Constitution. Consequently, the challenged regulation is also inconsistent with Article 69 of the Constitution because this constitutional provision does not envisage the forfeiture of movable private property, because it prohibits expropriation directly on the basis of a law, and because it only allows for expropriation if compensation in kind or appropriate monetary compensation is provided. The applicants believe that the first indent of the first paragraph of Article 261b of BA-1, which provides that the Bank of Slovenia is to determine the amount of the repayment of the eligible liabilities of the banks under the assumption that the company is a gone concern, is inconsistent with Article 1 of Protocol No. 1 to the ECHR as it does not proceed from the fair value of the bonds.

10. Allegedly, the challenged regulation is also inconsistent with free enterprise as determined by Article 74 of the Constitution, as the extraordinary measure, i.e. the forfeiture of the assets invested in the banks, allegedly caused an excessive restriction of competition. Furthermore, the challenged regulation allegedly also unconstitutionally interfered with the right to manage economic entities in accordance with economic principles, and disproportionally limited such entities in pursuing their activities, as well as their right to choose and to apply by themselves the means to improve their market position. Allegedly, the legislature failed to respect the principle of proportionality in limiting this right.

11. Allegedly, the challenged regulation is also inconsistent with the human right to compensation for damage determined by Article 26 of the Constitution, as the damage occurred due to the irresponsible conduct of the state. The applicants argue that the Republic of Slovenia can use other (more appropriate) methods of bank resolution (and not the European [Union] method).

12. The challenged provisions of the BA-1 are allegedly inconsistent with the principle of equality before the law determined by the second paragraph of Article 14 of the Constitution. The holders of subordinated bonds were allegedly *ex post facto* put in a position that was not equivalent to that of bank depositors, in view of the otherwise comparable nature of bank deposits with that of subordinated bonds. Allegedly, they were also treated differently compared to all the other creditors of the banks. Furthermore, the holders of subordinated bonds were unjustifiably put in a position equivalent to that of the shareholders of banks, however, in contrast to the latter, they had no influence on the management of banks. The applicants are of the opinion that Slovene law (and thus the possibility of eligible liabilities being written off or converted) only applies to the holders of subordinated bonds issued in the Republic of Slovenia, for instance NLB 26 subordinated bonds, but not to the holders of subordinated bonds issued abroad, for instance NLB XS0208414515 subordinated bonds, which fall under British law and the jurisdiction of British courts. Allegedly, the holders of the latter were ensured reimbursement of their entire investment. Hence, the legislature allegedly acted arbitrarily, as there were no reasonable and objective grounds for a different regulation of the positions of the holders of subordinated bonds, depending on the place of the issuance of the bonds (e.g. in the Republic of Slovenia or on foreign stock exchanges). Unequal treatment of the holders of subordinated bonds depending on a circumstance pertaining to status (e.g. where the bank is established) or a personal circumstance (e.g. the place of permanent residence) is allegedly inconsistent with the first paragraph of Article 14 of the Constitution.

13. The applicants furthermore underline that, despite calls therefor, certain banks failed to carry out the early repurchases of some of the subordinated bonds, whereas the same – or other – banks carried them out as regards other bonds. Therefore, the applicants believe that the holders of different, yet legally equivalent, subordinated bonds unjustifiably found themselves in different legal positions. The applicants draw attention to the regulation determined by Articles 46, 224, and 270 of the Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act (Official Gazette RS, Nos. 13/14 – official consolidated text, 10/15 – corr., and 27/16 – hereinafter referred to as the FOIPCDA), which allows actions that result in the unequal treatment of creditors or in the diminution of a bankruptcy estate to be challenged.

14. Putting majority and minority shareholders on equal footing as regards their responsibility is allegedly unacceptable. Article 261a of the BA-1, which imposes an equal “punishment” on all bank owners, is allegedly unconstitutional precisely because it does not observe the principle that those who are equal must be treated equally, and those who are different must be treated differently. The applicants question why no similar possibility of “expropriation” is provided by law also for the shareholders of other companies in trouble (as opposed to only the shareholders of banks), where an independent appraiser assesses that the value of the capital is zero. The applicants believe that the owners of companies are guiltier than the owners of banks for the situation regulated by the BA-1. Notwithstanding this fact, the private property of the

owners of banks is thereby nationalised, whereas the private property of other owners is thereby indirectly subsidised.

15. In the opinion of the applicants, the challenged regulation determined by Articles 346, 347, 350, and 350a of the BA-1, which excludes the right of the creditors of eligible bank liabilities to legal or judicial protection against decisions of the Bank of Slovenia, entails an interference with the human rights protected in the framework of Articles 22, 23, and 25 in conjunction with Article 2 of the Constitution, the fourth paragraph of Article 15, the third paragraph of Article 120, and Article 157 of the Constitution. Allegedly, the legislature failed to demonstrate reasonable grounds for the challenged measure that are predominantly in the public interest. Furthermore, the Act allegedly does not pass the strict test of proportionality. The challenged regulation is allegedly also inconsistent with Articles 6, 8, and 13 of the ECHR. The applicants draw attention to Article 347 of the BA-1, which only allows the management boards of the banks on which extraordinary measures have been imposed to protect the interests of the holders of bonds. Allegedly, it is difficult to expect that this is something management boards will be objectively committed to. In accordance with the challenged provisions, the holders of bonds have allegedly no claim against the issuing banks, nor can they request judicial review of the legality of decisions imposing the conversion of bonds into shares. Allegedly, the second paragraph of Article 350a of the BA-1 enables “the officials of the Bank of Slovenia” to preventively protect themselves from potential actions for damages, contrary to Protocol No. 1 to the ECHR. The applicants believe that the challenged regulation, which gives the Bank of Slovenia the authorisation to impose the extraordinary measures of the conversion or write-off of these bonds, is inconsistent with the principle of appellate decision-making determined by Article 25 of the Constitution.

16. Compensatory protection is allegedly inappropriate, as bank depositors only have the right to compensation if conduct that is unlawful and for which the Bank of Slovenia is responsible is demonstrated. Allegedly, on the basis of the challenged regulation, the latter are not entitled to compensation even if a court establishes, by a judgment, that a decision of the Bank of Slovenia is unlawful, provided that the Bank of Slovenia could be reproached for having acted without due diligence. The burden of proof in actions for damages is allegedly impossible to satisfy. Consequently, the applicants believe that investors in banks should be provided direct judicial protection against the decisions of the Bank of Slovenia enabling them to achieve the annulment of such decisions or to obtain the right to compensation. In their assessment, the possibility to challenge the legality and constitutionality of the issued extraordinary measures is not provided for. They claim that investors in banks cannot bear the burden of the expenses of complex proceedings for damages. In general, the surrogate and limited compensatory protection allegedly cannot effectively substitute for a judicial review under administrative law of the legality of the decisions of the Bank of Slovenia in proceedings for the judicial review of administrative acts, and allegedly interferes with human rights in a manner that is neither necessary nor proportionate.

17. The applicants stress that not even the position of shareholders is better, as they cannot obtain $^{1}/_{10}$ of the share capital, for instance, in NLB – given that the Republic of Slovenia and the companies related thereto in the capital of the bank possess a 90.35% share. Hence, judicial protection is allegedly not appropriate for them either. Furthermore, judicial protection is allegedly in fact rendered impossible also as regards shareholders who own 1/10 of the share capital, as they are unable to appoint other representatives (in place of the management board) within 15 days, which is the time period within which an action against a decision of the Bank of Slovenia must be filed on the basis of the first paragraph of Article 341 of the BA-1; namely, on the basis of Article 297 of the CA-1, a general meeting must be convened 30 days in advance. In such context, the applicants refer to the Judgments of the European Court of Human Rights (hereinafter referred to as the ECtHR) in *Ashingdane v. the United Kingdom*, dated 28 May 1985, Para. 57, and in *Philis v. Greece*, dated 27 August 1991, Paras. 58 and 65.

18. Articles 346, 347, 350, and 350a of the BA-1 are allegedly inconsistent with Article 22 of the Constitution, as they render impossible fair decision-making regarding the rights of the creditors and of the other affected persons referred to in Article 350a of the BA-1. The applicants draw attention primarily to the fact that decisions of the Bank of Slovenia are not served on investors in banks. Furthermore, they allege that, pending the procedure for the issuance of a decision, they do not have the possibility to participate, as they are not considered to be parties to the procedure. The applicants believe that the investors in banks should be informed of all decisive facts – the appraisals that form the basis for the assessment of the value of assets; the data on the financial situation of the banks; the reasons for the inability to carry out other measures of financial reorganisation; the data that justify the existence of a public interest; and the data that justify the establishment of the conditions for successful long-term bank operations. They refer to the case law of the ECtHR. They allege that, due to the inaccessibility of data, the allegations in an action relating to the legality of the decisions of the Bank of Slovenia regarding the extraordinary measure, its unlawfulness, the due diligence of the Bank of Slovenia, and the arisen damage, cannot be appropriately substantiated. In this respect, they also draw attention to the national case law, in accordance with which informative motions for evidence are inadmissible. The applicants believe that, without the data on the financial and liquidity situation of banks against which extraordinary measures were issued, the affected investors in banks are unable to even draft conclusive actions. They are of the opinion that judicial protection that limits damages in advance is ineffective and that, for instance in bankruptcy procedures, the judicial protection of creditors is better. In the relationship between the investors in banks, on the one hand, and commercial banks and the Bank of Slovenia, on the other, there is allegedly a complete asymmetry of [available] information.

19. The challenged regulation is allegedly also inconsistent with the principle of clarity and precision determined by Article 2 of the Constitution, with Article 87, and with the principle of legality determined by the second paragraph of Article 120 of the Constitution. Allegedly, the challenged regulation failed to determine the statutory framework for decision-making on the conversion or write-off of eligible liabilities of banks; namely, it allegedly did not include: (1) any provisions that would concretise the situation in which it is clear that aid for the bank is necessary, as otherwise it would drift into bankruptcy or controlled liquidation, (2) any provisions that would determine the criteria for the appraisal of the capital adequacy or financial situation of the bank, or substantive bases for carrying out the calculations (regarding the value of the bank's assets), on the basis of which the Bank of Slovenia can issue an extraordinary measure, or (3) any provisions that would determine the scope in which the eligible liabilities of the bank would be written off or converted into equity shares. Furthermore, the public interest (i.e. ensuring the stability of the financial system), which was allegedly pursued by the adoption of the challenged extraordinary measure, was allegedly insufficiently clearly and precisely determined. Namely, on the basis of Article 261b of the BA-1, the Bank of Slovenia is allegedly able to decide completely arbitrarily that it has no time to carry out an appraisal of the value of a bank, for reason of which that bank can by itself provide an appraisal necessary for the extraordinary measure of the conversion or write-off of subordinated bonds to be issued. Furthermore, the Bank of Slovenia has allegedly complete discretion in deciding on the guidelines and the criteria on the basis of which independent appraisers are to produce the appraisals of banks' assets. Allegedly, the Bank of Slovenia is under no obligation to carry out any balancing, as it is not required to substantiate expropriation, to balance its justification, or to carry out a test of the public interest.

20. The challenged regulation is allegedly also inconsistent with the regulation of the provision of the capital adequacy of companies regulated by the CA-1 and allegedly creates internal inconsistencies in the legal regulation of the Republic of Slovenia that cannot be remedied by application of the rules of interpretation. Due to the above, it is allegedly inconsistent with the principle of the rule of law as determined by Article 2 of the Constitution. In the opinion of the applicants, if banks establish capital inadequacy, they should reorganise themselves by converting the deposits of the owners of the bank into the capital of the bank on the basis of Article 498 of the CA-1, before adopting any extraordinary measures.

21. The challenged regulation is allegedly inconsistent with Article 153 of the Constitution. The applicants draw attention to the Act on the Ratification of the Agreement between the Government of the Republic of Slovenia and the Government of the Russian Federation on the Promotion and Mutual Protection of Investments (Official Gazette RS, No. 1/01 – hereinafter referred to as the ASRPPI). Namely, from the ASRPPI and similar agreements concluded with other states it allegedly follows that compensation in the amount of the market value must be paid in exchange for any investments subject to expropriation. What respect for these treaties results in is

allegedly at variance with the principle of equality before the law, as foreigners allegedly receive more than local residents.

22. Furthermore, the applicants claim that there was an inconsistency with Article 89 of the Constitution, as the procedure for the adoption of the challenged provisions was allegedly not carried out in accordance with the Constitution, i.e. in a multiphase procedure, but in an urgent procedure. They allege that the Government failed to substantiate its request for an urgent procedure or substantiated it too generally, therefore the procedure for the adoption of the challenged provisions was allegedly inconsistent with the Constitution.

23. The challenged provisions are allegedly inconsistent with the position of the CJEU adopted in its Judgment in *Panagis Pafitis and others v. Trapeza Kentrikis Ellados A. E. and others*, C-441/93, dated 12 March 1996, and in numerous other judgments in accordance with which national legislation that allows for a reduction of the bank's share capital without any decision of the general meeting of the shareholders or a judicial decision is invalid, irrespective of the purpose of the national rules. Considering that the writing off of the liabilities represented by the shares in conformity with Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on the coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 315, 14 November 2012 – hereinafter referred to as the Directive on the Coordination of Safeguards) is allegedly not possible without the consent of the majority of the shareholders (by a decision of the general meeting) or a judicial decision, this is allegedly even more so with regard to the writing off of liabilities held by other creditors.

The replies of the National Assembly and the opinions of the Government

24. The National Assembly and the Government allege that the BA-1L was adopted for the purpose of enabling the implementation of measures reinforcing the stability of the banking system laid down in the Act on Measures Adopted by the Republic of Slovenia to Strengthen Stability in the Banking Sector (Official Gazette RS, Nos. 105/12 and 104/15 – hereinafter referred to as the AMSSBS). They draw attention to the fact that the EU has exclusive competence, on the basis of Article 3 of the Treaty on the Functioning of the European Union (consolidated version, OJ C 202, 7 June 2016 – hereinafter referred to as the TFEU), as regards determining issues related to competition rules. Allegedly, the right of the EU to regulate the state aid sector falls within that framework. In their opinion, as regards the answer to the question of when state aid is admissible, the Banking Communication, which the European Commission (hereinafter referred to as the Commission) has applied since 1 August 2013 in

assessing the admissibility of acts entailing state aid, is decisive. Disrespect therefor would allegedly entail a violation of the rules of EU law on state aid. It allegedly follows from the mentioned Communication that no state aid may be granted to banks that do not fulfil the minimum regulatory requirements until the capital, hybrid capital, and subordinated debt instruments have fully contributed to offsetting any losses, and, where the capital shortfall is below the minimum threshold, state aid may not be granted until subordinated instruments have been converted into capital. Allegedly, the challenged provisions of the BA-1 entail the legal framework established by the Commission as the precondition for the granting of state aid to banks. The National Assembly and the Government are of the opinion that from paragraph 44 of the Banking Communication there follows the unconditional requirement to reduce eligible liabilities. They interpret paragraph 43 of the Banking Communication as meaning that no write-off is required where the capital ratio of the bank with a capital shortfall remains above the regulatory minimum. Nor, allegedly, does the BA-1 permit the write-off of eligible liabilities if the capital shortfall remains above the regulatory minimum. The National Assembly and the Government believe that effects similar to the establishment of a holding company (as mentioned in note 17 to the Banking Communication) can be produced by converting eligible liabilities. The Banking Communication allegedly does not provide any exceptions for banks owned by the state. Allegedly, the measures for the stabilisation of the banking sector in accordance with the AMSSBS and the Public Finance Act (Official Gazette RS, Nos. 11/11 – official consolidated text, 14/13 – corr., and 101/13 – hereinafter referred to as the PFA) cannot be carried out without the measure of the write-off or conversion of eligible liabilities. In such a case, the Commission allegedly requires that the recipients return the state aid. The National Assembly and the Government are positive that, in the event the capital of a bank is negative, the financial instruments containing eligible liabilities are worthless. In such an event, the preservation of the existence of such liabilities even after the reorganisation of the bank would entail that they obtained a certain value exclusively due to the reorganisation, and that such value was “given” by the entity recapitalising the bank.

25. The National Assembly and the Government allege that the challenged provisions do not violate the prohibition on the retroactive validity of legal acts determined by Article 155 of the Constitution. In their opinion, the BA-1 does not interfere with the interests of the holders of subordinated securities or with their acquired rights. There would only be an interference with their interests if, due to the measure of write-off or conversion being carried out, the position of the creditors would be worse than if the measure had never been carried out. However, the bankruptcy of the bank is, allegedly, an alternative to carrying out the disputed measure, as granting state aid would then not be allowed. The fifth paragraph of Article 261a of the BA-1 allegedly ensures that there be no interference with legally protected interests. Allegedly, the public interest justifies the application of the challenged provisions, and the provisions allegedly do not interfere with the acquired rights. The objectives of the BA-1L correspond to the notion of the public interest, among which the two most important

objectives are allegedly to ensure the security of deposits and to preserve financial stability. The National Assembly and the Government draw attention to the negative consequences of a situation wherein the Republic of Slovenia would not be allowed or able to carry out measures for strengthening the stability of banks. This would allegedly bring the functioning of the entire financial system to a halt, resulting in an economy that would stop functioning and in a significant decrease in the credit ratings of the state. A consequence thereof would allegedly be that the Republic of Slovenia would no longer be able to fulfil its obligations or ensure the exercise of numerous rights guaranteed by the Constitution.

26. In addition, in the event the Constitutional Court deems that there has been an interference with acquired rights, the National Assembly and the Government draw attention to the fact that such an interference may only be admissible on the basis of the third paragraph of Article 15 of the Constitution. They claim that the challenged provisions of the BA-1 pass the test of proportionality, as the measure of the write-off or conversion of eligible bank liabilities can allegedly only be carried out where necessary (due to a bank jeopardising the stability of the banking system) and urgent (since the increased risk in the operations of the bank cannot be remedied by a milder measure). They consider the challenged measures to be appropriate due to their effect on decreasing the indebtedness of the banks, on increasing their capital adequacy, and on enabling recapitalisation by the state. They substantiate the proportionality by drawing attention to the fact that the disputed measures may only be used where the bankruptcy of a bank is impossible to prevent otherwise and provided that individual creditors do not sustain losses greater than in the event of a bankruptcy due to the conversion or cessation of claims. Consequently, carrying out the measures allegedly does not worsen the actual position of the creditors of eligible liabilities.

27. The National Assembly and the Government allege that the challenged provisions also do not violate the principle of trust in the law determined by Article 2 of the Constitution, as they do not arbitrarily worsen the position of individuals. They are allegedly in any event reimbursed depending on, on the one hand, the risks assumed upon acquisition of the financial instruments, and, on the other, the solvency of the debtor. The challenged provisions of the BA-1 allegedly do not interfere with the legally protected expectations of the holders of eligible claims against banks that they had at the time when the bonds were acquired (i.e. to be reimbursed by means of bank resources, if the bank has sufficient assets). The creditors' expectations of being reimbursed by means of public resources are allegedly not protected. Also as regards the allegations of an inconsistency with the principle of trust in the law, the National Assembly and the Government draw attention to the fact that the position of the creditors as a result of carrying out the measure must not be worse than if the measure had not been carried out. The National Assembly and the Government do not concur with the allegations of the applicants regarding a violation of the principle of the clarity and precision of legal norms as determined by Article 2 of the Constitution. In such context, they draw attention to the fact that the term "independent appraisal" is not

open-ended – allegedly, this is a person qualified to assess value who is neither the Bank of Slovenia nor an employee thereof.

28. The National Assembly and the Government draw attention to the fact that the right to private property is not unlimited. The interference with the human right determined by Article 33 of the Constitution is allegedly appropriate, necessary, and proportionate. The National Assembly and the Government in particular reject the allegations regarding Article 261b of the BA-1. The determination of the amount of reimbursement of eligible liabilities from bank resources on the basis of the supposition that the company is a gone concern is allegedly constitutionally consistent, since such a valuation allegedly reflects the economic situation of the bank, which, but for the implementation of the extraordinary measure, would have gone bankrupt, as there is allegedly no realistic possibility of it continuing its operations. This should allegedly ensure that the holders of eligible claims do not receive less than they would have received in bankruptcy proceedings; this allegedly entails that appropriate compensation commensurate with the value of the right that has been interfered with is ensured. Furthermore, in practice, the value of banks is allegedly calculated on the basis of the presumption that the company at issue is either a going or gone concern. The National Assembly and the Government draw attention to Decision of the Constitutional Court No. U-I-243/96, dated 17 September 1998 (Official Gazette RS, No. 70/98, and OdlUS VII, 159), in which the Constitutional Court confirmed the consistency with the Constitution of an outside authoritative interference with already due, but not yet repaid, claims of creditors, an interference that is based on a law that had not yet been adopted at the time when the contractual relationship was concluded. The National Assembly and the Government are of the opinion that it is not inconsistent with the guarantee of private property if a shareholder does not receive monetary compensation where the value of written-off assets equals zero. They consider that issuing an extraordinary measure does not entail expropriation within the meaning of Article 69 of the Constitution, as the creditors are repaid in the amount they would have received in bankruptcy proceedings – in accordance with the financial situation of the bank.

29. As to the alleged inconsistency with the principle of equality before the law as determined by the second paragraph of Article 14 of the Constitution, the National Assembly and the Government explain that for certain securities issued by a bank a foreign law can apply in the sense that it is applicable for the content of the issuer’s liabilities and/or for the form of the security at issue. Allegedly, for all actions related to the supervision of a bank to which the BA-1 applies, only the Slovene law is relevant. The rules of the Reorganisation Directive in conjunction with the third paragraph of Article 253 of the BA-1 allegedly ensure that the measures regarding the write-off or conversion of subordinated liabilities apply in all EU Member States to all holders of subordinated financial instruments, who therefore cannot be treated unequally. With respect to the principle of equality, the National Assembly and the Government draw attention to the fact that eligible liabilities significantly differ from other bank liabilities,

as they were created in order for any losses of the banks to be covered thereby. They explain that the holders of hybrid and subordinated liabilities are not treated equally as shareholders, as their claims can only be converted or written off after the liabilities of the bank against shareholders are written off. Article 261a of the BA-1 allegedly observes the principle that what is equal should be treated equally, and what is different should be treated differently.

30. With respect to the allegations regarding a violation of the human right to judicial protection, the National Assembly and the Government underline that, in accordance with the first paragraph of Article 350a of the BA-1, the holders of eligible liabilities have the possibility to request, from the Bank of Slovenia, compensation for damage. They refer to Decision of the Constitutional Court No. U-I-18/02, dated 24 October 2003 (Official Gazette RS, No. 108/03, and OdlUS XII, 86), in which a similar instance of a limitation of the human right to judicial protection determined by the first paragraph of Article 23 of the Constitution was thereby considered to be constitutionally admissible. They allege that the challenged limitation, which pursues the objectives of the protection of the depositors and of the stability of the financial system, also conforms to the criteria of the strict test of proportionality. In such context, they allege that the Bank of Slovenia only decides to impose an extraordinary measure once it is clear that the bank does not fulfil the fundamental requirements determined by the BA-1. Since it is impossible to restore the previous situation, i.e. to halt and to reinitiate the procedure for the reorganisation of banks (which would entail that banks with capital inadequacy would be permitted to operate), judicial review of the decision of the Bank of Slovenia that would be different from invoking liability for damages is allegedly not even possible. As regards the liability for damages of the Bank of Slovenia, Article 350a of the BA-1 allegedly appropriately takes into consideration the general rule of the law of damages that the perpetrator is only liable for damage that has a causal link to his or her actions. In possible judicial proceedings in accordance with Article 350a of the BA-1, the burden of proving the existence of requirements justifying the write-off of eligible liabilities should be on the Bank of Slovenia.

31. The National Assembly and the Government also do not concur with the alleged inconsistency with the right to the equal protection of rights determined by Article 22 of the Constitution. Allegedly, in potential judicial proceedings in accordance with Article 350a of the BA-1, creditors have the right to propose the taking of all necessary evidence, including assigning a court-appointed expert who would assess whether the valuation of the bank’s assets that served as the basis for carrying out the extraordinary measure was appropriate, and whether the creditors would have been repaid a greater amount had there been a bankruptcy. The National Assembly and the Government consider each potential interference with the right to be heard of the holders of eligible liabilities to be constitutionally justified, i.e. appropriate, necessary, and proportionate. They allege that the BA-1 necessitates an interpretation in accordance with which the Bank of Slovenia must state and substantiate, in the reasoning of a decision to adopt

of an extraordinary measure, that all the statutorily determined conditions for issuing the measure are fulfilled.

32. The National Assembly and the Government disagree with the position that the Directive on the Coordination of Safeguards prohibits the existence of the challenged provisions in the national law of the Member States. They draw attention to the Reorganisation Directive, which allegedly authorises Member States to adopt appropriate reorganisation measures (allegedly, conversions and write-offs are reorganisation measures). The challenged provisions of the BA-1 are allegedly based on this Directive. In the opinion of the Government, the Reorganisation Directive is a special, posterior regulation, which excludes, as regards reorganisation measures, the application of Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ L 26, 31 January 1977 – hereinafter referred to as Directive 77/91/EEC).

33. As regards the interpretation of certain treaties regulating the rights of investors to compensation in the event of expropriation, the National Assembly and the Government underline that the write-off of eligible liabilities does not entail expropriation. However, should the Constitutional Court adopt a position to the contrary, they believe that such entails admissible expropriation in the public interest, which may only be carried out if the creditors are repaid an amount equal to what they would have received in bankruptcy proceedings.

34. The National Assembly and the Government reject the allegations regarding an inconsistency with Article 87 of the Constitution. The challenged provisions allegedly determine everything that the applicants claim they do not include: (1) the conditions to be fulfilled in order for granting aid to a bank to be necessary; (2) the basis on which the assessments of the bank’s assets will be carried out; and (3) the extent to which eligible liabilities are to be written off. In their assessment, the part in which eligible bank liabilities are written off cannot depend on the will of the creditors but on the capital situation of the bank and EU rules on state aid.

The Opinion of the Bank of Slovenia

35. The Bank of Slovenia is of the opinion that the measure of the write-off or conversion of eligible liabilities, in so far as the conditions under which it can be implemented and the consequences it creates are concerned, is a form of insolvency proceedings, given that it creates for the shareholders and certain creditors of the bank the same effects (depending on the established financial situation of the bank) as the bank’s bankruptcy would create for these persons. In its view, the challenged

provisions thus do not interfere with the acquired rights of shareholders or creditors with eligible claims, since no regulation has ever ruled out the possibility of the bankruptcy of a bank of systemic importance. According to the Bank of Slovenia, the extraordinary measures are envisaged as measures for the reorganisation of the banking sector, in the sense of a special compulsory settlement procedure. Thereby, the bankruptcy of a bank is avoided, on the basis of authoritative action by the supervisory body and in the public interest, namely, by precisely defined restructuring measures applied in such a manner so as to protect the fundamental rights of the owners and creditors, and to avoid the adverse effects of the bank's bankruptcy on the financial system.

36. The law allegedly provides adequate protection of fundamental rights by ensuring observance of the fundamental rules of the bankruptcy procedure also when deciding on the extent of the write-off or conversion necessary (for example, taking into consideration the priority ranking and the amount of compensation to be paid to those affected in the event of conversion). The content of the contested provisions of the BA-1 is allegedly such that failure to apply them would necessarily lead to the infringement of rights protected by the Constitution. The challenged provisions of the BA-1 allegedly refer to such matters that failure to apply them would necessarily lead to violations of constitutionally guaranteed rights. The instability of the financial system, which has immediate effects on the functioning of the economic system and on public confidence in the banking system, would namely necessarily destroy the fundamental values guaranteed by the Constitution, among them, primarily, the protection of a social state (Article 2, the first paragraph of Article 51, and Article 52 of the Constitution), as well as other rights (free enterprise as determined by Article 74 and the security of employment as determined by Article 66 of the Constitution). The Bank of Slovenia refers to Decision of the Constitutional Court No. U-II-1/12, U-II-2/12, dated 17 December (Official Gazette RS, No. 102/12, and OdlUS XIX, 39).

37. The Bank of Slovenia stresses that the measures for the reorganisation of banks in the Republic of Slovenia are regulated by the AMSSBS, which determines the measures of state aid granted to banks in the form of a capital increase and the transfer of banks' bad debts to a special company. It maintains that on the basis of the TFEU, the Commission has exclusive competence to decide on the admissibility and conformity of state aid with the rules of the internal market and the protection of competition, and that the Commission adopted the Banking Communication in order to harmonise practices and criteria for assessing state aid in relation to measures for the reorganisation of banks. The Bank of Slovenia emphasises that the Commission adopted the Banking Communication on the basis of point (b) of the third paragraph of Article 107 of the TFEU, which allows aid to be granted in exceptional circumstances to remedy a serious disturbance in the economy of a Member State and which determines more detailed instructions of the Commission with regard to the compatibility of state aid with the internal market (therefore, the conditions for granting state aid). The Bank of Slovenia explains to the applicants that the Commission's

communications entail formally approved and recognised modes of action falling within the ambit of the Commission's exclusive competence. Allegedly, the restructuring of banks on the basis of the Banking Communication may be admissible only if, before the implementation of any measure using state resources, provision has been made for a reduction in the capital [of the bank] and a reduction in the bank's subordinated debt or its conversion into capital. The Bank of Slovenia states that on the basis of paragraphs 43 and 44 of the Banking Communication, subordinated debt holders must, first and foremost, contribute to offsetting any losses and the conversion of bond instruments into capital will be permissible only when all of the bank's certified losses have been offset by way of a write-off. Lastly, the application of the challenged provisions of the BA-1 is decisive for ensuring that the measures necessary for the strengthening of the stability of banks on the basis of the AMSSBS are in conformity with EU rules on state aid.

38. According to the Bank of Slovenia, the challenged provisions of the BA-1 are not inconsistent with Article 155 of the Constitution. The Bank of Slovenia states that in the case at issue only "quasi-retroactivity" can be constitutionally relevant, which is protected within the framework of trust in the law determined by Article 2 of the Constitution. It believes that an interference with the principle of trust in the law is admissible if it is consistent with the test of proportionality. The Bank of Slovenia then alleges that it is not at all possible to speak of an interference with the rights of shareholders and creditors with eligible claims against the bank, since their situation is not new and has not been changed vis-à-vis the legislation previously in force. It alleges that their situation is a consequence of the bank's previous operations, as their entitlements in the economic sense (in the circumstances referred to in Article 253a of the BA-1) allegedly no longer exist, as without the extraordinary measures the banks would no longer be in a position to continue their operations and in a bankruptcy procedure they would no longer be able to recover their claims. The Bank of Slovenia maintains that with the adoption of a decision on the extraordinary measure of the write-off or conversion of the bank's eligible liabilities, the effects of the bank's bankruptcy are in fact realised as regards shareholders and a limited circle of holders of subordinated claims, and the conditions enabling the bank to continue its operations and to settle other bank liabilities are therewith secured. Also the requirement to pay in full and bail out shareholders and subordinated creditors is allegedly not justified, as the state itself would have to assume, to the detriment of taxpayers, the responsibility deriving from their investment decisions regarding investments in risky financial instruments.

39. The Bank of Slovenia is of the opinion that due to the implementation of the principle that individual creditors must not incur greater losses than they would in the event of the bank's bankruptcy, the challenged provisions of the BA-1 entail no interference whatsoever with the right to private property. If they do interfere therewith, however, it holds that the interference is legitimate and proportionate. The Bank of Slovenia alleges that the interference at issue was necessary to prevent the

bankruptcy of the banks, as they were unable to find foreign investors without being granted state aid. Furthermore, it alleges that the interference was appropriate, which it substantiates by stating the concrete effects of the already issued extraordinary measures, namely a reduction in the surcharges on long-term government bonds, the state's credit rating was not lowered, an increase in trust in the economy, and the return of deposits to banks. According to the Bank of Slovenia, bearing in mind the circumstances in which the risks faced by the banks increased, which at the same time entailed a reason for the initiation of bankruptcy proceedings against banks, and with regard to the assessment of an appraiser that such claims would not be met in the event of bankruptcy, it is not possible to speak of expropriation. It adds that when assessing the amount of payment obligations in the event of bankruptcy, the independent appraiser must take into consideration all the rules in force, i.e. not only the provisions of the BA-1, but also those of the FOIPCDA and of the CA-1 (also as regards the capital loan referred to in Article 498 of the CA-1). It draws attention to the Judgment of the ECHR in *Jahn and Others v*. *Germany*, dated 30 June 2005.

40. The Bank of Slovenia believes that the principle of equality as determined by Article 14 of the Constitution is not violated [in the case at issue], as Article 253 of the BA-1 states that the challenged extraordinary measures are deemed to be reorganisation measures based on the Reorganisation Directive, whence stems the validity of the measures in all Member States. It replies that a bank's business policy in accordance with which the latter decides to rebuy early some hybrid instruments but not all the other hybrid instruments as well, cannot entail inequality before law as [prohibited] by Article 14 of the Constitution.

41. Allegedly, the challenged provisions of the BA-1 are also inconsistent with the right of shareholders and holders of subordinated bank liabilities to judicial protection determined by Article 23 of the Constitution, as Article 350a of the BA-1 expressly regulates the right of shareholders and creditors of the bank whose rights have been affected by a decision on the extraordinary measure to claim, from the Bank of Slovenia, compensation for any damage. The Bank of Slovenia underlines that shareholders and the holders of eligible bank liabilities cannot have active standing in judicial protection proceedings against a decision of the Bank of Slovenia due to objective reasons, namely as the arguments regarding the circumstances that serve as the basis for issuing such measure are only accessible and known to the bank and the Bank of Slovenia as the competent supervisory authority. The Bank of Slovenia draws attention to the regulation as determined by the FOIPCDA, in accordance with which creditors are not entitled to challenge a decision to initiate bankruptcy proceedings where the proposal therefor was filed by the debtor. The regulation determined by the BA-1, which refers, as regards the assessment of the effects of bankruptcy, to the assessment of an independent appraiser, allegedly contributes to better assurances as regards the correctness of such assessment; however, it is allegedly impossible to attain certainty.

42. The Bank of Slovenia is of the opinion that in order to ensure the immediate effect and execution of the extraordinary measures and to avoid that uncertainty arises on financial markets and among depositors, in the procedure for issuing the extraordinary measure it is necessary to exclude the adversarial nature of the procedure and the right of the holders of eligible liabilities to be heard. Also, the shareholders and creditors are allegedly not in a position where they are able to assess and prove that the circumstances relating to the conditions for adopting the extraordinary measures were different, as the arguments regarding these circumstances refer to the sphere of the bank's operations, and [these data] are only accessible to the Bank of Slovenia as the competent supervisory authority. The Bank of Slovenia states that extraordinary measures are an extreme form of supervisory direction of a bank, and that during the supervision in the preliminary stage and the opinions given in that phase the bank has the possibility to cooperate with and to challenge the findings of the Bank of Slovenia. It also alleges that the suspension of the execution of the decision on the extraordinary measure after the decision has been served on the bank could jeopardise the attainment of the key objective of the extraordinary measures, i.e. to preserve the stability of the financial system. However, in view of the already executed measures and the time lag, the annulment of the decision in judicial protection proceedings would disproportionally interfere with the newly created positions and would reinstate the situation where the stability of the financial system is jeopardised, i.e. the situation that was remedied by the execution of the extraordinary measure.

43. With respect to Article 498 of the CA-1, the Bank of Slovenia explains that, in assessing the amount which the holders of eligible liabilities must be repaid, it has to take into account the amount in which such claims would have been repaid in the event of the bankruptcy of the bank, and that the transactions the state concludes with the banks (i.e. deposits of the state) are not loans or legal actions that would economically correspond to granting a loan. It further explains that a deposit of the Republic of Slovenia acting as a shareholder of the bank does not entail a deposit of the Republic of Slovenia but a deposit that is placed with the bank by the Ministry of Finance within the framework of the management of the assets of the treasury single account in accordance with the PFA.

44. The Bank of Slovenia explains to the applicants that the ASRPPI, to which they refer, is not even in force. It believes that the Reorganisation Directive, compared with Directive 77/91/EGS, represents a posterior and more special regulation in the field of the restructuring and insolvency of credit institutions, hence the judgments of the CJEU referred to by the applicants are allegedly irrelevant to the case at issue. In such context, the Bank of Slovenia also underlines the regulation determined by Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (OJ L 160, 30 June 2000), which allegedly additionally confirms the interpretation and scope of the Reorganisation Directive, and draws attention to the requirements laid down by the Banking Communication.

45. The Bank of Slovenia is of the opinion that Article 89 of the BA-1 was not violated, since the Government explained in detail, in the Draft Act Amending the Banking Act, dated 10 October 2013, why it proposed that the Act be adopted in an urgent procedure, and alleges that the urgent procedure was justified by the looming threat to the stability of the financial sector.

46. The Bank of Slovenia explains that the Commission determined in advance the application of the "bottom-up test" and required it as a prerequisite for the claims to be transferred to the Bank Assets Management Company (hereinafter referred to as the BAMC) and for the state aid to be approved, and that it was not arbitrarily set by the Bank of Slovenia. Furthermore, the BA-1 allegedly also clearly determined the conditions for issuing a decision on extraordinary measures (Articles 253a and 254 of the BA-1) and the objectives of such measures (Article 253b of the BA-1).

The Rejoinders of the Applicants to the Replies of the National Assembly and to the Opinions of the Government and the Bank of Slovenia

47. The applicants maintain what they stated before and oppose the positions presented by the National Assembly, the Government, and the Bank of Slovenia. They believe that the Banking Communication is not a binding legal act and that it does not require that a contribution be made by holders of subordinated liabilities to the extent that occurred in the Republic of Slovenia. They allege that the Banking Communication does not even call for a write-off but merely a write-down, and they refer to the English version of the document, which does not use the expression "write-off" but only the expression "write-down". The fact that the Banking Communication is not binding is allegedly supported by the Judgment of the CJEU in *European Commission v. Kingdom of Sweden*, C-270/11, dated 30 May 2013. The applicants also refer in more detail to the instance of granting state aid to the Austrian bank Hypo Group Alpe Adria, in which, notwithstanding the fact that the aid was declared compatible after the Banking Communication entered into force (Commission Decision SA.32554, dated 27 August 2013), there was allegedly no write-off or conversion of numerous subordinated bonds (which were otherwise similar to the bonds of Slovene banks). The applicants state that the mentioned case clearly rebuts the allegations of the National Assembly, the Government, and the Bank of Slovenia regarding the necessity of the measures allegedly imposed by the EU. The implementation of the disputed measures only might distort competition (but does not prevent violations of EU rules on competition). In their view, no EU rule imposes on the state the obligation to adopt the challenged regulation. They state that such a regulation was not even adopted by Austria, which carried out the recapitalisation of the Hypo Group Alpe Adria Bank when the Banking Communication was already in force.

48. Allegedly, trust in the Slovene banks was lost on account of the unequal treatment of the holders of subordinated bonds of the Slovene banks as opposed to the holders of equivalent bonds of Austrian banks. Allegedly, the claims of the Government that

failure to implement the BA-1L would have jeopardised numerous human rights are too general. As regards the existence of a public interest, the applicants oppose the allegations of the National Assembly and the Government that the extraordinary measures ensured the stability and liquidity of the financial sector and the economy, as it was allegedly precisely the measures of the Bank of Slovenia that undermined trust in the banks and, consequently, in the long-term stability of the financial sector in the Republic of Slovenia. The applicants disagree with the alleged appropriateness of the extraordinary measures for achieving the desired objective, as the calculation of bank capital "under a valid method and in real time" would have demonstrated that the bank capital was sufficient. They believe that the Bank of Slovenia should disclose the manner in which the bank assets were assessed.

49. Allegedly, the challenged measures do not ensure that no one can be in a worse situation than he or she would have been in had the bank gone bankrupt. The cancellation of the right to payment allegedly constitutes a completely new innovation in the legal system that is allegedly not applicable even in the case of bankruptcy, which would allegedly merely cause a change in the order in which liabilities are paid in terms of their position regarding subordination. In such a case, it would in fact be possible that some creditors would remain unpaid, however they would nonetheless have the same right to payment that could be asserted against any subsequently found assets of the debtor. The applicants also dispute the comparison of the extraordinary measures with compulsory settlement. They draw attention to the positions with regard to the protection of private property, which also includes shares; they namely refer to Decision of the Constitutional Court No. U-I-199/02 (Official Gazette RS, No. 124/04, and OdlUS XIII, 65), to the Judgment of the ECtHR in *Sovtransavto Holding v. Ukraine*, dated 25 July 2002, and to the Admissibility Decision of the ECtHR in *Aivars Cesnieks v. Latvia*, dated 12 December 2002. They allege that they can be expropriated on the basis of mere guessing regarding the possible bankruptcy of the banks, without any actual data. The third paragraph of Article 261b of the BA-1 allegedly enables the adoption of an arbitrary decision and the factual expropriation of the holders of eligible bank liabilities without a basis in the Constitution (Article 69 of the Constitution), instead of merely enabling a limitation of private property. Allegedly, the Constitution only allows for the expropriation of real property (in exchange for compensation).

50. The applicants are of the opinion that the challenged provisions of the BA-1 reduced the holders of eligible liabilities to the level of objects of decision-making, reducing them to a "burdensome balancing item". They draw attention to the fact that the BA-1L does not provide banks a possibility to bring an action to set aside [a decision on an extraordinary measure] (which, however, debtors in bankruptcy enjoy), which would increase, if successful, the amount of assets available to the creditors. Therefore, the calculation of the value of assets referred to in Article 261b of the BA-1, on the basis of which the Bank of Slovenia decides on the write-off or conversion of eligible liabilities, is drafted to the significant detriment of the creditors. Furthermore, the applicants allegedly do not have a possibility to bring an action for damages against

the Bank of Slovenia, as they are still not aware how the losses of the banks were calculated. The challenged regulation of actions for damages is allegedly inconsistent with Article 23 of the Constitution also for other reasons, among which is the fact that it only allows for the awarding of compensation for damage provided that the Bank of Slovenia failed to act with due diligence, but not if it subsequently transpires that its calculations were wrong. The applicants find it self-evident that everyone must be reimbursed for what was unjustifiably taken from them, regardless of whether this happened in conformity with the prescribed standard of due diligence or not. Consequently, they believe that the BA-1 as well should enable bank investors to request compensation for damage irrespective of the fault (or diligence) of the Bank of Slovenia. They also draw attention to the high cost of the repeated appraisals, which they themselves must bear. Bank investors allegedly do not have the possibility to also challenge in judicial proceedings the legality of the decision of the Bank of Slovenia, nor do they have an effective judicial remedy for such. The applicants claim that the allegations of the Bank of Slovenia that bank investors can submit claims for damages against the management board of a bank that fails to fulfil the obligation to challenge the decision of the Bank of Slovenia on an extraordinary measure are unfounded.

51. As regards the assessment of the value of bank assets under the assumption that the company is a gone concern, which is (as a general rule) made by an independent business appraiser and referred to in the first paragraph of Article 261b of the BA-1, the applicants allege that: (1) the data on which this assessment was based are not accessible to the affected individuals; (2) there are concerns regarding the integrity of the stress tests; (3) the assumption that the company is a gone concern is not reasonable; (4) there is a conflict of interests between the appraisers and the management boards of banks; (5) the scenarios for assessing the capital deficit of the banks were completely unrealistic; and (6) the write-offs of government bonds were unacceptably high. The applicants notice significant differences between the measures provided by the FOIPCDA and the BA-1.

52. Allegedly, the adoption of the BA-1L directly interfered with the planned business policies of the banks, which, *inter alia*, also included early bond repurchases, which were then not carried out. Bank investors thus found themselves in an unequal position as some bondholders had the possibility of selling bonds early, while they themselves did not have this option. The adoption of extraordinary measures on the basis of the challenged regulation thus prevented individual banks from treating their creditors equally. The applicants believe that stricter rules on granting state aid cannot constitute legitimate grounds for the unequal treatment of affiliated financial instruments of the same issuer.

53. The challenged regulation is allegedly also inconsistent with Article 8 and the second paragraph of Article 153 of the Constitution, as it violates the rules of customary international law. Allegedly, customary international law only allows for the expropriation of a foreign individual or legal entity where (1) the interference is carried

out in the public interest, (2) the interference is not discriminatory, and (3) the expropriated person is at the same time ensured just satisfaction (which must be immediate, appropriate, and effective, and as well must be equivalent to the market value of the forfeited assets). The expropriation procedure must ensure the expropriated person sufficient protection of rights (i.e. the right to be informed, the right to make a statement, and the right to a legal remedy).

54. The applicants propose that the Constitutional Court carry out a public hearing. They also filed a motion for evidence as regards the obligation to carry out the extraordinary measures of 18 December 2013 due to the requirements of the EU.

B – I

The Procedural Requirements and the Scope of the Review

55. The Constitutional Court joined cases No. U-I-301/13, No. U-I-302/13, No. U-I-304/13, No. U-I-310/13, No. U-I-311/13, No. U-I-317/13, No. U-I-2/14, No. U-I-16/14, No. U-I-17/14, No. U-I-34/14, No. U-I-48/14, No. U-I-86/14, No. U-I-120/14, No. U-I-148/14, No. U-I-154/14, No. U-I-193/14, No. U-I-222/14, No. U-I-223/14, No. U-I-250/14, No. U-I-8/15, No. U-I-15/15, and No. U-I-17/15 with case No. U-I-295/13 for joint consideration and decision-making.

56. On 17 December 2013, referring to several challenged provisions of the BA-1, the Bank of Slovenia issued decisions on extraordinary measures No. PBH 24.20-021/13-010, No. PBH 24.20-030/13-009, No. PBH 24.20-022/13-009, No. PBH 24.20-029/13-009, and No. PBH 24.20-023/13-009, by which it ordered NLB, NKBM, Factor banka, d. d., Ljubljana (hereinafter referred to as Factor banka), Probanka, d. d., Maribor (hereinafter referred to as Probanka), and Abanka Vipa, d. d., Ljubljana (hereinafter referred to as Abanka), to write off all eligible liabilities.[3] The next day, on 18 December 2013, the Bank of Slovenia issued, for the mentioned banks, decisions confirming an increase in their share capital on the basis of the subscription of and payment for new shares carried out by the Republic of Slovenia. [Also] on 18 December 2013, the Bank of Slovenia issued decisions increasing the share capital of all the mentioned banks – except Probanka and Factor banka. On 16 December 2014, by its decision on extraordinary measures No. PBH-24.20-024/13-023, the Bank of Slovenia decided that all eligible liabilities of Banka Celje, d. d., Celje (hereinafter referred to as Banka Celje) would be written off and that the share capital of Banka Celje would be increased by capital investments and in-kind contributions provided by the Republic of Slovenia. On the same day, after the investments and contributions were paid, the Bank of Slovenia issued to Banka Celje a decision to terminate the extraordinary measures.

57. The third indent of the first paragraph of Article 23a of the Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text and 109/12 – hereinafter referred to as the CCA) determines that the procedure for the review of the constitutionality of regulations or general acts issued for the exercise of public authority can be initiated by a request submitted by National Council. The fifth indent of the first paragraph of Article 23a of the CCA authorises the Ombudsman for Human Rights to initiate, by a request, proceedings for the review of the constitutionality of a regulation or general act issued for the exercise of public authority if it deems that it inadmissibly interferes with human rights or fundamental freedoms. The first paragraph of Article 23 of the CCA determines that when in the process of deciding a court deems a law or part thereof that it should apply to be unconstitutional, it shall stay the proceedings and by a request initiate proceedings for the review of its constitutionality. The requirements of the National Council, of the Ombudsman for Human Rights, and of the Ljubljana District Court fulfil the procedural requirements determined by the CCA. The applicants challenge Articles 261a, 261b, 261c, 261d, 261e, 347, and 350a of the BA-1.

58. The petitions for the initiation of proceedings for the review of the constitutionality of the BA-1 and BA-1L were filed by several legal entities. On the basis of the third paragraph of Article 26 of the CCA, the Constitutional Court accepted for consideration the petitions decided on by this decision by the following individual orders: (a) Order No. U-I-295/13, dated 6 November 2014 (Tadej Kotnik and others, Angel Jaromil, the company Črpalke Potnik and others, Jože Sedonja, Primož Kozmus and the company Savaprojekt, Luka Jukič, Andrej and Dušanka Pipuš, Tomaž Štrukelj, the company VR Global partners LP and others, the company Fondazione cassa di risparmio di Imola) for the initiation of proceedings for the review of the constitutionality of Articles 253, 253a, 253b, 260a, 260b, 261a, 261b, 261c, 261d, 261e, and 262a of the BA-1, the second paragraph of Article 262b of the BA-1, Articles 346, 347, 350, and 350a of the BA-1, and Article 41 of the BA-1L, (b) Order No. U-I-295/13, dated 11 December 2014 (Janez Forte and others, the Pan-Slovenian Shareholders' Association and others, the companies Fax Max and RMS Invest, Franc Marušič and others, Marija Pipuš, Andreja Kogovšek and others, Stajka Skrbinšek) for the initiation of proceedings for the review of the constitutionality of point 1a of the first paragraph and the third paragraph of Article 253 of the BA-1, the second and fourth points of the first paragraph of Article 253a of the BA-1, Articles 253b, 260a, 260b, 261a, 261b, 261c, 261d, 261e, and 261f of the BA-1, the first and second paragraphs of Article 262a of the BA-1, the second paragraph of Article 262b of the BA-1, Articles 347 and 350a of the BA-1, and Article 41 of the BA-1L; (c) Order No. U-I-295/13, dated 19 February 2015 (Janez Gosar, the company Alpen Invest and others, Igor Karlovšek, and Marija Karlovšek) for the initiation of proceedings for the review of the constitutionality of point 1a of the first paragraph and the third paragraph of Article 253 of the BA-1, points 2 and 4 of the first paragraph of Article 253.a of the BA-1, Articles 253b, 260a, 260b, 261a, 261b, 261c, 261d, 261e, and 261f of the BA-1, the first and second paragraphs of Article 262a of the BA-1, the second paragraph of Article 262b of the BA-1, and Articles 347 and 350a of the BA-1 and Article 41 of the BA-1L.

59. Considering the substance of the alleged unconstitutionalities, the Constitutional Court deemed that the provisions of Articles 260a, 260b, and 262a of the BA-1 were not challenged. Such entails that the Constitutional Court assessed Articles 253, 253a, 253b, 261a, 261b, 261c, 261d, and 261e of the BA-1, the second paragraph of Article 262b of the BA-1, and Articles 346, 347, 350, and 350a of the BA-1, as well as Article 41 of the BA-1L, which read as follows:

Article 253
(Extraordinary measures)

(1) In accordance with the conditions laid down in this Act, the Bank of Slovenia may impose on a bank, by issuing a decision, the following extraordinary measures:
1. the appointment of the extraordinary management of the bank;
1.a the write-off or conversion of the bank's eligible liabilities;
2. the sale of all the shares of the bank;
3. an increase in the bank's share capital;
4. the transfer of the bank's assets.

(2) The Bank of Slovenia imposes the measures referred to in the first paragraph of this Article by issuing a decision on extraordinary measures. The Bank of Slovenia may impose on a bank one or more of the measures referred to in the first paragraph of this Article at the same time.

(3) Extraordinary measures are deemed to be reorganisation measures within the meaning of Directive 2001/24/EC.

Article 253a
(Reasons for extraordinary measures)

(1) The Bank of Slovenia shall issue a decision on extraordinary measures imposed on a bank if:
1. there exists an increased risk related to the bank; and
2. no circumstances exist from which it would follow that the reasons for an increased risk referred to in the preceding point will probably be eliminated within an appropriate period of time; and
3. it is not probable that on the basis of this Act, the Bank of Slovenia could achieve, by other measures and within an appropriate period, the short-term and long-term capital adequacy or an adequate liquidity position of the bank; and
4. the imposing of extraordinary measures is in the public interest in order to prevent the stability of the financial system from being jeopardised.[4]

(2) For the purposes of the first paragraph of this Article, it shall be deemed that an increased risk in relation to the bank exists particularly if the bank does not ensure or

in the next six months is not likely to ensure the minimum capital in accordance with Article 136 of this Act or the relevant liquidity position in accordance with Article 184 of this Act in a way that would justify the withdrawal of the authorisation to provide banking services.

(3) It is deemed that the bank will probably not be able to ensure the minimum capital in conformity with Article 136 of this Act if in particular:
1. during the last 12 months, the ratio between the bank's capital referred to in Article 132 of this Act and the capital requirements referred to in Article 136 of this Act indicate a constant negative trend due to which it can be expected that in the next six months these requirements will not be achieved, while at the same time there are no other circumstances that would indicate that the minimum capital requirements will be achieved in such period; and
2. the measures for improving the capital adequacy in relation to the requirements on the basis of Article 136 of this Act, in particular the measures for increasing the bank's share capital, were not carried out, were not successful, or will probably not be successful within an appropriate period.

Article 253b
(The objective of extraordinary measures)

Extraordinary measures shall be imposed in order to reorganise the bank, namely to:
1. remedy the reasons that existed with regard to the bank as determined under the first paragraph of Article 253a of this Act and to re-establish the conditions for the long-term successful operations of the bank in accordance with this Act and other regulations in force; or
2. implement the procedures for the gradual winding up of the bank, including partial or complete termination of its operations.

Article 261a
(Measures entailing the write-off or conversion of eligible liabilities)

(1) By a decision on an extraordinary measure, the Bank of Slovenia shall determine that:
1. the eligible liabilities shall be partially or entirely written off or
2. the eligible liabilities of the bank under points 2 through 4 of the sixth paragraph of this Article shall be partially or entirely converted to new ordinary shares of the bank on the basis of an increase in the bank's share capital on the basis of the payment of in-kind contributions in the form of creditors' claims, which represent the eligible liabilities.

(2) The decision on the write-off of eligible liabilities shall contain:
1. a decision on which of the eligible liabilities shall be written off, and for each class of liabilities, also whether all liabilities shall be written off or only a share thereof,

whereas the Bank of Slovenia may decide that the eligible liabilities of a lower class may be partially or entirely written off if the Bank of Slovenia decides that the eligible liabilities of a higher class shall be entirely written off;
2. in the case of the write-off of eligible liabilities of the first class, also the amount of the share capital after the write-off of the eligible liabilities of the first class and the nominal or attributable value of the shares, or a decision on the annulment of shares in the event the eligible liabilities of the first class shall be written off entirely;
3. a decision on the simultaneous increase in the bank's share capital in accordance with Article 262a of this Act, if the bank's share capital decreases below the amount determined under Article 42 of this Act due to the write-off of the eligible liabilities of the first class, i.e. to the minimum extent that will enable the bank to guarantee the share capital under Article 42 of this Act.

(3) A decision on the conversion of eligible liabilities into shares shall contain:
1. a decision that the bank's share capital shall increase with in-kind contributions consisting of creditors' claims that represent the bank's eligible liabilities under points 2 through 4 of the sixth paragraph of this Article;
2. a decision on which eligible liabilities of the bank shall be converted into the bank's ordinary shares in the procedure for increasing the share capital with in-kind contributions, and with regard to the eligible liabilities of each order, also whether they shall be converted entirely or, [alternatively,] what the portion up to which they shall be converted is; the Bank of Slovenia may decide that the eligible liabilities of a lower class may only be partially or entirely converted if it decides that the eligible liabilities of the higher class are entirely written off or entirely converted;
3. with regard to the eligible liabilities of each rank as determined by the sixth paragraph of this Article that are converted into ordinary shares, the ratio expressed as the amount (unit) of the eligible liability for one new share;
4. the finding that by issuing the decision it shall be deemed that the claims of creditors subject to in-kind contributions in the increase of the bank's share capital and which represent the bank's eligible liabilities under point 2 of this paragraph shall be transferred to the bank and the new shares shall be registered and paid.

(4) Article 262a of this Act shall apply to a decision on an increase in the bank's share capital under the second and third paragraphs of this Article.

(5) In connection with the write-off or conversion of the eligible liabilities of the bank, the Bank of Slovenia shall guarantee that each creditor shall not be subjected to greater losses than in the event of the bank's bankruptcy due to the write-off or conversion of the bank's eligible liabilities.

(6) The bank's eligible liabilities shall comprise:
1. the bank's share capital (liabilities of the first class),
2. liabilities to holders of hybrid financial instruments as determined under point 4 of the first paragraph of Article 133 of this Act (liabilities of the second class),

3. liabilities to holders of financial instruments which are, under Article 134 of this Act, considered in the calculation of the bank's additional Tier 1 and Tier 2 capital*, unless such liabilities are already contained under point 1 or point 2 of this paragraph (liabilities of the third class),*
4. liabilities not included under points 1, 2, or 3 of this paragraph, and which would in the event of the bankruptcy of the bank be repaid after the payment of the bank's senior debts (liabilities of the fourth class).

Article 261b
(Establishing the value of assets)

(1) The Bank of Slovenia shall decide on the write-off or conversion of eligible liabilities on the basis of a valuation of the assets of the bank by an independent business appraiser, by assessing:
− the amount of the repayment of eligible liabilities from its assets on the assumption that the company is a gone concern,
− the value of new shares in the case of an increase in share capital by means of the conversion of eligible liabilities into equity on the assumption that the company is a going concern.

(2) Any potential effects of measures comprising state aid offered to the bank or the Bank of Slovenia's measures providing liquidity aid to the bank shall not be considered in the assessment of value on the basis of the preceding paragraph.

(3) When a timely assessment under the first paragraph cannot be obtained due to the urgency of the measure, the assessment shall be conducted by the Bank of Slovenia.

Article 261c
(Scope of the write-off or conversion of eligible liabilities)

(1) In a decision issued in accordance with the second paragraph of Article 261a of this Act, the Bank of Slovenia sets the amount of the eligible liabilities to be written off to the extent necessary to cover the bank's losses, taking into consideration the value of the assets as established in accordance with the preceding Article.

(2) In the decision issued in accordance with the third paragraph of Article 261a of this Act, the Bank of Slovenia sets the amount of eligible liabilities to be converted into the bank's ordinary shares to the extent necessary to establish capital adequacy in accordance with the requirements of the Bank of Slovenia.

Article 261d
(Other rules on the conversion of eligible liabilities)

In its decision on the conversion of eligible liabilities, in the determination of the ratio under point 3 of the third paragraph of Article 261a of this Act, the Bank of Slovenia shall take into consideration the value of the eligible liabilities that are subject to in-kind contributions, i.e. on the basis of the appraisal determined in Article 261b of this Act, and considering the probable share of the repayment of these claims in the event of the winding up of the bank, if other extraordinary measures are not imposed.

Article 261e
(The rights of creditors in the event of the write-off or conversion of eligible liabilities)

(1) Creditors with eligible claims shall not be entitled to request damages from the bank or to assert other claims provided for in the contract in the event of a breach or non-performance of the contract where such breach or non-performance is the result of extraordinary measures adopted on the basis of this Act. Any contractual terms that are contrary to this provision shall be void.

(2) The effects of the extraordinary measure of the write-off or conversion of eligible liabilities shall not constitute a legitimate basis for the early termination or revocation of the contract which the other party to the contract concluded with the bank and which includes the right to the early termination or revocation of the contract in the event of the breach or non-performance thereof. Similarly, the extraordinary measure referred to above shall not, irrespective of the terms of the contract between the bank and the other contracting party, constitute legitimate grounds for requiring performance of the other obligations under the contract. Any contractual terms that are contrary to this provision shall be void.

Article 262b
(Transfer of property and liabilities)

…. (2) Notwithstanding the provision of the first paragraph of this Article, a bank's eligible liabilities referred to in the sixth paragraph of Article 261a of this Act cannot be transferred…. ***[5]***

Article 346
(Application of provisions)

(1) The provisions of Subsection 10.2.2 of this Act shall apply in judicial protection proceedings against a decision on the initiation of a compulsory liquidation procedure, against a decision on the establishment of grounds for the initiation of bankruptcy proceedings (hereinafter referred to as: "a decision on the winding up of a bank"), and against a decision on an extraordinary measure.

(2) Unless otherwise determined in Subsection 10.2.2. of this Act, the provisions of Subsection 10.2.1. of this Act shall apply in judicial protection proceedings against a

decision on the winding up of a bank and against a decision on an extraordinary measure.

Article 347
(The plaintiff)

(1) An action against a decision of the Bank of Slovenia on the winding up of a bank or against a decision on an extraordinary measure can be filed by the bank. The time period in which the action against the decision on the winding up of the bank or against the decision on an extraordinary measure may be filed starts on the day when the decision is served on all the members of the bank's management board.

(2) If the authorisations of the bank's management board to carry out business operations or to represent the bank have terminated as a result of a decision on the winding up of the bank or on the basis of a decision on an extraordinary measure, the bank shall be represented in judicial protection proceedings against the decision of the Bank of Slovenia by persons whose positions as member of the bank's management board have terminated due to the decision on the winding up of the bank or due to the decision on the extraordinary measure. For the purpose of representation in judicial protection proceedings, the bank shall conclude a contract for work with such persons.

(3) The persons whose positions as member of the bank's management board have terminated due to a decision on the winding up of the bank or due to a decision on an extraordinary measure must act, with respect to representing the bank on the basis of the preceding paragraph, with the due diligence of a conscientious and fair business manager. The persons whose positions as member of the bank's management board have terminated due to a decision on the winding up of the bank or due to a decision on an extraordinary measure are not, due to this fact alone, exonerated of the accountability of the members of the bank's management board towards the bank and its shareholders as regards due diligence in invoking judicial protection rights against the decision on the winding up of the bank or the decision on the extraordinary measure.

(4) In order to invoke judicial protection against a decision of the Bank of Slovenia on the winding up of a bank or on an extraordinary measure, the shareholders of the bank whose aggregate shares amount to at least one tenth of the bank's share capital can request that the bank's management board or extraordinary management board, when appointed, convene a general meeting of the bank's shareholders and propose that the general meeting remove the persons authorised on the basis of the second paragraph of this paragraph to represent the bank from their positions, and that other persons be appointed to represent the bank in judicial protection proceedings against the decision of the Bank of Slovenia.

(5) The persons liable to pay the costs related to the procedures for invoking judicial protection against a decision of the Bank of Slovenia on the winding up of a bank and on a decision on an extraordinary measure, including the fees for persons authorised to represent the bank in accordance with this Article, are the persons referred to in the third paragraph of this Article. Notwithstanding the preceding sentence, they are liable for the costs referred to in the preceding sentence in the event the "other persons" who in accordance with the preceding paragraph are appointed to represent the bank in judicial protection proceedings against a decision of the Bank of Slovenia are those who voted for the order referred to in the preceding paragraph.

(6) The persons who in accordance with this Article are authorised to represent the bank in judicial protection proceedings against a decision of the Bank of Slovenia may request that the special management, when appointed, submit the data on the bank's business operations that they need in order to invoke judicial protection.

Article 350
(The Decision-Making Process of the Court)

If in judicial protection proceedings against a decision of the Bank of Slovenia on the winding up of a bank or against a decision imposing an extraordinary measure the court establishes the existence of grounds on the basis of which the court could, in accordance with the AJRAA-1 [i.e. the Act on the Judicial Review of Administrative Acts], annul the decision or suspend its implementation, it shall not adopt the decision on the annulment or suspension thereof, but shall establish, by way of a judgment, that the decision is unlawful and that the conditions for the winding up of the bank or for the extraordinary measure did not exist. The decision of the court on the unlawfulness of the decision on the winding up of the bank or on the extraordinary measure shall not affect the effects of the decision on the winding up or the effects of the extraordinary measure determined by this Act.

Article 350a
(Protection of shareholders and creditors in the event of a decision to impose an extraordinary measure)

(1) The shareholders, creditors, and other persons whose rights are affected by the decision of the Bank of Slovenia to impose the extraordinary measure may request, from the Bank of Slovenia, compensation for damage, provided that they prove that the damage incurred due to the effects of the extraordinary measure is greater than the damage that would have been incurred had the extraordinary measure not been issued.

(2) Article 264 of the CA-1 shall not be used for the protection of the rights of shareholders and creditors against the Bank of Slovenia in the event of a decision to wind up a bank or a decision imposing an extraordinary measure.

(3) If an action is filed against a decision imposing an extraordinary measure in accordance with Article 347 of this Act, the court deciding on a claim for damages on the basis of the first paragraph of this Article must stay the proceedings until the decision of the court in judicial protection proceedings against the decision of the Bank of Slovenia.

*Article 223a**[6]***
(Responsibilities related to carrying out supervision)

(1) The Bank of Slovenia and persons acting on its behalf shall act with the due diligence of a good businessman in carrying out the supervisory competence pursuant to this Act.

(2) It shall be deemed that while imposing supervision measures and performing other competences pursuant to this Act, the Bank of Slovenia has acted with due diligence when, upon taking into consideration the facts and circumstances at its disposal or which at the time of decision-making should have been at its disposal pursuant to its powers in accordance with this Act, it may have reasonably considered that the conditions for imposing supervision measures in accordance with this Act have been met and that the measures imposed are lawful.

(3) The Bank of Slovenia shall be held responsible for the actions of persons who, in carrying out supervision and other competences of the Bank of Slovenia in accordance with this Act, have acted on the basis of authorisation granted by the Bank of Slovenia under the rules regulating the liability of employers for damage to third persons caused by employees at work or in relation to their work. When damage is incurred due to the action of a person acting pursuant to authorisation granted by the Bank of Slovenia, the injured party may seek compensation for damage exclusively from the Bank of Slovenia.

(4) It shall be deemed that the person having acted on behalf of the Bank of Slovenia in carrying out the supervisory competence in accordance with this Act has acted with due diligence when, upon taking into consideration the facts and circumstances at his or her disposal or which at the time these activities were carried out should have been at his or her disposal pursuant to powers in accordance with this Act, the said person acted with the due diligence of a good businessperson.

Article 41 of the BA-1L

This Act shall enter into force on the day following its publication in the Official Gazette of the Republic of Slovenia.

60. Since the subject of the constitutional review at issue is merely a single extraordinary measure for ensuring the stability of the financial system – i.e. the write-off or conversion of the eligible liabilities of the bank – the Constitutional Court assessed all the challenged provisions that also refer to the other extraordinary measures or that can be used therefor only from the viewpoint of this measure.

61. A number of allegations of the applicants refer to the allegedly incorrect (unconstitutional or unlawful) application of the challenged provisions in the concrete situation at issue, namely relating to the write-off of the eligible liabilities of banks on the basis of decisions of the Bank of Slovenia, which are enumerated in Paragraph 56 of the reasoning of the present decision. The applicants believe that, in these cases, the conditions for writing off eligible liabilities were not fulfilled. The Constitutional Court cannot address allegations of such kind in proceedings for the review of the constitutionality of a law. Therefore, it did not grant the motion for evidence of one of the applicants that written documentation should be obtained from which it would be clear whether the Bank of Slovenia indeed tried to prevent such write-off (as carried out in practice) and on the basis of which arguments. Similarly, for this reason the Constitutional Court did not serve on the National Assembly, in order for it to reply thereto, the supplement to the petition dated 27 September 2016 filed by Jože Sedonja and other petitioners that included in particular a comparative view of the burden-sharing measures in granting state aid to banks in individual EU states that were carried out in practice, the supplement to the petition dated 4 October 2016 of the Pan-Slovenian Shareholders' Association, Peter Glavič, and Marija Glavič, in which the “entire overview of the factual circumstances of the writing off of NKBM shares” is presented, briefs dated 10 October 2016 of Franc Marušič and other petitioners by which they in particular comment on some articles in the media on the issue of extraordinary measures, and the supplement to the petition of Peter Glavič dated 11 October 2016, which mainly deals with the issue of the circumstances of how the extraordinary measures were carried out in practice. In the same manner, the Constitutional Court cannot adopt a position as to the allegations of the applicants that refer to the appropriateness of the challenged regulation (as the state would allegedly have to find different methods of “bank resolution”, as the Constitutional Court is not competent to assess the appropriateness of a law. The Constitutional Court did not follow the proposal that a public hearing should be carried out, as the extensive written documentation sufficed for the decision to be adopted.[7] The Constitutional Court deemed that the applications classified as petitions by which individuals challenge the decisions of the Bank of Slovenia on the write-off of eligible liabilities are constitutional complaints, and will decide thereon separately.

62. Below, the Constitutional Court uses the umbrella term “eligible rights” to designate the holders’ entitlements, which represent the converse of eligible bank liabilities referred to in the sixth paragraph of Article 261a of the BA-1, and it differentiates under this term (where necessary) between shareholders (as the holders of eligible liabilities of the first class) and eligible creditors or holders of eligible liabilities (as the holders of

eligible liabilities of the second though fourth classes). This is the manner it proceeds when it would like to emphasise the position of the entitled party in the legal relation.

63. The fact that the BA-1 ceased to be in force after the requests and petitions of the applicants were filed (see the first paragraph of Article 405 of the Banking Act, Official Gazette RS, No. 25/15 – hereinafter referred to as the BA-2, Article 62 of the Deposit Guarantee Scheme Act, Official Gazette RS, No. 27/16, and point 1 of Article 267 of the Resolution and Compulsory Dissolution of Banks Act, Official Gazette RS, No. 44/16 – hereinafter referred to as the RCDBA) has no influence on the fulfilment of the conditions for the substantive review of the challenged provisions of the BA-1. In accordance with the second paragraph of Article 47 of the CCA, the Constitutional Court decides on the constitutionality of a law that ceased to be in force in the challenged part or was amended if the consequences of its unconstitutionality have not been remedied. In the case at issue, it is manifest that the consequence that the applicants consider to be unconstitutional (the write-off of eligible rights without compensation) has not been remedied, whereas the judicial protection available to the holders of eligible rights to possibly remedy the unconstitutionality is considered by the applicants to be unconstitutional. At the same time, it follows from Article 265 of the RCDBA that the judicial protection proceedings against the decisions of the Bank of Slovenia issued prior to the entry into force of the RCDBA must be concluded in accordance with the provisions of the BA-1.[8] Therefore, the conditions for the initiation of the proceedings for the review of the constitutionality of the provisions of the BA-1 and BA-1L, which no longer exist, are fulfilled.

B – II

The Staying of Proceedings before the Constitutional Court, the Judgment of the CJEU, and Assessment of the Meaning of the Banking Communication.

64. By Order No. U-I-295/13, dated 6 November 2014, the Constitutional Court stayed the proceedings for the review of the constitutionality of the BA-1 and BA-1L until the CJEU decided in the preliminary procedure on the following questions[9] regarding the validity and interpretation of the Banking Communication and regarding the interpretation of the Reorganisation Directive:
1. Having regard to the legal effects actually produced by the Banking Communication, and given that the EU has exclusive competence in the state aid sector, in accordance with point b) of the first paragraph of Article 3 of the TFEU, and that the Commission has competence to issue decisions relating to the state aid sector, pursuant to Article 108 TFEU, must the Banking Communication be regarded as binding on Member States seeking to remedy a serious disturbance in the economy by granting state aid to credit institutions where such aid is intended to be permanent and cannot be easily revoked?

2. Are paragraphs 40 through 46 of the Banking Communication – which make the possibility of granting state aid intended to remedy a serious disturbance in the national economy conditional upon compliance with the requirement to write off capital, hybrid capital, and subordinated debt and/or to convert into capital hybrid capital instruments and subordinated debt instruments, in order to limit the amount of aid to the minimum necessary in the light of the need to take account of the moral hazard – compatible with Articles 107, 108, and 109 of the TFEU, as they exceed the Commission's competence, as defined in the mentioned provisions of the TFEU on state aid?

3. Are paragraphs 40 through 46 of the Banking Communication – which make the possibility of granting state aid conditional on the requirement to write off capital and/or convert into capital, in so far as that requirement relates to shares (capital), hybrid capital instruments, and subordinated debt instruments issued before the publication of the Banking Communication, all or some of which, at the time they were issued, could have been written off without any provision for compensation only in the event of the bank's bankruptcy – compatible with the principle of the protection of legitimate expectations enshrined in EU law?

4. Are paragraphs 40 through 46 of the Banking Communication – which make the possibility of granting state aid conditional on the requirement to write off capital, hybrid capital, and subordinated debt instruments and/or to convert into capital hybrid capital instruments and subordinated debt instruments, without the initiation and conclusion of a bankruptcy procedure by which the debtor's assets may be liquidated by means of judicial proceedings in which the holders of subordinated financial instruments would have the opportunity to participate as parties to the proceedings – compatible with the right to property enshrined in the first paragraph of Article 17 of the Charter of Fundamental Rights of the European Union (OJ C 202, 7 June 2016, p. 389 – hereinafter referred to as the Charter)?

5. Are paragraphs 40 through 46 of the Banking Communication – which make the possibility of granting state aid conditional on the requirement to write off capital, hybrid capital, and subordinated debt instruments and/or to convert into capital hybrid capital instruments and subordinated debt instruments, because the implementation of those measures calls for a reduction and/or an increase in the share capital of public limited liability companies on the basis of the decision of the competent administrative body and not the decision of the general meeting of shareholders of the public limited liability company – compatible with Articles 29, 34, 35, and 40 through 42 of the Directive on the Coordination of Safeguards?

6. With regard to paragraph 19 of the Banking Communication, in particular the requirement laid down in that provision to respect fundamental rights, to paragraph 20, and to the affirmation of the requirement, in principle, laid down in paragraphs 43 and 44 of the Banking Communication, to convert or write off hybrid capital and subordinated debt instruments before granting state aid, may the Banking Communication be interpreted as meaning that those measures do not require Member States seeking to remedy a serious disturbance in their economy by granting state aid to credit institutions to impose an obligation to adopt such conversion and writing-off measures as a condition for the granting of state aid on the basis of point b)

of the third paragraph of Article 107 of the TFEU, or as meaning that, in order to be able to grant state aid, it is sufficient that the conversion or write-off measure should merely operate in a manner that is proportionate?
7. May the seventh indent of Article 2 of the Reorganisation Directive be interpreted as meaning that the measures requiring burden sharing by shareholders and subordinated creditors provided for in paragraphs 40 through 46 of the Banking Communication (the write-off of Common Equity Tier 1, hybrid capital, and subordinated debt instruments and the conversion into capital of hybrid capital instruments and subordinated debt instruments) may also be classified as reorganisation measures?

65. In its Judgment in case No. C-526/14, the CJEU answered the questions raised as follows:[10]
1. The Banking Communication must be interpreted as meaning that it is not binding on the Member States.
2. Articles 107 to 109 TFEU must be interpreted as not precluding points 40 to 46 of the Banking Communication in so far as those points lay down a condition of burden-sharing by shareholders and holders of subordinated rights as a prerequisite to the authorisation of State aid.
3. The principle of the protection of legitimate expectations and the right to property must be interpreted as not precluding points 40 to 46 of the Banking Communication in so far as those points lay down a condition of burden-sharing by shareholders and holders of subordinated rights as a prerequisite to the authorisation of State aid.
4. Articles 29, 34, 35 and 40 to 42 of the Directive on Coordination of Safeguards must be interpreted as not precluding points 40 to 46 of the Banking Communication in so far as those points lay down a condition of burden-sharing by shareholders and holders of subordinated rights as a prerequisite to the authorisation of State aid.
5. The Banking Communication must be interpreted as meaning that the measures for converting hybrid capital and subordinate debt or writing off their principal, as provided for in point 44 of that communication, must not exceed what is necessary to overcome the capital short-fall of the bank concerned.
6. The seventh indent of Article 2 of the Reorganisation Directive must be interpreted as meaning that burden-sharing measures such as those provided for in points 40 to 46 of the Banking Communication fall within the scope of the concept of ‘reorganisation measures’, within the meaning of that provision of that Directive.

66. When assessing the regulations that entail the implementation of EU law, the Constitutional Court must take into consideration, on the basis of the third paragraph of Article 3a of the Constitution,[11] the primary and secondary EU legislation and the case law of the CJEU.[12] The Constitution does not regulate in more detail either the temporal or the hierarchical position of the rules that on the basis of the third paragraph of Article 3a of the Constitution enter the Slovene constitutional order.[13] From the mentioned provision of the Constitution there only follows the requirement that all state authorities, including the Constitutional Court, must apply EU law when exercising their

competences in accordance with the legal regulation of that organisation.[14] The effect of EU law in the national legal order therefore depends on the rules in force that regulate the functioning of the EU, and in this framework also on the fundamental principles of EU law that are laid down in the Treaty on European Union (consolidated version, UL C 202, 7 June 2016 – hereinafter referred to as the TEU) and in the TFEU or that have been developed by the CJEU in its case law. Due to the third paragraph of Article 3a of the Constitution, the fundamental principles defining the relation between national law and EU law are at the same time also national constitutional principles that are binding with the force of the Constitution.[15]

67. The most important fundamental principle is that of the primacy of EU law, which entails that in the event of an inconsistency between the law of a Member State and EU law the latter has primacy over the law of the Member State. The other fundamental principles of EU law that regulate the relation between EU law and national law are the principle of sincere cooperation, including the principle of consistent interpretation (the third paragraph of Article 4 of the TEU),[16] the principle of direct application of EU law, the principle of direct effect of EU law, the principle of the transfer of competences (the first paragraph of Article 5 of the TEU), the principle of subsidiarity (the third paragraph of Article 5 of the TEU), and the principle of proportionality (the fourth paragraph of Article 5 of the TEU). These principles, as national constitutional principles, are also binding on the Constitutional Court when carrying out its competences in the framework of the legal relations concerning EU law. On the basis of the first paragraph of Article 51 of the Charter, also the provisions of the Charter are binding thereon when implementing EU law. In the procedure for the assessment of regulations in the interpretation of national law (the Constitution and other regulations), the Constitutional Court must observe EU law, namely in the manner that follows from EU acts or as it has been developed in the case law of the CJEU. It must interpret national law in the light of EU law in order to ensure its full effectiveness.[17]

68. The above-mentioned means that when interpreting the challenged provisions of the BA-1 and the Constitution, and in assessing the constitutionality of the BA-1, the Constitutional Court must observe the Judgment of the CJEU in case C-526/14, which answered the legally relevant questions regarding the validity and interpretation of the Banking Communication and the interpretation of the Reorganisation Directive, with regard to which, in the mentioned judgment, the CJEU also explained the meaning and scope of certain other acts and rules of primary and secondary EU law. Namely, the CJEU has exclusive competence to interpret EU law and to assess the validity of secondary EU law. Considering the fact that by the challenged provisions of the BA-1 the legislature transposed the essential content of the Banking Communication into the Slovene legal order, the legally relevant questions that remain concern the legal effects of the Banking Communication and how its provisions should be interpreted.

69. The exclusive competence of the EU in a certain field means that only the EU can issue legislative acts and adopt legally binding acts, whereas Member States are able

to do so themselves only if so empowered by the Union or for the implementation of Union acts (the first paragraph of Article 2 of the TFEU). On the basis of point (b) of the first paragraph of Article 3 of the TFEU, the EU has exclusive competence to establish the competition rules necessary for the functioning of the internal market. State aid fall under the rules on competition (Title VII, Chapter 1, Section 2), therefore the exclusive competence of the EU applies thereto as well. The exclusive competence of the EU thus means that the EU has exclusive competence to regulate those fields that Member States may not regulate by themselves. On the basis of Article 3a of the Constitution, the Republic of Slovenia transferred to EU institutions the exercise of part of its sovereign rights in the field of state aid.

70. Any state aid that distorts or threatens to distort competition, in so far as it affects trade between Member States, is, on the basis of the first paragraph of Article 107, prohibited (for being incompatible with the internal market), except in the cases listed as exceptions in the second paragraph of Article 107 of the TFEU for which no authorisation by the Commission is needed, and in the cases listed as exceptions on the basis of the authorisation of the Commission or the EU Council determined by the third paragraph of Article 107 of the TFEU. If the Commission finds, on the basis of the second paragraph of Article 108 of the TFEU, that state aid is not compatible with the internal market, or that such aid is being misused, it determines that the state concerned must abolish such aid or alter it within a period of time it imposes. State aid granted contrary to the rules on the admissibility of state aid is therefore prohibited. The purpose of the rules on the admissibility of state aid is to ensure a uniform internal EU market and competition between the entities on such market, and such rules must be applied uniformly on the entire EU market.

71. The first paragraph of Article 2 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24 September 2015 – hereinafter referred as the State Aid Regulation) determines that any plans to grant new aid shall be notified to the Commission in sufficient time by the Member State concerned (unless determined otherwise by the TFEU or in the regulations adopted on the basis of the TFEU). Where the Commission immediately finds that the measure is compatible with the internal market, it issues a decision stating that it is not opposed to state aid.[18] If the Commission finds, upon preliminary assessment, that concerns arise as to the compatibility of the measure with the internal market, it decides to initiate proceedings on the basis of the second paragraph of Article 108 of the TFEU and issues an order on the initiation of the formal investigation procedure.[19] Once the formal investigation is concluded, the Commission can (a) establish that the measure does not constitute state aid; (b) that the state aid is compatible with the internal market; (c) that the state aid is, under certain conditions, compatible with internal market; or (d) that the state aid must not be put into effect, as it is not compatible with the internal market.[20] Article 16 of the State Aid Regulation regulates the authorisation of the Commission to issue, in the event of unlawful state aid, a recovery decision, by which it imposes upon

the Member State concerned the obligation to take all necessary measures for the state to recover the aid from the beneficiary, unless the recovery of the aid would be contrary to the general principles of EU law. Where the Member State concerned does not comply with the decision of the Commission, the Commission can submit the case directly to the CJEU.[21] Article 263 of the TFEU enables judicial protection against the acts of the Commission (as well as against decisions on the admissibility of state aid) before the CJEU.

72. Point (b) of the third paragraph of Article 107 of the TFEU determines that aid to remedy a serious disturbance in the economy of a Member State may be considered to be compatible with the internal market. With regard to such legal basis, the Commission issued numerous communications by which it publicly explained its legal positions as to the admissibility of state aid. Prior to the issuance of the Banking Communication, the Commission adopted six communications regarding the financial sector.[22] These Communications provide detailed guidance on the criteria to be applied in determining whether state aid granted in the financial sector during the financial crisis is compatible with the internal market within the meaning of point (b) of the third paragraph of Article 107 of the TFEU, criteria which the Commission takes into consideration when examining whether state aid is compatible with the internal market.

73. The term “soft law” is applied to quasi-legal instruments that lack legally binding power. On the EU level, this term is used to designate different acts (e.g. codes of conduct, directives, notifications, recommendations, notes).[23] Although the mentioned acts are not legally binding, they have a certain normative content and practical effects.[24] In theory, soft law instruments are classified into multiple categories. One category comprises interpretative and decisional instruments, among which fall (*inter alia*) interpretative and decisional communications and notices.[25] Interpretative communications of the Commission do not create new legal rules but are intended to interpret primary and secondary legislation and strive to ensure its correct interpretation and uniform application. Decisional notices are not limited to merely the interpretation of legal norms, but also indicate how the Commission will exercise EU law in concrete cases and how it will use its discretion in such sense.[26]

74. Analysis of the case law of the CJEU[27] indicates that the soft law instruments issued by the Commission (a) limit its own power [i.e. of the Commission] in that it must respect the rules from these instruments; (b) limit its discretion where the Commission has discretionary room to manoeuvre; (c) do not form a legal basis for the concrete decisions of the Commission and must not be inconsistent with “higher ranked” law, including the case law of the CJEU; (d) are not binding on the CJEU when it interprets EU law; (e) cause that the Commission must not depart from their rules, as they would otherwise break certain general principles of EU law, in particular the principles of legal certainty, equality, and legitimate expectations.

75. It is impossible to deny the indirect legal effect of the Banking Communication on Member States, as the Communication represents important information for the states as to how the Commission will carry out its competences in the field of the assessment of the admissibility of state aid. It must be considered that the Judgment in case No. C-526/14, by which the CJEU answered the preliminary questions of the Constitutional Court, follows in its entirety the hitherto views on the legal nature of the “soft law” of the Commission. The CJEU clearly and undoubtedly explains that the Banking Communication has no binding legal effect for the Member States and creates no “autonomous legal obligations” for them. It states that the assessment of the admissibility of aid measures with the internal market based on the third paragraph of Article 107 of the TFEU is in the exclusive competence of the Commission. In this respect, the Commission has a broad discretionary right, the exercise of which encompasses complex economic and social assessments. In the exercise of such discretionary right, the Commission can adopt guidelines to determine the criteria on the basis of which it plans to assess the compatibility of aid measures planned by Member States with the internal market. Once the Commission adopts and publicly publishes such guidelines, it limits itself in the exercise of its discretionary right, as it cannot depart therefrom, as a general rule, without exposing itself to the threat of being sanctioned due to a violation of the general principles of law, such as the principle of equal treatment and the principle of the protection of legitimate expectations. Furthermore, the CJEU expressly underlines that adopting a communication such as the Banking Communication does not relieve the Commission of the duty to verify special extraordinary circumstances in the framework of a proposal to directly apply point (b) of the third paragraph of Article 107 of the TFEU. According to the CJEU, Member States retain the possibility to notify the Commission of plans to grant state aid that do not fulfil the criteria laid down by the Banking Communication, and, in exceptional circumstances, the Commission may approve such plans.

76. The Constitutional Court is competent to assess the constitutionality of regulations that transpose directives into the national legal order.[28] When the Slovene legislature enacted the challenged provisions of the BA-1 on the extraordinary measure of the write-off or conversion of eligible bank liabilities in such a manner that it followed (on its own initiative) the guidelines of the Banking Communication, it in fact pursued the objective of establishing a legal framework to grant state aid to banks in financial difficulties that is not contrary to the rules of the TFEU on state aid. Therefore, the content of the Banking Communication is not irrelevant to the Constitutional Court. When assessing the constitutionality of the BA-1, the Constitutional Court also interprets this Act; in this respect, also the content of the Banking Communication must be taken into account, which is the actual substantive basis for the challenged provisions of the BA-1.[29]

B – III

Assessment of Conformity with the Principle of Clarity and Precision, and the Prohibition of Internal Inconsistencies in the Legal Order (Article 2 of the Constitution)

77. The applicants allege that the challenged regulation does not clearly define the statutory framework on the basis of which the Bank of Slovenia can impose the challenged extraordinary measure of the write-off or conversion of eligible liabilities of banks. The Constitutional Court assessed these allegations from the viewpoint of Article 2 of the Constitution. One of the principles of a state governed by the rule of law determined by Article 2 of the Constitution requires that regulations be clear and precise, so that the content and the purpose of the norm can be ascertained. This applies to all regulations, and is of particular importance for regulations that include legal norms that determine the rights or obligations of legal entities. The requirement of the clarity and precision of a regulation does not mean that regulations must be such that they need not be explained. The application of regulations always entails an interpretation thereof and, like all regulations, laws too are subject to interpretation. From the viewpoint of legal certainty, which is one of the principles of a state governed by the rule of law determined by Article 2 of the Constitution, the regulation becomes disputable when it is impossible to learn its true content by means of interpretation of legal norms (as stated in Decision of the Constitutional Court No. U-I-32/02, dated 10 July 2003, Official Gazette RS, No. 73/03, and OdlUS XII, 71).

78. The Bank of Slovenia (the central bank) is, in its functioning, independent and accountable directly to the National Assembly (the first paragraph of Article 152 of the Constitution). In theory, there are four aspects of the independence of central banks: institutional, functional, personal, and financial.[30] It follows from the above, by the nature of the matter, that the Bank of Slovenia has, when exercising its supervision over the banks, acting as an expert body that decides on the basis of complex economic-financial assessments and projections, a certain leeway as regards expert judgment as to the manner of exercise of the supervisory function and in deciding on extraordinary measures. Within the framework of the extraordinary measure of the write-off or conversion of the eligible liabilities of a bank, the Bank of Slovenia also had a special obligation, on the basis of the fifth paragraph of Article 261 of the BA-1, to ensure that individual creditors do not sustain greater losses than they would sustain in the event of the bank’s bankruptcy.

79. The Bank of Slovenia was competent and responsible for supervision over banks established in the Republic of Slovenia which obtained authorisation from the Bank of Slovenia to carry out banking services, namely as regards all services and transactions carried out on the territory of the Republic of Slovenia, on the territory of a Member State, and on the territory of a third country (the first paragraph of Article 217 in conjunction with Article 13 of the BA-1). The Bank of Slovenia carried out supervision over a given bank in order to assess whether the bank was operating in accordance with the rules on managing risks and other rules determined by the BA-1, the

regulations issued on its basis, as well as other laws regulating the performance of financial services carried out by the bank, and regulations adopted on its legal basis (the first paragraph of Article 222 of the BA-1). The Bank of Slovenia can issue, on the basis of the BA-1, various measures of supervision, *inter alia*, also extraordinary supervisory measures to ensure the stability of the financial sector (see point 5 of the second paragraph of Article 223 of the BA-1, and subdivision 7.7 of this Act).

80. There are two fundamental obligations that represent a burden for every bank. [Under the BA-1,] the bank had to ensure capital adequacy, which means that it had to ensure that it always had adequate capital with respect to the scope and manner of the services it carried out, and considering the risks it was exposed to in carrying out such services (Article 125 of the BA-1). In no event was it admissible for the bank capital to fall under the level of the so-called minimum capital level. The capital of the bank was divided into three categories: core capital (within which fall, inter alia, shares and core capital hybrids), additional Tier 1 capital, and Tier 2 capital (*cf.* Article 4 of the Order on the Calculation of Bank Capital and Savings Bank Capital, Official Gazette RS, No. 85/10, 97/10, 100/11, and 100/12 – hereinafter referred to as the Order on the Calculation of Capital). Taking into account the prescribed relations between the mentioned components and deductions, the bank capital was calculated as the sum of all three components. The capital of the bank determined in such manner always had to attain or exceed the higher of the determined values, i.e. either EUR 5,000,000.00 or the sum of the capital requirements determined by Article 136 of the BA-1 (Article 5 of the Order on the Calculation of Capital). This was the so-called minimum bank capital. The capital requirements determined by Article 136 of the BA-1 meant that the required capital taking into consideration the risks the bank was exposed to. These risks were, in particular, credit risk, market risk, position risk, the credit risk of clients, settlement risk, currency risk, etc. Therefore, the minimum capital was different for each bank, depending on the risks the bank accepted or was exposed to.[31] In addition, the bank had to be solvent. In accordance with Article 128 of the BA-1, the bank had to carry out its operations so that it was capable of fulfilling its due obligations at any moment (i.e. it had to ensure liquidity) and so that it was permanently capable of fulfilling all its obligations. As a general rule, the failure of a bank to maintain liquidity, long-term solvency, and capital adequacy led to the termination of the bank's operations and to the end of its existence as a legal entity. In fact, the applicants allege that the BA-1 did not determine the manner of calculating the core capital of the bank, however the allegation regarding the inconsistency with Article 2 of the Constitution does not hold true. Numerous provisions of the BA-1 were expressly intended to enable the calculation of the capital adequacy of the bank, namely the entire Section 4.4 of the BA-1 and the implementing regulations on risk management, to be exact.

81. The Bank of Slovenia was competent to continuously assess whether the system of bank management, the strategies and processes for the assessment of the adequacy of the internal capital, and the bank capital provide for a firm and reliable management system and for adequate coverage of the risks that the bank was or could

be exposed to in its operations (the third paragraph of Article 222 of the BA-1). Its competence to perform supervision over banks was far-reaching, as it was able to impose on banks numerous supervision measures.[32] In carrying out its tasks and competences in the field of supervision, which was based on the information available at the relevant moment, the Bank of Slovenia had to appropriately take into account the possible impact of its decisions on the stability of the financial system of the Member States, which was in particular relevant in extraordinary financial circumstances (the third paragraph of Article 223 of the BA-1).[33]

82. Article 253a of the BA-1 explains the conditions under which the Bank of Slovenia was able to issue a decision imposing extraordinary measures (see Paragraph 59 of the reasoning of this Decision, where the wording of the Article is quoted). The grounds for adopting extraordinary measures were uniformly determined in the Act for all extraordinary measures (hence, also for the challenged extraordinary measure of the write-off or conversion of eligible bank liabilities referred to in point 1a of the first paragraph of Article 253 of the BA-1), namely in Article 253a of the BA-1, and, simply stated, they can be summarised as how affected or seriously threatened the minimum capital and adequate liquidity situation were, so that the conditions for withdrawing the authorisation to provide banking services were or probably would be fulfilled, with regard to which the extraordinary measure was in the public interest in preventing a threat to the stability of the financial sector.[33] Any of the extraordinary measures could therefore be imposed if the vital public interest in ensuring the stability of the financial system was jeopardised. It was deemed that the stability of the financial system was jeopardised if an increased level of risk in the bank could cause significant negative effects on the operations of other financial institutions, on the functioning of the financial markets, or on the general trust of investors and other entities in the stable functioning of the financial sector (the second paragraph of Article 254 of the BA-1). The objective of extraordinary measures was the reorganisation of the banks so that (1) the reasons for extraordinary measures that existed with regard to the bank at issue be remedied and the conditions for the long-term successful operation of the bank be re-established in accordance with the BA-1 and other regulations in force, or (2) the procedures for the gradual winding up of the bank be implemented, which includes partial or complete termination of the bank’s operations (Article 253b of the BA-1). Then, prior to issuing the extraordinary measure, the Bank of Slovenia had to verify whether the bank alone – without any measures of the regulator – could have remedied the increased risk within an appropriate time period. If that was not possible, the Bank of Slovenia had to verify whether it could achieve short-term and long-term capital adequacy or an adequate liquidity situation in the bank by other (milder) mandatory measures that were available. The spectrum of these possibly milder measures was extremely broad. The available measures included an order on remedying violations (Article 242 of the BA-1); additional measures for implementing the rules on risk management that were available even if the bank did not attain the minimum or adequate internal capital or did not ensure an adequate liquidity situation, or if such violations were probable (Article 247 of the BA-1);[34] additional measures relating to

hybrid instruments (Article 248a of the BA-1[35]); requiring the management board of the bank to submit a report on a merger with another bank or on a split of the bank and to convene a general meeting of the bank, and to address a proposal for a merger or split (Article 248b of the BA-1);[36] additional measures for increasing the share capital of the bank (Articles 249a through 249d of the BA-1), which the Bank of Slovenia imposes when the bank does not achieve or probably would not achieve the minimum or adequate capital in an appropriate period of time;[37] appointing an extraordinary authorised representative (Articles 249e through 249j of the BA-1);[38] specific supervisory measures that the Bank of Slovenia was able to impose on the basis of Article 249k of the BA-1 if there existed a probability that, due to violations regarding ensuring the capital adequacy or adequate liquidity situation, there were reasons that allowed the Bank of Slovenia to withdraw the bank's authorisation to provide banking services; and the conditional or permanent withdrawal of the authorisation to provide banking services (Articles 250 through 252 of the BA-1).[39]

83. According to the applicants, it was not clear from the statutory regulation under which conditions and under which circumstances the Bank of Slovenia was able to interfere with the rights of the holders of eligible liabilities, as the BA-1 allegedly did not include provisions that would concretise the situation in which it is clear that [state] aid is necessary for the bank, as otherwise the bank would end up in bankruptcy or in controlled liquidation. In other words, the applicants allege that the so-called triggering element for the resolution process and the challenged extraordinary measure to begin was not clearly and precisely determined. It follows from the preceding paragraph of the reasoning of this Decision that the BA-1 sufficiently clearly (i.e. in a manner amenable to legal interpretation) determined that the extraordinary measure of the write-off or conversion of eligible bank liabilities can only be imposed once the stability of the financial system is jeopardised to a degree where the measures can no longer be postponed and when it simultaneously transpires that the more lenient measures that the Bank of Slovenia has at its disposal are not or cannot be successful. Hence, as regards the criteria for deciding when the Bank of Slovenia can issue the measure of the write-off or conversion of eligible bank liabilities, the BA-1 is sufficiently clear and precise from the perspective of Article 2 of the Constitution. Also the [other] allegation of the applicants relating to Article 2 of the Constitution, namely that the public interest that is pursued by the adoption of the challenged extraordinary measure (i.e. ensuring the stability of the financial system) is not sufficiently clearly and precisely determined, does not hold true. Conversely, the substance of this public interest is clearly determined by the second paragraph of Article 254 of the BA-1. Furthermore, it is not possible to concur with the applicants insofar as they allege that also the provisions of the BA-1 that determined the degree to which eligible bank liabilities shall be written off or converted into equity shares are unconstitutionally unclear as well. These provisions of the BA-1 were also not inconsistent with Article 2 of the Constitution, as Article 261c of the BA-1 clearly determined to what degree eligible liabilities may be written off (to the degree necessary to cover the loss of the bank, taking into account the valuation of assets in accordance with Article 261b of the BA-1) or converted (to

the degree necessary to attain the capital adequacy of the bank in accordance with the requirements of the Bank of Slovenia). The concrete determination of the degree to which [these eligible liabilities] were written off or converted understandably depended on the expert assessment of the bank's assets carried out by the Bank of Slovenia. As such, it cannot be the subject of a review of the constitutionality of a law.

84. While it was impossible to initiate a compulsory settlement procedure for a bank (see Article 318 of the BA-1), it was nevertheless possible to initiate a bankruptcy procedure for a bank, for which, unless otherwise provided by the BA-1, the FOIPCDA was applicable (Article 319 of the BA-1). The compulsory liquidation of the bank was also possible (Articles 266 through 271 of the BA-1). The authorisation to provide banking services also expired if the Bank of Slovenia issued a decision finding that the conditions for the initiation of bankruptcy proceedings or the compulsory liquidation of the bank were fulfilled (point 3 of the first paragraph of Article 87 of the BA-1). The Bank of Slovenia issued, on the basis of Article 320 of the BA-1, a decision establishing that the conditions for initiating bankruptcy proceedings were fulfilled (following which the Bank of Slovenia had to file a motion before the competent court for the initiation of bankruptcy proceedings for the bank) if it established that the bank's assets were insufficient to repay the claims of all creditors of the bank or that the bank was unable to fulfil its due obligations in due time and if it assessed that by means of extraordinary measures, or despite extraordinary measures having already been carried out, it was impossible to remedy such a situation. On the other hand, it was possible to initiate compulsory liquidation if the bank's assets were sufficient to repay all the creditors of the bank and the bank had sufficient liquid assets that allowed it to repay, upon maturity, all the claims of the creditors, yet the conditions for the successful continuation of banking operations were nevertheless not fulfilled.[40] The decision to initiate compulsory liquidation was issued by the Bank of Slovenia (*inter alia*) if the bank's authorisation to provide banking services was withdrawn, and also if the Bank of Slovenia established that the bank was unable to ensure long-term successful operations in accordance with the BA-1 and other regulations in force and, however, the conditions for the initiation of bankruptcy proceedings were not fulfilled (the first paragraph of Article 266 of the BA-1). The choice between bankruptcy and compulsory liquidation could (sometimes) be made after the bank had already been subject to one or more extraordinary measures for ensuring the stability of the financial sector as determined by Article 253 of the BA-1, i.e. also following the write-off or conversion of eligible liabilities.[41]

85. The challenged measure refers to eligible bank liabilities, which entail rights and creditors' claims against banks, i.e. eligible rights. The first paragraph of Article 261a of the BA-1 determined: "By a decision on an extraordinary measure, the Bank of Slovenia shall determine that: 1. the eligible liabilities shall be partially or entirely written off or 2. the eligible liabilities of the bank under points 2 through 4 of the sixth paragraph of this Article shall be partially or entirely converted to new ordinary shares of the bank on the basis of an increase in the bank's share capital on the basis of the payment of

in-kind contributions in the form of creditors' claims, which represent the eligible liabilities." The sixth paragraph of Article 261a of the BA-1 determined four classes of eligible liabilities.[42] Liabilities or rights of the first class were included in all shares of the banks. Liabilities or rights of the second class referred to hybrid financial instruments, which were the items of a bank's core capital and had to have had at least the following characteristics: permanency (without maturity or with the maturity period being at least 30 years); unrestricted availability to cover the losses during regular operations; flexibility of payments with the possibility of restrictions (the first paragraph of Article 133a of the BA-1); and other characteristics determined by Articles 16 through 19 of the Order on the Calculation of Capital. Liabilities or rights of the third class referred to financial instruments that were the items of the bank's additional Tier 1 and Tier 2 capital[43] (the first paragraph of Article 134 of the BA-1). On the basis of the second paragraph of Article 134 of the BA-1 and Article 22 of the Order on the Calculation of Capital,[44] items of additional Tier 1 capital, which are third class liabilities, included, for instance, hybrid instruments of additional Tier 1 capital, subordinated debt of additional Tier 1 capital, other subordinated liabilities, and other items similar to these. In the calculation of Tier 2 capital, subordinated debt and other items were taken into consideration that were, according to their characteristics and purpose, adequate for meeting capital requirements regarding market risk (the third paragraph of Article 134 of the BA-1 and Article 32 of the Order on the Calculation of Capital). Liabilities or rights of the fourth class were all remaining bank liabilities, which were not, however, an item of the bank's regulatory capital. Eligible bank liabilities or eligible rights of the bank's creditors were mainly items of the bank's capital. A bank's capital in the formal sense was namely not merely share capital, as it is known by all companies, but the entire, i.e. the bank's regulatory capital as determined by the BA-1. In other words, these were not merely corporate rights of shareholders or "the owners" of a bank that were personified in shares, but also instruments of the law of obligations and instruments of a mixed legal nature.

86. The applicants allege that it is impossible to clearly decipher from the BA-1 on which legal basis (i.e. on the basis of which guidelines and criteria) the appraisals of a bank's assets and its losses must be made, i.e. the appraisals on the basis of which the Bank of Slovenia may impose an extraordinary measure of the write-off or conversion of eligible bank liabilities. The first paragraph of Article 261b of the BA-1 determined that the Bank of Slovenia shall decide on the write-off or conversion of eligible liabilities on the basis of a valuation of the assets of the bank by an independent business appraiser. The first indent of this provision further determined that the amount of the repayment of eligible liabilities from its assets shall be determined on the assumption that the company is a gone concern. The BA-1 did not regulate the question of who may be an independent business appraiser. This does not mean that the BA-1 was unconstitutionally unclear and imprecise in this part. By the nature of the matter, only a person with an appropriate education and experience in assessing a bank's assets may be an independent business appraiser, while the rules he or she applies (be they codified or not) can only be a collection of expertise, knowledge, and

experience [accumulated and] developed by the accounting, auditing, financial, and similar professions. The legal standard of “an independent business appraiser” will ultimately have to be given substance in the case law. Consequently, this is another reason why the BA-1 was not inconsistent with the principle of clarity and precision determined by Article 2 of the Constitution.

87. It is not irrelevant to the decision-making of the Constitutional Court which types of bank obligations or creditors’ rights these were. It namely undoubtedly follows from the demonstrated statutory regulation that the eligible rights held by the petitioners were not, from various viewpoints, legally equivalent to the “ordinary” claims of the banks’ creditors (i.e. claims from ordinary credits, bonds, loans, deposits, etc.). In the predominant part, they were rights or claims that are included in the regulatory capital of banks, which is primarily, i.e. before anything else, intended to cover the bank’s losses and to protect other creditors, namely depositors in particular (regardless of the fact that, in the background of individual eligible rights, there are ordinary contracts under the law of obligations). By its legal nature, a bank’s capital is namely underprivileged compared to other bank liabilities. The second paragraph of Article 133a of the BA-1 determined by that, in the case of the bank’s bankruptcy or liquidation, the paid-up share capital and share premium accounts may be paid out only upon the settlement of all obligations and upon the payment of all other financial instruments. The core capital also included hybrid instruments (point 4 of the first paragraph of Article 133 of the BA-1), i.e. the entirety of the rights with special status that in the event of bankruptcy or liquidation were paid out before the bank’s shareholders and after ordinary creditors and holders of subordinated liability instruments (the first paragraph of Article 19 of the Order on the Calculation of Capital). Hybrid instruments of additional Tier 1 capital and subordinated debt classified as additional Tier 1 capital were paid out, in the event of bankruptcy or liquidation, before shares and hybrid instruments of core capital, and after all the bank’s other obligations, with regard to which, within Tier 1 capital, subordinated debt had priority over hybrids (*cf.* point (e) of the fourth paragraph of Article 25 and point (d) of the fourth paragraph of Article 28 of the Order on the Calculation of Capital). Also the subordinated debt classified as Tier 2 capital was subordinate, in the amount of the entire claim, to liabilities held by ordinary creditors (point (d) of the first paragraph of Article 32 of the Order on the Calculation of Capital).

88. It follows from the above that all eligible rights of creditors towards banks are subordinate to ordinary claims, with regard to which Article 261a of the BA-1 determined that also these eligible rights have a relation of superiority and subordination to one another, depending on their classification into four “classes”, mostly as follows from the general definition of individual items of a bank’s capital. When deciding on an extraordinary measure of the write-off or conversion of eligible bank liabilities, the Bank of Slovenia was only able to decide that the eligible liabilities of a lower class shall be partially or entirely written off if it decided that the eligible liabilities of a higher class shall be entirely written off (point 1 of the second paragraph

of Article 261a of the BA-1). Similarly, in this respect, the Bank of Slovenia was only able to decide that the eligible liabilities of a lower class shall be partially or entirely converted into ordinary bank shares if it decided that the eligible liabilities of the higher class shall be entirely written off or entirely converted (point 2 of the third paragraph of Article 261a of the BA-1). In such a manner, the principle of the equal (level of) treatment of creditors was respected, which follows already from the FOIPCDA.

89. An equal priority order for subordinated claims also follows from the FOIPCDA, whose Article 359 determines that claims shall be paid from the common distribution estate in the following order of priority: priority claims, ordinary claims, subordinated claims. From the viewpoint of banks, subordinated claims include all liabilities from the bank's regulatory capital and all other subordinated bank liabilities. As long as the common distribution estate does not suffice to repay in full the claims of the higher class that must be taken into account in the distribution, it is not allowed to start repaying the claims of a lower class. If the distribution estate does not suffice to repay in full the claims of a particular class that must be taken into account in the distribution, all claims of that particular class must be paid in the share calculated as the relation between the amount of the available distribution estate and the total amount of all claims of that class that must be taken into account in the distribution. Furthermore, the regular rules of bankruptcy law determined by the FOIPCDA only allow the repayment of the shareholders of a company in a bankruptcy procedure if absolutely all creditors under the law of obligations have been repaid prior to them. The second paragraph of Article 373 of the FOIPCDA determines that if the distribution estate is sufficient to cover all unsecured (i.e. also subordinated) claims, the part of the distribution estate which is not necessary for the payment of unsecured claims shall be distributed according to the plan of final distribution to the shareholders of the debtor in bankruptcy in proportion to their shares. The rules of the FOIPCDA on repayment in a bankruptcy procedure also applied to the bankruptcy of banks (Article 319 of the BA-1). The terminology was, in fact, specific; however the BA-1 proceeds from the same starting points as the FOIPCDA, namely that in bankruptcy, as well as in liquidation (voluntary or compulsory), first the ordinary creditors are repaid, and only then the holders of instruments of regulatory capital and other subordinated creditors.

90. The limited or underprivileged position of eligible rights in comparison with ordinary claims is not only apparent in the bankruptcy or liquidation of a bank. Also outside of procedures for the winding up of a bank, eligible rights that form the capital "cushion" that should protect ordinary creditors from the burden of losses in the operations of a bank also have certain specific characteristics that relatively worsen the position of their holders. Even regardless of the challenged write-off or conversion and subordination in bankruptcy or liquidation, the holders of eligible rights must assume a much bigger share of the risks in the development of the business operations of a bank than the other creditors (depositors, holders of ordinary bonds, creditors, creditors from commercial transactions, etc.). This is determined by numerous legal rules.

91. Hence, under the general rules of corporate law, it holds, as a general rule, that only distributable profit may be distributed to the shareholders from the company's assets (the eighth paragraph of Article 230 of the CA-1) – provided that the general meeting so decides and that there is some distributable profit available). A shareholder cannot force the company to repurchase his or her shares (i.e. [which would become] the company's shares after repurchase), whereas the payments via a reduction in the share capital are conditional upon demanding procedures that ensure the protection of the company's creditors (see Articles 372 through 378 of the CA-1).[45] Especially with regard to banks, the interests of shareholders can be affected, under the regulation determined by the BA-1, also by the supervisory measures of the Bank of Slovenia (a special additional measure for the implementation of the rules on risk management is the prohibition or limitation of payments made by the bank to shareholders, including paying out profit).[46] Article 248a of the BA-1 gave the Bank of Slovenia the authorisation, with regard to hybrid instruments of core capital, to [impose the following additional measures] (on the basis of an assessment of the liquidity situation or the bank's capital adequacy): (1) the prohibition of the redemption of the hybrid instrument prior to its maturity date;[47] (2) requiring that the payment of interest or dividends or other form of payments linked to hybrid instruments be cancelled; and (3) requiring that the bank replaces the hybrid instruments by core capital items of equal or better quality. Otherwise, the payment of profit to shareholders of or other beneficiaries of the bank and other payments related to hybrid instruments were in certain cases (related primarily to an inadequate level of bank capital or liquidity issues) inadmissible.[48] The further – non-exhaustively listed – limitations (or potential limitations) of the entitlements of the holders of eligible rights included in the bank's regulatory capital were included in the Order on the Calculation of Capital:

− it was possible that some hybrid instruments of core capital were formed so that they could not be paid out in money but could only be converted into ordinary shares (the sixth paragraph of Article 16 of the Order on the Calculation of Capital),

− hybrid instruments of core capital were permanent and could not be revoked or paid out upon the request of the holder; however, if they had a maturity date, it had to be at least thirty years (the first paragraph of Article 17 of the Order on the Calculation of Capital); the revocation or paying out of instruments without a maturity date could in fact be carried out upon the initiative of the issuing bank; however, as a general rule, after at least five years following the day the instrument was issued, and only with the authorisation of the Bank of Slovenia (the second paragraph of Article 17 of the Order on the Calculation of Capital); the bank had to have the possibility to cancel, anytime and for an indeterminate period of time, the payment of (due) yields from the hybrid instruments of core capital, depending on the financial position and capital adequacy of the bank (the first paragraph of Article 18 of the Order on the Calculation of Capital); these hybrids had to be issued under contractual conditions that enabled the bank to cover its losses from regular operations by the permanent write-off of the principal of the hybrids or their conversion into ordinary shares or in another alternative manner, and also the Bank of Slovenia was able to require that such losses be covered (Article 19 of the Order on the Calculation of Capital),

− hybrid instruments of additional Tier 1 had to have an indeterminate maturity date – it was not possible for them to be redeemed upon the request of the holder; the revocation or repayment of these instruments of the issuing bank were possible, as a general rule, only after five years following the day of their issuance, and with the authorisation of the Bank of Slovenia; the bank had to have the possibility of deferring the repayment of (due) yields from the hybrid instruments if it did not pay any dividends from shares for the past business year or yields from the hybrids of core capital (Article 25 of the Order on the Calculation of Capital),
− the subordinated debt classified as being part of additional Tier 1 capital did not have a determined maturity date, but if it had one, it was at least five years and one day; if the maturity date was indeterminate, the subordinated debt could only be paid out if the five-year preliminary notification was sent prior to that to the Bank of Slovenia. Preliminary payment or omitting the five-year notification were only possible if the Bank of Slovenia allowed such (the fourth paragraph of Article 28 of the Order on the Calculation of Capital);
− the subordinated debt classified as Tier 2 capital had to have a maturity date of at least two years and one day; preliminary payment could only be allowed by the Bank of Slovenia; neither the principal nor the interest on this subordinated debt were allowed to be paid out if such caused a reduction in the bank's capital such that it was below the amount of the prescribed minimum capital requirements (Article 32 of the Order on the Calculation of Capital).

92. The above stated thus indicates that the holders of eligible rights had – in particular if these rights were deemed to be a part of the regulatory bank capital – a special and in particular a different and worse legal position than the bank's other creditors, which follows already from the very nature of eligible liabilities.

93. The applicants allege that the challenged regulation was inconsistent with Article 2 of the Constitution also due to the fact that it allegedly created such internal inconsistencies in the legal regulation of the Republic of Slovenia that it was impossible to remedy them by means of the use of the rules of interpretation. They underline the relation between the challenged regulation and the requirements of Article 498 of the CA-1. The first paragraph of Article 498 of the CA-1 determines that a member of a limited company who granted a loan to the company – at a time where the partners should have provided the company its own capital in acting with due care and diligence – may not pursue a claim against the company for repayment of the loan in bankruptcy or compulsory settlement proceedings, and that in bankruptcy or compulsory settlement proceedings such a loan shall be deemed to form a part of the company's assets. On the basis of the fourth paragraph of Article 227 of the CA-1, this provision of the CA-1 concerning granting loans to the company instead of providing it with its own capital also applies *mutatis mutandis* to shareholders who have more than 25% of the shares with a right to vote. The BA-1 did not include any special provisions as regards granting loans to a company instead of providing it with its own capital in the event of bankruptcy, therefore Article 498 of the CA-1 applies *mutatis mutandis*. In the

event the extraordinary measure of the write-off or conversion of the eligible liabilities of banks on the basis of Article 261a of the BA-1 was imposed, the Bank of Slovenia had to assess the amount of the repayment of eligible liabilities under the assumption that the company was a gone concern and thereby it had to take into account all the provisions of the legislation in force, including Article 498 of the CA-1. When assessing the value of the assets and liabilities of the bank, it was namely also necessary to assess which legal transaction between a shareholder with more than 25% of such shares and the bank can be deemed to be a loan (in general) or a loan referred to in Article 498 of the CA-1, and appropriately take such into consideration. The Constitutional Court has no competence to assess the compatibility between laws and statutory provisions. However, it is competent to assess whether internal inconsistencies within the legal order violate the principles of a state governed by the rule of law determined by Article 2 of the Constitution (as stated in Decision of the Constitutional Court No. U-I-81/96, dated 12 March 1998, Official Gazette RS, No. 27/98, and OdlUS VII, 46). The case at issue does not concern such a situation.

94. With regard to the above, the challenged provisions were not inconsistent with Article 2 of the Constitution due to a lack of clarity and precision or due to an antinomy between the provisions of different laws.

B – IV

The Assessment of Conformity with the Prohibition of Retroactivity (Article 155 of the Constitution) and the Principle of the Protection of Trust in the Law (Article 2 of the Constitution)

95. The applicants base their allegations as to the unconstitutionality of the challenged provisions partly on the alleged inconsistency with the principle of the protection of trust in the law (Article 2 of the Constitution) and partly on the alleged inconsistency with the constitutional prohibition of the retroactive validity of legal acts determined by Article 155 of the Constitution. Their starting point is the objection that the entire substantive and procedural regulation of extraordinary measures for ensuring the stability of the financial sector, namely the write-off or conversion of eligible bank liabilities, also applied to those eligible rights that were created (i.e. that their holders acquired) prior to the entry into force of the substantive and procedural framework of the mentioned measure. The Constitutional Court first has to decide whether the main starting point of the applicants – i.e. that the provisions that justify the possibility of an authoritative write-off or conversion of their rights must not be applied “retroactively” – must be assessed from the viewpoint of Article 2 or 155 of the Constitution. In doing so, the Constitutional Court proceeds from the fact that the legislature determined, by Article 41 of the BA-1L, that the BA-1L entered into force on the day following its publication in the Official Gazette of the Republic of Slovenia (i.e. on 23 November 2013). Article 6 of the BA-1L expanded the then existing statutory set of extraordinary

measures for ensuring the stability of the financial system in Article 253 of the BA-1 by “the write-off or conversion of a bank’s eligible liabilities,” which has been in force since 23 November 2013. It was precisely by the BA-1L that all of the special provisions of the BA-1 that referred exclusively to the write-off or conversion and which are also challenged entered into force.[49] By the BA-1L, also several other new provisions entered into force that referred to (all) extraordinary measures,[50] whereas some of the already existing provisions of the BA-1L were amended so that they referred to (all) extraordinary measures,[51] some of the previously existing general provisions on extraordinary measures of the BA-1 were modified,[52] and it was determined that eligible liabilities cannot be transferred to an acquiring company,[53] which also has a certain substantive connection to the measure of write-off or conversion.

96. The entire legal mechanism of the write-off or conversion of eligible liabilities was therefore in force and ready to be applied on 23 November 2013. The BA-1L did not contain a provision that would limit the effect of this mechanism to those eligible rights that arose only after 23 November 2013. Not even the Bank of Slovenia, which applied the newly implemented provisions precisely for the “old” eligible rights issued or created prior to 23 November 2013 (or even exclusively for them), understood the Act in such a manner. Nor are the National Assembly, the Government, and the Bank of Slovenia opposed, as stated in their replies and opinions to the petitions and requests, to the interpretation that extends the possibility of the application of the BA-1L to the already existing entitlements. It is also entirely manifest that the intent of the legislature was not such that the possibility of the write-off or conversion would only apply to newly created rights. Such follows from the legislative file of the Draft Act of the BA-1L. It clearly follows from this file that the proposer of the BA-1L planned the application of the new instruments for the recovery of banks (in particular, the write-off and conversion of eligible rights) in the concrete situation at issue that arose.[54] Such necessarily entails that an integral part of the purpose for which the new extraordinary measure for ensuring the stability of the financial sector entered into force was precisely the fact that it was possible to compulsorily write off or convert also eligible liabilities created already in the past.[55] This is how the challenged provisions of the BA-1 and BA-1L must be interpreted.

97. The immediate statutory implementation of the mechanism of the compulsory write-off or conversion of financial instruments (eligible liabilities) that existed prior to its entry into force enabled the Bank of Slovenia to decide, on the basis of the first paragraph of Article 261a of the BA-1, that the mentioned eligible liabilities shall be partially or entirely written off or that they shall be partially or entirely converted to new ordinary shares of the bank on the basis of an increase in the bank’s share capital on the basis of the payment of in-kind contributions in the form of creditors’ claims, which represent the eligible liabilities. Thus, the existing legal relationships formed under specific statutory conditions and with a consensus as regards the intentions of the contracting parties could be modified or changed without the consent of the beneficiary [i.e. the entitled party or rights holder], on the basis of an authoritative act of an entity of public

law and the statutory basis that entered into force after these legal relationships were formed, namely in a manner that was not expressly contractually or statutorily envisaged at the time these relationships were formed. Such entails that the Act created a basis enabling that certain ongoing legally regulated relationships would not come to a conclusion under conditions equal to those that existed when they began.

98. However, the above-mentioned does not mean that the challenged provisions interfere with the constitutional prohibition of the retroactive validity of legal acts determined by the first paragraph of Article 155 of the Constitution. In the mentioned paragraph the Constitution prohibits the retroactive validity of legal acts by determining that laws and other regulations and general acts cannot have retroactive effect. The meaning of this constitutional prohibition is to ensure the essential element of a state governed by the rule of law, namely legal certainty. In accordance with the established case law of the Constitutional Court, a regulation has retroactive effect when the moment of the beginning of its application is the moment before its entry into force and even when the moment of the beginning of its application is the moment after its entry into force, but some of its provisions have such effect that they retroactively interfere with legal situations or legal facts that were final when the previous legal norm was in force (see, e.g., Decision of the Constitutional Court No. U-I-158/11, dated 28 November 2013, Official Gazette RS, No. 107/13, and OdlUS XX, 11).

99. The implementation of the mechanism of the compulsory write-off or conversion of “old”, already existing financial instruments does not interfere retroactively with legal situations or legal facts that were concluded when the previous legal norm was in force (i.e. when the write-off and conversion were not possible). Under the correct interpretation (which also takes into account Article 155 of the Constitution), it was namely impossible for the write-off and conversion to result in an obligation of the holder of an eligible right to return to the bank or any other entity an amount of money that he or she had already received on the basis of the eligible right. It was also impossible for the specific exercise of his or her other potential entitlements that had already been “consumed” in the past and that would have been revoked or reduced *ex nunc* by the write-off or conversion to become invalid.[56] In other words, the challenged regulation was not “oriented” backwards [in time], but forwards. Insofar as the challenged regulation[57] was to abolish or transform a certain financial instrument that was still in force, i.e. a certain legal relationship that was still open, or entitlements that would – if there was no intervention by the state – continue to arise in the future in an unchanged form, it would interfere with open, uncompleted legal situations. Its effect would be such that existing financial instruments would be written off, i.e. instruments that would yield, with a higher or lesser certainty,[58] some (as a general rule) monetary payments to the holder in the future, were there no write-off. Following the write-off, there would definitely not be any such payments. The challenged regulation changed – if on its basis there was “merely” a change of a certain right under the law of obligations or a mixed eligible right into a corporate eligible right (the conversion of another financial instrument into a share) – a necessarily relatively stronger legal

position, from the viewpoint of the “guarantees” of monetary yields and priority ranking in insolvency procedures, into the relatively weakest position (one of a holder of ordinary shares of the bank). The challenged regulation is hence not retroactive, and consequently it does not interfere with Article 155 of the Constitution. Therefore, the question that arises is whether the challenged regulation interferes with the principle of trust in the law, which is one of the principles of a state governed by the rule of law determined by Article 2 of the Constitution.

100. In its efforts to answer this question, the Constitutional Court had to rely, *inter alia*, on the Judgment of the CJEU in case No. C-526/14 concerning the validity of the Banking Communication. In that case, the CJEU established that the principle of the protection of legitimate expectations (as a general principle of EU law, which functionally corresponds to the principle of trust in the law determined by Article 2 of the Constitution) is not opposed to paragraphs 40 through 46 of the Banking Communication (which are the substantive basis for the challenged provisions of the BA-1 and BA-1L) in the part where the mentioned paragraphs for granting state aid impose the condition of burden-sharing between shareholders and “subordinated creditors”.[59] It deemed that the holders of eligible liabilities who are affected by burden-sharing measures cannot refer to the principle of the protection of legitimate expectations to object to the execution of the mentioned measures. The reasons therefor are the following: (a) the right to refer to the principle of legitimate expectations is conditional upon the requirement that the competent EU authorities provide the person concerned exact, unconditional, and harmonised assurances that follow from authorised and reliable sources, to which every legal entity in whom an institution, authority, office, or EU agency created legitimate expectations by providing it precise assurances can refer; (b) the holders of eligible rights did not receive the assurance of the Commission that it would grant state aid for remedying the capital deficit of banks, nor did they have the assurance that the measure to remedy it would not have an influence on their investments; (c) the fact that the holders of eligible rights did not have to contribute, in the initial phases of the international financial crisis, to the resolution of credit institutions does not enable reference to the principle of the protection of legitimate expectations, as such a circumstance is not a precise, unconditional, and harmonised assurance that could possibly create legitimate expectations among the holders of eligible rights that the burden-sharing measures would not be applied to them in the future, as economic entities cannot have legitimate expectations as to the maintenance of the status quo, which EU institutions can change on the basis of their discretionary right, namely in a field such as state aid in the banking sector, which is constantly adapting to changes in economic conditions; (d) even if legitimate expectations existed in such a situation (which, in fact, they did not), the absence of special “transitional measures” for situations that arose prior to the entry into force of the new regulation and which are still developing would be based on the predominant public interest of ensuring the stability of the financial sector, while avoiding excessive public spending and distorting competition as minimally as possible. Furthermore, in Paragraphs 98 and 101 of the Judgment in case No. C_526/14, the CJEU draws

attention to the fact that the adoption of the Banking Communication did not relieve the Commission of its obligation to examine specific exceptional circumstances that are relied on by Member States, and that the Banking Communication allows for an exception to the requirements of, "*inter alia*, point 44 of [this] Communication"[60] where the implementation of measures for converting debt or writing off financial instruments "would endanger financial stability or lead to disproportionate results."

101. The above-mentioned entails that the write-off and conversion of eligible rights are in fact necessary under EU law – during the period in which the Banking Communication should be observed – if banks are to be assisted by public funds, namely to ensure the stability of the economic sector.[61] Hence, the recovery of banks by means of public funds under the conditions determined by EU law requires the establishment of a new legal framework that is to enable that also the holders of eligible rights, i.e. shareholders and holders of various hybrid and subordinated instruments, involuntarily assume a part of the financial burden of this recovery. The legal framework for this was precisely the challenged provisions of the BA-1 and BA-1L.

102. This fact is important in order to adopt a position on the question of whether the challenged act in fact concerns an interference with the principle of trust in the law. Under the challenged regulation, the extraordinary measure of write-off or conversion was namely only possible where it was impossible to prevent the bankruptcy of the bank or the financial sector as a whole being threatened in any other manner than by granting state aid. That which was termed write-off or conversion in the BA-1 entails, from another point of view, merely a decision that a certain category of a bank's creditors will not be rescued with public funds. These funds can only be made available in the interest of depositors and other ordinary bank creditors. In an economic sense, the challenged measure therefore has similar effects as if the state allowed the bankruptcy of the bank and then allocated compensation for the lost legal positions or unpaid claims, by its own discretion and by taking into account the principle of equality before the law, only to ordinary creditors of the bank, but not also to subordinated creditors. It must namely be taken into consideration that one of the key rules of the challenged regulation is that by the write-off or conversion the beneficiary must always receive (or retain) at least the amount he or she would have received in bankruptcy (the fifth paragraph of Article 261a of the BA-1). Such entails that the challenged regulation encompassed the very important "no creditor worse off" principle,[62] as the Bank of Slovenia had to ensure, as regards the write-off or conversion of eligible liabilities, that individual creditors did not sustain greater losses due to the write-off or conversion of the bank's eligible liabilities than they would have sustained in the event of the bank's bankruptcy. In fact this entails that, provided the fifth paragraph of Article 261a of the BA-1 is interpreted correctly and in a constitutionally consistent manner, the extraordinary measure only formally interfered with the legal situation of the affected beneficiary; economically, the challenged measure, which was intended to prevent the bankruptcy of the bank as the *ultima ratio*, was not allowed to affect the beneficiary any more than if there had been no measure and the bank had ended in

bankruptcy. This aspect of the BA-1 significantly affects the position of the holders of eligible rights.[63]

103. The write-off and conversion only refer to those financial instruments which the holders knew in advance have a relatively weaker legal position (although as regards aspects other than those challenged in the case at issue), which are more heavily burdened with the risk of non-repayment. A *mutatis mutandis* equal aspect was also important – however in a different context – when the General Court decided on an action for damages due to the obligatory restructuring of the public debt of Greece, where private investors sustained losses (Judgment of the General Court in *Alessandro Accorinti and Others v. European Central Bank*, T-79/13, dated 7 October 2015).[64]

104. Article 261c of the BA-1 had to be interpreted as meaning that the stricter measure of write-off would only be applied in instances where bank losses reduced the bank's capital to the point where the bank no longer fulfilled the minimum capital requirements (whereas conversion, which is more lenient towards creditors, could be used in instances where the bank's capital was still above the prescribed minimum). Article 261b determined, *inter alia*, that the Bank of Slovenia shall decide on the write-off or conversion of eligible liabilities on the basis of a valuation of the assets of the bank by an independent business appraiser (or, if necessary, by the Bank of Slovenia), by assessing the amount of the repayment of eligible liabilities from bank assets on the assumption that the company is a gone concern. It is namely clear that it was impossible to ensure the implementation of the "no creditor worse off principle" if the amount of money (if any at all) that the holders of the written-off eligible rights would have received in bankruptcy (a company that is a gone concern) was unknown. The same calculation of the value of the rights of the holders of eligible rights had to be carried out under the same assumption on the basis of Article 261d of the BA-1, and it is also logical and acceptable, however, that the issue value of new shares of the bank issued when the share capital would be increased by converting eligible liabilities would be determined on the assumption that the company is a going concern (the second indent of the first paragraph of Article 261b of the BA-1).[65]

105. Taking into consideration the mentioned starting points, also the allegations of the applicants relating to the alleged interference with the principle of trust in the law must be assessed. The expectation of the holders of eligible rights that, as holders of financial instruments, they would benefit [from the measure] in such a manner that their investments would be saved in the form of received state aid is not a legally protected expectation. The holders of eligible rights had no guarantee by the state or the Bank of Slovenia that their investment would also be protected in the event its economic value was (at least partially) lost, i.e. when the conditions for the assessed extraordinary measure are fulfilled. Due to the mentioned reason, issuing a measure whose fundamental prerequisite is that the beneficiary must always receive (or retain) at least as much as he or she would have received in bankruptcy, cannot lead,

essentially, to an interference with the principle of trust in the law. With regard to all of the above, the challenged regulation is not inconsistent with this principle as determined by Article 2 of the Constitution.

B – V

Assessment of Conformity with the Right to Private Property Determined by Articles 33 and 67 of the Constitution

106. The applicants believe that the challenged regulation disproportionately limits the right to private property determined by Article 33 of the Constitution, in conjunction with the social function of property determined by Article 67 of the Constitution. They allege that the challenged regulation also violates Article 1 of the First Protocol to the ECHR. Since the challenged provisions enable the cessation of rights without compensation, the applicants allege that there was an unconstitutional expropriation, and in relation thereto they also allege an inconsistency with Article 69 of the Constitution.

107. The right to private property as guaranteed by Article 1 of the First Protocol to the ECHR is also regulated by Articles 33 and 67 of the Constitution. The ECHR does not guarantee a higher level of protection of the right to private property than the Constitution. Article 17 of the Charter guarantees the same level of protection. With regard thereto, the Constitutional Court assessed the interference with the right to private property from the viewpoint of conformity with the mentioned provisions of the Constitution, taking into account also the case law of the CJEU from the viewpoint of the right to private property in the Judgment in case No. C-526/14. Article 33 of the Constitution protects all rights that entail the implementation of one's freedom in the field of property. Such entails that it not only protects the right to private property as defined in civil law, but it also provides protection from interferences with other existing legal situations that have a property value for individuals, similarly as the right to private property, and enable them the freedom to act in the field of property.

108. The Constitutional Court has already adopted the position that property and management rights that follow from the capital investment (shares) of shareholders in a public limited liability company enjoy constitutional protection on the basis of Articles 33 and 67 of the Constitution (as stated in Decisions of the Constitutional Court No. U-I-165/08, Up-1772/08, Up-379/09, dated 1 October 2009, Official Gazette RS, No. 83/09, and OdlUS XVIII, 40, and No. U-I-28/11, dated 24 October 2013, Official Gazette RS, No. 98/13).[66] Also claims on the basis of subordinated loans, subordinated bonds, subordinated hybrid bonds, or other subordinated financial instruments enjoy constitutional protection on the basis of Articles 33 and 67 of the Constitution. The Constitutional Court has namely already adopted the position that the constitutional protection of property also encompasses, *inter alia*, claims, i.e. the

property rights of a creditor towards the debtor, who is to perform specific fulfilment.[67] The subject of assessment in the case at issue is the shareholders' rights from shares and the monetary claims of creditors on the basis of subordinated bank liabilities of classes two through four, i.e. the bank obligations determined by points 2 through 4 of the sixth paragraph of Article 261 of the BA-1, which are composed of the principal and (as a general rule) also interest. This is the entirety of the so-called eligible rights of creditors of banks that are protected by the constitutional guarantee of the right to private property. The Constitutional Court first had to assess whether the regulation, whose essence is that, upon the fulfilment of certain statutory conditions, the Bank of Slovenia can decide that the bank's shares or eligible claims of creditors towards the bank shall be partially or entirely written off or that certain eligible claims of the creditors towards the bank shall be partially or entirely converted to new ordinary shares of the bank (the first paragraph of Article 261a of the BA-1) interferes with the right to private property of the holders of eligible rights.

109. In case No. C-526/14, the CJEU decided that the right to private property (as protected in EU law by the first paragraph of Article 17 of the Charter) is not contrary to paragraphs 40 through 46 of the Banking Communication (which are the substantive basis for the challenged provisions of the BA-1 and BA-1L) in the part where the mentioned points determine the condition of burden-sharing between shareholders and subordinated creditors in order for state aid to be granted.[68] It assessed that burden-sharing measures such as those referred to in the Banking Communication do not entail an interference with the right of shareholders and subordinated creditors to private property. The reasons therefor are (*inter alia*) the following: (a) shareholders in public limited liability companies themselves bear the burden of their investments and are responsible for a bank's debts up to the amount of its share capital, therefore it cannot be deemed that the requirement that they contribute, prior to state aid being granted, to covering its capital deficit to the same extent as if such aid were not granted interferes with their right to private property; (b) the losses of the shareholders of banks in difficulty would in any event be of the same proportion, no matter whether the reason therefor is based on a decision to initiate bankruptcy proceedings because state aid was not granted or on a decision to grant such aid, which is conditional upon preliminary burden-sharing; (c) as regards subordinated creditors, it is important that subordinated instruments are financial instruments that have certain characteristics of debt and equity securities, which entails that in the event the issuer of these instruments is insolvent their holders are paid after the holders of ordinary bonds, but before shareholders; (d) burden-sharing measures upon which the granting of state aid to a bank with a capital deficit is conditional cannot result in an interference with the right to private property of subordinated creditors that would not have arisen in bankruptcy proceedings had state aid not been granted.

110. The challenged provisions of the BA-1 regulated the extraordinary measure of the write-off or conversion of the eligible liabilities of banks. It was a compulsory and extraordinary measure that gave the Bank of Slovenia the authorisation, *inter alia*, to

decide by a decision on the extraordinary measure that the bank's shares would be partially or entirely written off, provided that certain conditions determined by law were fulfilled. On the basis of the challenged regulation, when a decision on the extraordinary measure was adopted, the shareholders lost all their shares in the bank or a part thereof. Such entails that they also lost all the management rights and, in particular, property rights (i.e. the right to a part of the profit thereof, the right to an appropriate part of the property remaining after the liquidation or the bankruptcy of the company, and the priority right to buy new shares) that follow from these rights. On the basis of the challenged regulation, the Bank of Slovenia also had authorisation to issue a decision that all eligible claims of creditors towards the bank or a part thereof would be written off. Such entails that the holders of these credits lost the right to future (but not also past) payments of interest and to the payment of the principal upon maturity.[69] The challenged regulation also enabled the conversion of the eligible claims of creditors against the bank into ordinary shares of that bank, namely in part or in full, by taking into account the value of the claims in accordance with Article 261b of the BA-1. On the basis of such measure, the creditors of the banks became their shareholders. Hence, this entailed a change from a creditor-debtor relation between the bank and its creditor to a corporate relation between a shareholder and the company (i.e. the bank). The previously clearly determined (although not necessarily unconditional) right to repayment based on the claim against the bank changed into a share that confers a proportionally more uncertain and *ex-ante* indeterminate right to property yields, which depends on the bank's operating results and also on a decision of the general assembly of shareholders to pay out dividends.

111. When adopting a position regarding whether this regulation interfered with the right of holders of eligible rights to private property determined by Article 33 of the Constitution, one must take into consideration the criteria that were decisive for the assessment that the challenged regulation does not interfere with Article 2 of the Constitution (above all, the conditions of looming bankruptcy and the instability of the financial system of the state, the decision of the state that it would only save the ordinary creditors of banks with public funds, the limitations of EU law as regards the admissibility of state aid, respect for the "no creditor worse off than in a bankruptcy" principle and the existence of a merely formal interference with the position of the affected beneficiaries). The challenged regulation was namely adopted for instances where the only possibility to continue the operations of the bank or to wind up the bank in a stable manner (outside of bankruptcy) appeared to be state intervention or financial aid, which, in accordance with EU rules, is deemed to entail state aid. It was adopted in order to enable the implementation of measures to strengthen the stability of the banking sector envisaged by the AMSSBS, i.e. measures that in accordance with EU law are deemed to constitute state aid.[70] The write-off or conversion of eligible liabilities was the ultimate measure of the Bank of Slovenia to prevent the financial sector in the state from being threatened, which is of key importance for the normal functioning of the economy and for implementing the rights guaranteed by the Constitution.

112. The extraordinary measure of the write-off or conversion of eligible bank liabilities was thus an extraordinary form of insolvency proceedings. It was an administrative, extraordinary measure intended to prevent bankruptcy and to enable the further operations of the bank or its controlled winding up (liquidation – *cf*. Article 253b of the BA-1). Its adoption prevented the initiation of bankruptcy proceedings against the bank, in which the holders of bank liabilities would not be paid out or would be paid out partially, namely in a manner such that the creditors received the same amount, or more, also in this special administrative procedure for bank resolution. There is, in fact, no duty of the state stemming from the Constitution or a right of the creditor entailing that the state should reimburse the money from private investments that transpired to be economically unsuccessful. The fundamental condition for imposing the extraordinary measure on the basis of the challenged regulation was that no creditor would sustain greater losses than in the event of the bank's bankruptcy due to the write-off or conversion of the bank's eligible liabilities (the fifth paragraph of Article 261a of the BA-1). Hence, the "no creditor worse off" principle was respected. Due to the mentioned reason, imposing a measure whose fundamental prerequisite is that the beneficiary must always receive (or retain) at least the amount he or she would have received in bankruptcy, cannot result, by the nature of the matter, in an interference with the right to private property. The applicants' opposition to the principle that the value of the bank's assets is determined under the assumption that the company is a gone concern is not convincing. The value that the holders of eligible liabilities would have received in the event the extraordinary measure of the write-off or conversion of eligible liabilities had not been issued is precisely the value of claims against a company that is a gone concern, i.e. a bankrupt company. Any different appraisal of value would thus not enable the determination of the fair value. The estimated value of an individual bank in the concrete situation at issue in accordance with its economic situation (without taking into account state aid) is hence one that can lead to a situation where the holders of eligible liabilities receive nothing or less than they expected on the basis of their legal relation to the bank. In such light, it is apparent that the holders of eligible rights are not economically disadvantaged on the basis of the challenged regulation. However, if the beneficiaries who were affected by the extraordinary measures of the Bank of Slovenia referred to in Paragraph 56 of the reasoning of this Decision believe that incorrect assumptions were applied in the concrete procedures in which extraordinary measures were issued, they must invoke such claims in the relevant proceedings.

113. The first paragraph of Article 67 of the Constitution reads as follows: "The manner in which property is acquired and enjoyed shall be established by law so as to ensure its economic, social, and environmental function." This entails that the economic function of property is laid down in the constitutional definition itself of the term private property and is manifested in particular with regard to things and rights intended for economic operations or that have a substantive relation thereto. This also applies to

the eligible rights of investors in banks. When it transpires that the financial instruments of bank investors do not have economic value, such that the holders thereof would have no benefit therefrom in bankruptcy proceedings, the economic function of property has already ceased in some manner. The holders of eligible rights are in an economically comparable situation, even before their rights cease or are converted[71] on the basis of the assessed extraordinary measure. With regard to the above, the challenged regulation is not inconsistent with Article 33 in conjunction with Article 67 of the Constitution.

114. The applicants allege that the challenged regulation is also inconsistent with Article 69 of the Constitution. Article 69 of the Constitution merely refers to the dispossession or restriction of private property that is real property, which is not a subject of the regulation at issue.

B – VI

The assessment of conformity with the right to judicial protection (the first paragraph of Article 23 of the Constitution)

115. The applicants allege, *inter alia,* that the challenged regulation entails an inadmissible interference with the right to judicial protection (the first paragraph of Article 23 of the Constitution). In such framework, they primarily underline the fact that the holders of eligible rights do not have claims against issuing banks and that they cannot secure a judicial review of the legality of the decisions of the Bank of Slovenia. Furthermore, compensatory protection is allegedly inappropriate. Since these allegations substantively refer merely to Articles 346, 347, 350, and 350a of the BA-1, the Constitutional Court only assessed the constitutionality of the mentioned decisions of the BA-1 from this point of view. The Constitutional Court also assessed, within the framework of the review of the conformity of the challenged provisions with the right to judicial protection, the arguments of the applicants relating to the effectiveness and accessibility of the bases for the decision-making of the Bank of Slovenia, and the possibility to substantiate claims.

116. The first paragraph of Article 23 of the Constitution determines that everyone has the right to have any decision regarding his rights and duties made without undue delay by an independent, impartial court constituted by law. The right to judicial protection ensures the possibility to submit a case to a court that will substantively decide on the case within a reasonable period of time. It is a guarantee that a decision will be reached on the basis of rights and obligations, i.e. on whether the request for judicial protection is well founded or not well founded under substantive law. Judicial protection must be effective, which means that the affected person can effectively defend his or her rights, interests, and legal benefits. Hitherto, when the Constitutional Court defined the

substance of the right to judicial protection, it always proceeded from the general premise in accordance with which it is not the purpose of the Constitution to recognise human rights only formally and theoretically; however, there is a constitutional requirement that the possibility of the effective and actual exercise thereof must be ensured (Decision of the Constitutional Court No. Up-209/99, dated 9 December 1999, OdlUS VIII, 301). The right to judicial protection determined by the first paragraph of Article 23 of the Constitution does not entail the right to concretely defined judicial proceedings.[72] Judicial protection against the decisions of state authorities (including administrative decisions) can also be ensured in some other (e.g. civil) proceedings or in proceedings before another (not administrative) court, namely within the scope that corresponds to the nature of the legal relation.[73]

117. Judicial protection proceedings against a decision of the Bank of Slovenia to impose an extraordinary measure (including a decision on the write-off or conversion of eligible liabilities) was mainly regulated in Subsection 10.2.2 of the BA-1, which contained Articles 346 through 350a (see the first paragraph of Article 346 of the BA-1). Unless Subsection 10.2.2 determined otherwise, the provisions of Subsection 10.2.1 applied in judicial protection proceedings against a decision to impose an extraordinary measure (the second paragraph of Article 346 of the BA-1). Subsection 10.2.1 also included the second paragraph of Article 337 of the BA-1, which determined that the Act on the Judicial Review of Administrative Acts (Official Gazette RS, Nos. 105/06, 62/10, and 109/12 – hereinafter referred to as the AJRAA-1) should apply *mutatis mutandis* for judicial protection proceedings against decisions of the Bank of Slovenia.[74] The efforts to ensure the speediness and effectiveness of judicial protection against decisions of the Bank of Slovenia followed already from the general provisions of Subsection 10.2.1 of the BA-1: these were urgent cases subject to priority deciding by the court (Article 340 of the BA-1); the time limit for filing an action and a reply thereto was fifteen days (Article 341 of the BA-1); the plaintiff was not allowed to state new facts or present new evidence (Article 342 of the BA-1); the court assessed the decision of the Bank of Slovenia within the limits of the claim and within the limits of the grounds stated in the action, while *ex officio* only paying attention to violations of the essential procedural requirements referred to in the third paragraph of Article 27 of the AJRAA-1 (Article 343 of the BA-1); the court decided, as a general rule, without a hearing (Article 344 of the BA-1); and no appeal was allowed against a judgment or an order adopted in judicial protection proceedings (Article 345 of the BA-1). The decision of the Bank of Slovenia on the extraordinary measure was served on the bank and, in accordance with the rules on personal service, also on all members of the bank’s management board (the third paragraph of Article 353 of the BA-1).[75] Like most other decisions of the Bank of Slovenia, also the decision at issue became enforceable – this is when constitutive decisions take effect – when it became final (the first paragraph of Article 378 of the BA-1).[76]

118. A bank was able to file on its behalf an action against the decision of the Bank of Slovenia on the extraordinary measure, which resulted, in the event its arguments were

substantiated, in a declaratory judgment of the Administrative Court finding that the decision of the Bank of Slovenia was illegal and that the conditions for the write-off or conversion of eligible liabilities were not fulfilled. By means of interpretation, it has to be concluded that the write-off or conversion of eligible rights was an “irreversible” extraordinary measure, meaning that its effects cannot be annulled. For all extraordinary measures, Article 350 of the BA-1 determined that, even if their illegality were to be established, the court cannot annul the decision that serves as their legal basis, nor can it remedy its effects (not even *ex nunc*). However, (at least) for a write-off or conversion, the position must be adopted that not even the Bank of Slovenia could do it itself, which in fact was authorised by Article 255b of the BA-1 to issue a decision on the cessation of the extraordinary measure once the reasons therefor had ceased. [77] An inherent consequence of the extraordinary measure determined by Article 261a of the BA-1 was an irreversible change in the bank capital as of that time. The write-off or conversion of eligible liabilities is always related to changes in share capital (in any event, with a reduction, but also, as a general rule, with a subsequent increase due to the strengthening of the bank). Changes in the share capital that have already been carried out and written in the court register (as well as the write-offs of hybrid and subordinated instruments with their amortisation schedules and maturity) cannot be annulled as if they had never existed.

119. The possibilities of the holders of eligible rights to affect whether the bank actually filed the mentioned action or proceeded with the initiated proceedings were in the formal sense limited to shareholders, namely via their right to appoint, at the general meeting of shareholders (convened upon the request of [the holders of] one tenth of the share capital), persons who represent the bank in judicial protection proceedings against the decision of the Bank of Slovenia.[78] On the basis of the challenged regulation it was not possible for the holders of the written-off or converted eligible rights to judicially challenge (i.e. act as parties – plaintiffs – in judicial proceedings) the constitutive and final decision of the Bank of Slovenia, as Article 347 of the BA-1 did not recognise their active standing in such a dispute. The above-mentioned holds true despite the fact that the mentioned decision of a public law authority could also have affected their rights (i.e. voided, limited, degraded such). The holders of the written-off or converted eligible rights had, however, on the basis of the challenged regulation, a different form of judicial protection at their disposal, namely an action for damages on the basis of the first paragraph of Article 350a of the BA-1.

120. In order for the holders of eligible rights to succeed with this action for damages against the Bank of Slovenia due to the issued extraordinary measure, namely write-off or conversion, it was necessary to demonstrate the damage and the causal link precisely between the extraordinary measure and the damage that the applicants sustained (i.e. that the damage that was incurred due to the effects of the extraordinary measure was greater than would have been the case had the extraordinary measure not been issued). The liability for damages of the Bank of Slovenia under Article 350a of the BA-1 should not be equated with liability for unlawful conduct, which serves as

the basis for the right to compensation for damage under Article 26 of the Constitution). Obviously, what was at issue was a specifically regulated liability for damages, as it is not clear from the text that the unlawfulness of the conduct of the Bank of Slovenia was the basis for its liability for damages. The text of the challenged provision merely referred to Article 223 of the BA-1, which determined the criteria for due diligence of the Bank of Slovenia in carrying out supervision, but did not limit the liability for damage only to instances where the Bank of Slovenia acts by failing to perform due diligence, i.e. unlawfully. Under the challenged provision, every person whose rights have been affected on account of the effects of the decision of the Bank of Slovenia on the extraordinary measure had the right to compensation for damage, with regard to which the applicant had to prove that the damage incurred on account of the effects of the extraordinary measure was greater that would have been the case in the event the extraordinary measure had not been issued, based on the facts and the circumstances as they were at the time of the decision-making of the Bank of Slovenia and which the Bank of Slovenia took or should have taken into account. Such an instance was where a plaintiff would have received more in bankruptcy proceedings against the bank than the amount his or her remaining assets would be following the realisation of the write-off or conversion of the financial instrument at issue, or where he or she would even receive the total value of the financial instrument at issue because the bankruptcy proceedings would not even be initiated (it goes without saying that this means under the financial situation as it existed at the time when the extraordinary measures were issued and without taking into account the effects of the issued extraordinary measures). For example, because the assessments of the facts prepared by the Bank of Slovenia were erroneous and, consequently, there would have been no grounds for an extraordinary measure, or grounds for bankruptcy.

121. The Constitutional Court first had to assess whether the fact that the extraordinary measure only offered the affected persons the described different judicial protection interfered with the right to judicial protection determined by the first paragraph of Article 23 of the Constitution. However, this provision of the Constitution does not require that proceedings for the judicial review of administrative acts be available to the holders of eligible rights. Namely, the Constitution does not require concretely determined proceedings. A different form of judicial protection in the BA-1 in itself only entailed the manner of exercise of the right to judicial protection within the meaning of the second paragraph of Article 15 of the Constitution. The plaintiffs were namely able to fully and comprehensively protect their property interests that they had on the basis of their property investment in banks (even) with (merely) compensatory protection that is decided on in judicial proceedings. It must be mentioned that it does not follow from the text of the challenged provision that the BA-1 in any way curtailed their right to compensation in full in the event it transpired that the decision of the Bank of Slovenia was an erroneous one and that they sustained property deprivation due to the issued extraordinary measure (see the preceding point of the reasoning). The constitutional review of a statutory regulation that substantively does not entail a limitation of a particular human right is necessarily self-restrained. In such context, the Constitutional

Court assesses primarily whether the challenged regulation is reasonable. In fact, a write-off or conversion of eligible rights that has already been carried out cannot be reversed. Since the interest of the investors is a typical property interest,[79] whose degree to which it is affected can be effectively remedied by judicially awarding them full monetary compensation, the challenged solutions, which provided the holders of the written-off and converted eligible rights – instead of in proceedings for the judicial review of administrative acts – a different form of judicial protection in civil proceedings to challenge the decision of the Bank of Slovenia, with regard to which their claim was limited to the payment of compensation, cannot be deemed to be essentially unreasonable.

122. Therefore, the mere fact that the legislature regulated the judicial protection of the holders of eligible rights in Article 350a of the BA-1 via the right to compensation decided on in judicial proceedings did not in itself constitute an interference with the right to judicial protection and was not inconsistent therewith from this point of view. However, it is important whether the manner of exercise of the right to judicial protection seen as a whole was such as to satisfy the requirement of effective judicial protection determined by the first paragraph of Article 23 of the Constitution. If it was not, the legislature interfered with the mentioned right. In accordance with the BA-1, compensatory protection was namely the only possibility for the bank's investors to protect their property interests affected by the write-off or conversion. The essential principle of the protection of investors under the challenged provisions of the BA-1 (i.e. "no creditor worse off") could only be ensured by full and effective compensatory protection.

123. The bank investors allege, *inter alia*, that due to the inaccessibility of data they will not be able to appropriately substantiate and prove the allegations in the actions for damages. Since plaintiffs in actions for damages do not know and cannot know on the basis of which and what kind of specific economic and financial assessments the Bank of Slovenia decided to adopt a radical measure such as the write-off or conversion, already the formation and substantiation of the basic arguments relating to the existence of the prerequisites for the liability for damages are made difficult. In the phase preceding the filing of the action, the challenged regulation did not provide the plaintiffs access to information relating to the valuation of the bank assets and other documents of the Bank of Slovenia and did not provide information on the details of the banks' operations. The effectiveness of their compensatory protection was thereby reduced. The possibility of the plaintiffs safeguarding their rights would only be effective if they had the possibility to fully access the documents relating to the write-off or conversion that the Bank of Slovenia possessed, and sufficient time to draft the claim afterwards.[81]

124. In addition to the above-stated, also the fact that the holders of written-off and converted eligible rights have to prove that the damage incurred due to the effects of the write-off/conversion is higher than it would have been in the event the extraordinary

measure had not been issued reduces the effectiveness of the compensatory protection under the conditions determined by the first paragraph of Article 350a of the BA-1. The context is that of a technically extremely complex dispute that is resolved in civil proceedings and proceeds from the principle of the equality of the parties, although the Bank of Slovenia, as the regulator that has oversight of all the details of the functioning of the banking sector, is, in fact, from the technical, personnel, and informational points of view, much stronger than a typical investor in eligible bank instruments. A comparison of the positions of the Bank of Slovenia and of (potential) plaintiffs indicates an essential and significant imbalance in numerous elements that can have important consequences for the procedural imbalance in the proceedings on compensatory protection that were available to the affected persons in accordance with the first paragraph of Article 350a of the BA-1. This can have an important influence on the actual possibilities of the applicants to succeed in disputes against the Bank of Slovenia. Only particular rules for conducting civil proceedings adapted to the nature of the disputed relations could remedy such imbalance. Only a regulation whereby the Bank of Slovenia would have to clearly demonstrate why the measure that affected the investments of the holders of eligible bank liabilities was necessary in the concrete circumstances could lead to investors (current and future ones) having trust in the reasonable security of such investments.

125. Furthermore, attention must be drawn to the fact that the mere (potential) number of plaintiffs that can be reasonably expected in the mentioned disputes represents a significant burden[82] on the judicial system, despite the fact that Article 279b of the CPA also envisages the possibility of so-called sample proceedings. It must namely be taken into consideration that the CPA does not envisage specific proceedings for collective judicial protection that would ensure the speed, economy, and uniformity of decision-making in disputes between the holders of written-off and converted rights and the Bank of Slovenia. The holders of written-off and converted eligible rights who wish to make use of their compensatory protection on the basis of the first paragraph of Article 350a of the BA-1 against the Bank of Slovenia would have to act individually, i.e. as individuals who are not, in general, in an appropriate position to be actually able, considering the nature of their relations to individual banks, to effectively invoke the reasons that inherently touch upon complex issues of bank operations and the valuation of their assets (and which are also relevant for decision-making in such actions for damages).[84]

126. The findings stated in Paragraphs 123 through 125 of the reasoning of this Decision decisively affect the assessment of the effectiveness of the judicial protection of the holders of written-off and converted eligible rights. By deciding to determine a special manner of exercise of the right to judicial protection without, however, taking into account all the characteristics of the actually weaker position of bank investors as (potential) plaintiffs in comparison with the Bank of Slovenia, it strengthened and intensified the already existing imbalance between them and the Bank of Slovenia, and significantly reduced their chances of success with their claims. It thereby interfered

with their right to effective judicial protection determined by the first paragraph of Article 23 of the Constitution. An interference therewith is only constitutionally admissible if it is based on a constitutionally admissible, i.e. objectively justified, goal (the third paragraph of Article 15 of the Constitution) and is in conformity with the general principle of proportionality as one of the principles of a state governed by the rule of law (Article 2 of the Constitution). The Constitutional Court carries out an assessment of the conformity of a challenged regulation with the general principle of proportionality on the basis of the so-called strict test of proportionality, which encompasses the assessment of three aspects of the interference, i.e. the assessment of appropriateness, necessity, and proportionality in the narrower sense, provided that it is established beforehand that the limitation is based on a constitutionally admissible objective (see Decision of the Constitutional Court No. U-I-18/02).

127. From the wording of the BA-1 itself, namely by means of so-called systemic and teleological interpretations, from the wider legal context where the challenged provisions are placed, from the preparatory work of the proposer of the BA-1L[85], and from the responses of the National Assembly and the Government on the requests and petitions, there follows what the goal of the write-off and conversion of eligible liabilities was. The legislature wished to create a basis for the reorganisation (in compliance with EU law) of banks in difficulty with public funds, i.e. by means of state aid or – if the further operations of a certain bank would be impossible – at least a basis to prevent a chaotic and uncontrolled drift into bankruptcy proceedings. The legislature acted in such a manner so as to preserve the stability of the financial sector,[86] which can be defined in the broader sense as a condition under which the negative effects are prevented or kept under control, effects which could extend from the “distressed” bank to other parts of the financial and economic system (to other financial companies, to the financial markets as a whole, and to investors and other entities in the general sense).[87]

128. However, the mentioned objective of the legislature in fact only encompasses the purpose due to which the possibility of a write-off or conversion of eligible rights was included in the BA-1. From the BA-1 and the materials available to the Constitutional Court there follows no special objective due to which the assessed interference with the right to judicial protection would be necessary, which is reflected in the fact that the judicial protection of the holders of eligible liabilities is not regulated in an effective manner, although it is ensured after the extraordinary measures have been issued and although it is, by the nature of the matter, such that it cannot affect the functioning of the measure itself. If no constitutionally admissible objective is demonstrated for an interference with the right to judicial protection (the third paragraph of Article 15 of the Constitution), the interference is unconstitutional. The Constitutional Court adds to that (without having to take a position as to the appropriateness and proportionality in the narrower sense of the interference) that the assessed interference with the right to judicial protection (even if a constitutionally admissible objective were demonstrated for the interference) could not have been necessary in the sense that such objective

could not be reached by means of a milder interference or without the interference. This is clearly evident from the fact that the legislature could have regulated the judicial protection of the holders of eligible rights in a manner such that it satisfied the requirement as to their effectiveness, taking into account the criteria from Paragraphs 123 through 125 of the reasoning of this Decision.

129. Considering that which is stated above in Paragraph 121 of the reasoning of this Decision, Articles 346, 347, and 350 of the BA-1 were not inconsistent with the right to judicial protection determined by the first paragraph of Article 23 of the Constitution.

130. Due to the reasons stated in Paragraphs 123 through 125 of the reasoning of this Decision, there was an unconstitutional legal gap in the BA-1 due to the absence of special procedural rules for actions for damages filed by the holders of written-off or converted eligible liabilities against the Bank of Slovenia. Therefore, Article 350a of the BA-1 was inconsistent with the right to judicial protection determined by the first paragraph of Article 23 of the Constitution (Point 1 of the operative provisions).

131. Article 265 of the RCDBA reads as follows: “Judicial protection proceedings against the decisions of the Bank of Slovenia issued prior to the entry into force of this Act shall be completed under the provisions of the Banking Act.” Such entails that Article 265 of the RCDBA requires the application of the unconstitutional Article 350a of the BA-1 also after it is no longer in force. Article 30 of the CCA determines that in deciding on the constitutionality of a regulation, the Constitutional Court may also review the constitutionality of other provisions of the same or other regulation for which a review of constitutionality has not been proposed, if such provisions are mutually related or if such is necessary to resolve the case. Since Article 265 of the RCDBA is the basis for the further application of the unconstitutional provisions of the BA-1, it is sufficiently mutually related therewith for the Constitutional Court to initiate, by connectivity, proceedings to review its constitutionality. Article 265 of the RCDBA requires the application of (*inter alia*) Article 350a of the BA-1, which is inconsistent with the right to judicial protection determined by the first paragraph of Article 23 of the Constitution. Therefore, this Article itself is also inconsistent with this right. Since the issue at hand is that the Act does not regulate certain issues, which is inconsistent with the Constitution, the Constitutional Court established, on the basis of the first paragraph of Article 48 of the CCA, its unconstitutionality (Point 2 of the operative provisions). In accordance with the second paragraph of the mentioned Article, the legislature will have to adopt such regulation that will enable constitutionally consistent exercise of the right to judicial protection for all possible already filed and future actions for damages relating to the write-off of eligible rights on the basis of the BA-1. The Constitutional Court imposed on the legislature a six-month time limit to remedy the established inconsistency (Point 3 of the operative provisions).

132. On the basis of the second paragraph of Article 40 of the CCA, the Constitutional Court determined the manner of implementation of its decision finding the

unconstitutionality of the challenged regulation in order to safeguard the right to judicial protection until the legislature responds to the established unconstitutionality (Points 4 and 5 of the operative provisions). Namely, for actions for damages that have already been and for those that are yet to be filed (but prior to the entry into force of the new constitutionally consistent regulation) it is necessary to ensure, by the *ex lege* staying of judicial proceedings, that the actions of all holders of eligible rights will be considered already from the beginning under the new, constitutionally consistent, conditions that the legislature is yet to define. Equally, by deferring the beginning of the statute of limitations it is necessary to enable future plaintiffs to wait until the new regulation [enters into force] before they prepare and file their actions for damages.

B – VII

The Assessment of Conformity with the Principle of Equality Determined by Article 14 of the Constitution

133. The applicants allege that as regards several points the challenged regulation is also inconsistent with the principle of equality. The general principle of equality before the law guaranteed by the second paragraph of Article 14 of the Constitution binds the legislature to regulate situations that are essentially equal equally (see, for instance, Decisions of the Constitutional Court No. U-I-147/12, dated 29 May 2013, Official Gazette RS, No. 52/13, and OdlUS XX, 7; No. U-I-76/11, dated 14 June 2012, Official Gazette RS, No. 71/12; No. U-I-68/04, dated 6 April 2006, Official Gazette RS, No. 45/06, and OdlUS XV, 26; and No. U-I-120/08, dated 9 April 2009, Official Gazette RS, No. 32/09, and OdlUS XVIII, 18). In order to assess which similarities and differences in the situations are essential, it is necessary to proceed from the subject of legal regulation. In addition to situations that are compared between themselves, the subject of legal regulation entails the third element in the comparison (*tertium comparationis*) – this is the value-based criterion of the comparison that is applied when two situations are compared to each other (Decision of the Constitutional Court No. U-I-147/12).

134. The applicants allege that, considering the comparable nature of these bonds and bank deposits, the holders of subordinated bonds were unjustifiably in an unequal position compared to the holders of deposits in banks, and also in an unequal position compared to all other bank creditors. In addition, the holders of subordinated bonds were also allegedly unjustifiably on an equal footing with bank shareholders, as they allegedly had no influence on the management of the bank, in contrast to the shareholders. The considered positions of a holder of the subordinated bonds of a bank and of a holder of bank deposits are not equal, as subordinated bonds are a significantly more risky legal instrument that (in contrast to deposits) are not typically intended to collect massive assets from small savers, they are not protected by a special guarantee, and also have a lower priority ranking in insolvency proceedings. Therefore, it was justified for the two situations to be treated differently. A completely

equal conclusion also applies to the comparison of a holder of subordinated bonds with other (ordinary) shareholders of banks; in insolvency proceedings, the latter enjoyed priority over the holders of subordinated bonds and in general did not have to count on equal or comparable risks. As to the alleged equal treatment of the holders of subordinated bonds of the bank and the bank's shareholders, it must be assessed that they were not treated equally. Prior to the conversion of subordinated bonds into the ordinary shares of the bank, shareholders had to contribute in full to the bank's loss, namely in such a manner that the shares of the bank were written off in full (cf. point 2 of the third paragraph of Article 261a and the first paragraph of Article 261c of the BA-1). Equally, prior to the write-off of subordinated bonds, all shares of the bank had to be annulled (cf. point 2 of the second paragraph of Article 261a of the BA-1). Such entails that the shareholders of the banks were in a significantly worse, and not in an equal, position than the holders of subordinated bonds of the banks.

135. Furthermore, as to responsibility for the situation, the applicants believe that equating majority shareholders with minority shareholders was unacceptable. Article 261a of the BA-1 is allegedly unconstitutional, as it did not differentiate between minority shareholders and shareholders with an eligible share, whereby the principle that those who are equal must be treated equally and those who are different must be treated differently was allegedly violated. The positions of majority and minority shareholders are equal in the essential element (precisely because they are both shareholders and not a bank's creditors), therefore one cannot speak of the unjustified equal treatment of different situations.

136. The applicants ask why the possibility of "dispossession" was not legalised also for the shareholders of other companies in difficulty (instead of only for banks) where an independent appraiser assesses the value of the assets to be zero. With regard to these allegations, the Constitutional Court assesses that these positions are not equal. Due to the significant importance of banks for the national economy and due to the inappropriateness of bankruptcy proceedings for a bank in order to achieve the objective of preserving the stability of the financial sector, the position of banks is not equal to the position of other companies.

137. The applicants draw attention to the fact that, despite calls therefor, certain banks did not carry out the early repurchases of certain subordinated bonds, while the same or other banks did that for other bonds. Therefore, they believe that the holders of different issues (but equal in the formal sense) of subordinated bonds unjustifiably found themselves in different legal situations. Carrying out an early repurchase of subordinated bonds is a matter of the business policy of the individual banks, and the different positions that the applicants draw attention to had no connection to the BA-1.

138. The applicants also believe that Slovene law (and, hence, the possibility of the write-off or conversion of eligible bank liabilities) only applies to the holders of subordinated bonds issued in the Republic of Slovenia, for instance NLB 26

subordinated bonds, but not also for the holders of subordinated bonds of Slovene banks issued abroad, for instance NLB XS0208414515 subordinated bonds, which are subject to British law and the jurisdiction of British courts. The legislature allegedly acted arbitrarily, as there are allegedly no reasonable or objective grounds to regulate differently the position of the holders of subordinated bonds of the same bank with respect to the place of their issuance (for instance in the Republic of Slovenia or on a foreign stock exchange). Due to the differentiation with respect to the [state of the] residence or registered office [of the holder], the BA-1 is allegedly also inconsistent with the first paragraph of Article 14 of the Constitution. The third paragraph of Article 253 of the BA-1 determined that extraordinary measures, *inter alia* the extraordinary write-off or conversion of the eligible liabilities of banks, are deemed to be reorganisation measures as determined by the Reorganisation Directive. In their replies, the National Assembly, the Government, and the Bank of Slovenia allege that this provision enabled the direct execution and validity of the measures issued by the Bank of Slovenia in other EU states.

139. The Constitutional Court is bound by the interpretation of the Reorganisation Directive as provided by the CJEU in case No. C-526/14. The CJEU decided that "the seventh indent of Article 2 of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions must be interpreted as meaning that burden-sharing measures such as those provided for in points 40 to 46 of the Banking Communication fall within the scope of the concept of 'reorganisation measures', within the meaning of that provision of that Directive." The CJEU draws attention to the fact that the Reorganisation Directive has the objective of putting in place a system for the mutual recognition of reorganisation measures, and that that objective entails that the reorganisation measures taken by the administrative or judicial authorities of the home Member State, that is, the Member State in which a credit institution has been authorised, must have, in all the other Member States, the effects which the law of the home Member State confers on them. The CJEU states that the burden-sharing measures referred to in paragraphs 40 through 46 of the Banking Communication (among which fall, without a doubt, also the challenged write-off and conversion of eligible bank liabilities in the present Decision) fall within the scope of the concept of 'reorganisation measures', within the meaning of the Reorganisation Directive. On the one hand, the aim of these measures was to preserve or re-establish the financial situation of a credit institution, while on the other hand, the burden-sharing measures, in particular the conversion of the principal of subordinated rights into equity or the write-off of the principal, are, by their very nature, likely to adversely affect the pre-existing rights of third parties. Allegedly, the Reorganisation Directive only refers to measures adopted by an authority, and not to measures that are decided on and carried out by the shareholders or subordinated creditors.

140. Considering the mentioned decision of the CJEU and considering the fact that it undoubtedly follows from the BA-1 that the legislature determined that the challenged

extraordinary write-off and conversion of eligible liabilities are deemed to be reorganisation measures on the basis of the reorganisation Directive, the legislature determined the equal treatment of all creditors of banks, regardless of in which state that bank issued the subordinated bonds. Hence, there was no unequal treatment of the creditors of subordinated bonds issued in the Republic of Slovenia compared to the creditors of subordinated bonds issued in other EU states. Therefore, there was also no different treatment with respect to [the state of] the registered office of the company or the residence of the natural person.

141 With respect to the above, the challenged regulation is not inconsistent with the second paragraph of Article 14 of the Constitution.

B – VIII

The Assessment of Conformity with Articles 87 and 120 of the Constitution

142. The applicants allege that Article 87 of the Constitution was violated because the rights and in particular obligations were not determined by law, as it was only the Bank of Slovenia that determined these obligations in its decision. Article 87 of the Constitution is general in nature and determines the constitutional standard in accordance with which the National Assembly may determine the rights and duties of citizens and other persons only by law (and not by some different type of legal act). Obviously, there is no inconsistency with Article 87 of the Constitution in the present case.

143. In accordance with the second paragraph of Article 120 of the Constitution, administrative authorities must perform their work within the framework and on the basis of the Constitution and laws. This provision of the Constitution refers to the Bank of Slovenia already due to the fact that it cannot be classified among administrative authorities or authorities of the executive power. As to the allegation of the applicants that the BA-1 grants the Bank of Slovenia too broad discretion, the Constitutional Court considered it from the viewpoint of conformity with the fourth paragraph of Article 153 of the Constitution (to which the applicants refer as well).

B – IX

The Assessment of Conformity with the Second and Fourth Paragraphs of Article 153 of the Constitution

144. According to the applicants, the challenged regulation is inconsistent with Articles 8 and 153 of the Constitution, as it is not in conformity with certain treaties that are binding on the Republic of Slovenia and which require that compensation be paid for

the written-off investments in the amount of their market value, and in compliance with rules of customary international law with an essentially equal substance. Article 8 of the Constitution determines that laws and other regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia, while ratified and published treaties shall be applied directly. The second paragraph of Article 153 of the Constitution further determines that laws must be in conformity with generally accepted principles of international law and with valid treaties ratified by the National Assembly.

145. The applicants refer to the ASRPPI, the Act on the Ratification of the Agreement between the Republic of Slovenia and the Republic of Poland on the Reciprocal Promotion and Protection of Investments (Official Gazette RS, No. 24/2000, MP, No. 6/2000 – hereinafter referred to as the ASPRPPI), the Act on the Ratification of the Agreement between the Republic of Slovenia and the Republic of Austria on the Mutual Promotion and Protection of Investments (Official Gazette RS, No. 82/01, MP, No. 22/01 – hereinafter referred to as the ASAMPPI), and the Act on the Ratification of the Agreement between the Republic of Slovenia and the Republic of Turkey on the Promotion and Protection of Investments (Official Gazette RS, No. 45/06, MP, No. 10/06 – hereinafter referred to as the ASTPPI). All of the mentioned ratified treaties are, by their nature, international agreements on the promotion and mutual protection of investments. Each and every one of them includes a similar text on the protection of the investments of the investors of one contracting state from dispossession or similar measures on the territory of the other contracting state.[88]

146. Contrary to what is alleged, there is obviously no inconsistency with the second paragraph of Article 153 of the Constitution. Since the disputed write-off and conversion of eligible liabilities is not dispossession (as they do not even interfere with the right to private property), the treaties and the (alleged) rules of customary international law do not even refer thereto. This is why also the allegation that the fact that, on the basis of the mentioned treaties, foreign investors in eligible rights received more than Slovene investors was inconsistent with the principle of equality with the law (the second paragraph of Article 14 of the Constitution) is manifestly unfounded.

147. The fourth paragraph of Article 153 of the Constitution determines that individual acts and actions of state authorities, local community authorities, and bearers of public authority must be based on a law or regulation adopted pursuant to law. The applicants essentially fault the challenged regulation for conferring on the Bank of Slovenia too broad discretion, i.e. the power to decide in a discretionary manner. The mere fact that its decisions depended on an extensive and complex expert assessment of financial data regarding the banks does not mean that the Bank of Slovenia was able to decide in a discretionary manner. However, contrary to what was alleged, there was not, in any event, any inconsistency with the fourth paragraph of Article 153 of the Constitution, as the challenged regulation was the lawful basis for the Bank of Slovenia to decide in the concrete cases at issue. The question of whether the Bank of Slovenia

acted in accordance with such statutory basis, however, cannot be a subject of review of the constitutionality of a law.

B – X

The Assessment of the Other Allegations of the Applicants

148. The applicants also allege an inconsistency with Article 89 of the Constitution, as the procedure for adopting the challenged provisions was not carried out in accordance with a multiphase procedure but in an urgent procedure. In accordance with the third paragraph of Article 21 of the CCA, when the Constitutional Court decides on the matters referred to in indents one to five of the first paragraph of Article 21 of the CCA,[89] the Constitutional Court also decides on the constitutionality and legality of the procedures by which these acts were adopted. Statutory provisions are not unconstitutional only when their content is inconsistent with the Constitution, but can also be unconstitutional due to violations of the constitutionally determined procedure for their adoption.[90] The challenged provisions of the BA-1 were adopted in an urgent procedure.[91] The urgent procedure for adopting a law is regulated in Articles 143 and 144 of the Rules of Procedure of the National Assembly (Official Gazette RS, No. 92/07 – official consolidated text, 105/10, and 80/13). As the Constitutional Court explained in Order No. U-I-301/05, dated 9 March 2006, when assessing the procedure in accordance with which a law was adopted, it is necessary to take into account the procedures and rules prescribed by the Constitution. However, there are no rules in the Constitution as to when an act shall be adopted in a regular procedure and when in an urgent procedure. The question of whether in the case at issue there existed circumstances for adopting the law in an urgent procedure is not a question that the Constitutional Court can assess, in view of its competences. Therefore, the allegation of the applicants as to the inconsistency with Article 89 of the Constitution is manifestly unfounded.

149. The applicants also allege that the challenged regulation was inconsistent with Article 74 of the Constitution. The challenged regulation, which *inter alia* regulated the new measure of the write-off or conversion of eligible bank liabilities, did not interfere with free enterprise, nor did it determine the manner of its implementation, as individual holders of eligible rights were not limited in their business endeavours. As regards the fact that the challenged measure did not in fact deprive them of private property, the Constitutional Court has already explained this matter in its assessment of the conformity of the challenged measure with Article 22 of the Constitution.

150. The applicants allege that the challenged regulation is also inconsistent with Article 26 of the Constitution. The applicants' reference to this provision of the Constitution is unfounded, as the mentioned constitutional provision refers to the right to compensation for damage caused by state authorities, local community authorities,

or bearers of public authority. The adoption of the challenged regulation did not in any way limit this right of the applicants. Insofar as the allegations of the applicants refer to the characteristics of the action for damages referred to in Article 350a of the BA-1, these allegations were considered within the framework of its conformity with the right to judicial protection as determined by the first paragraph of Article 23 of the Constitution.

151. The applicants draw attention to the fact that the challenged provisions are also allegedly inconsistent with the position of the CJEU in case No. C-443/93 and numerous other cases. In accordance with this position, national legislation that enables a reduction in the share capital of a bank without a decision of the general meeting of the shareholders or without a court decision is unlawful, regardless of the purpose of national rules.

152. The Constitutional Court is bound by the interpretation of the Directive on the Coordination of Safeguards provided by the CJEU in case No. C-526/14. In Point 4 of the operative provisions, the CJEU decided that “Articles 29, 34, 35, and 40 to 42 of Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the TFEU, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, must be interpreted as not precluding points 40 to 46 of the Banking Communication in so far as those points lay down a condition of burden-sharing by shareholders and holders of subordinated rights as a prerequisite to the authorisation of state aid.” The CJEU underlines that the Banking Communication contains no specific provision on the legal procedures whereby the burden-sharing measures set out in points 40 to 46 of that communication are to be implemented. Consequently, while the Member States may possibly find it necessary, in a particular situation, to adopt such burden-sharing measures without the agreement of the general meeting of the company, that circumstance cannot, however, call into question the validity of the Banking Communication in the light of the provisions of the Directive on the Coordination of Safeguards. Furthermore, the CJEU believes that the measures provided by the Directive on the Coordination of Safeguards to safeguard respect for investors’ rights relate to the normal operation of public limited liability companies. By contrast, the burden-sharing measures involving both shareholders and subordinated creditors constitute, when they are imposed by the national authorities, exceptional [i.e. extraordinary] measures. They can be adopted only in the context of there being a serious disturbance of the economy of a Member State and with the objective of preventing a systemic risk and ensuring the stability of the financial system. The CJEU concludes that, regardless of the Judgment in case No. C-441/93, the Directive on the Coordination of Safeguards does not preclude measures relating to share capital being adopted, in certain specific circumstances, such as those

mentioned in the Banking Communication, without the approval of the company's general meeting.

153. Considering the mentioned decision of the CJEU and considering the fact that the challenged extraordinary write-off and conversion are certainly measures that refer to the mentioned "specific circumstances" referred to in the Banking Communication, the allegations of the applicants are unfounded.

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154. Considering the above, Articles 253, 253a, 253b, 261a, 261b, 261c, 261d, and 261e, the second paragraph of Article 262b, Articles 346, 347, and 350 of the BA-1, and Article 41 of the BA-1L were not inconsistent with the Constitution (Points 6 and 7 of the operative provisions).

C

155. The Constitutional Court adopted this Decision on the basis of Articles 21, 30, 47, 48, and the second paragraph of Article 40 of the Constitutional Court, and the second indent of the second paragraph of Article 46 of the Rules of Procedure, composed of: Mag. Miroslav Mozetič, President, and Judges Dr Mitja Deisinger, Dr Ernest Petrič, Jasna Pogačar, and Dr Jadranka Sovdat. Judges Dr Dunja Jadek Pensa and Dr Etelka Korpič – Horvat were disqualified from deciding in the case. The Constitutional Court adopted the Decision unanimously.

Mag. Miroslav Mozetič
President

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[1] In cases where the National Assembly, the Government, and the Bank of Slovenia submitted their briefs, the Constitutional Court served them on the applicants or petitioners to reply thereto (some of which replied to these briefs).

[2] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Sixth Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU, and 2013/36/EU, and Regulations (EU) No. 1093/2010 and (EU) No. 648/2012, of the European Parliament and of the Council (OJ L 173, 12 June 2014).

[3] The sixth paragraph of Article 261a of the BA-1 determines that the bank's eligible liabilities shall comprise (1) the bank's share capital (liabilities of the first class), (2) liabilities to holders of hybrid financial instruments as determined under point 4 of the first paragraph of Article 133 of this Act (liabilities of the second class), (3) liabilities to holders of financial instruments which are, under Article 134 of this Act, considered in the calculation of the bank's additional Tier 1 and Tier 2 capital, unless such liabilities are already contained under point 1 or point 2 of this paragraph (liabilities of the third class), (4) liabilities not included under points 1, 2, or 3 of this paragraph, and which would in the event of the bankruptcy of the bank be repaid after the payment of the bank's senior debts (liabilities of the fourth class).

[4] The second paragraph of Article 254 of the BA-1 determines that the stability of the financial system is deemed to be jeopardised if an increased risk in a bank can cause significant negative effects with regard to the operations of other financial companies, the functioning of the financial markets, or the general trust of investors and other entities in the stable functioning of the financial system. The third paragraph of Article 254 of the BA-1 determines that when assessing the degree to which the financial system is jeopardised due to an increased risk in a bank, the Bank of Slovenia shall take into consideration in particular the following: 1. the type and scope of the bank's liabilities to financial companies and other entities on the financial markets; 2. the scope of the bank's liabilities stemming from deposits accepted; 3. the type and scope of risks (exposure to risks) undertaken by the bank on the basis of off-balance-sheet transactions and the circumstances on the markets on which these exposures are traded; 4. the interconnectedness of the bank with the other entities that cooperate in transactions on the financial markets; 5. the circumstances on the financial markets, especially the consequences expected in the event of the initiation of bankruptcy proceedings against the bank that would be felt by the other participants on these markets, especially banks, and the consequences for the functioning of these markets.

[5] The Constitutional Court cites only the challenged and assessed second paragraph of Article 262b of the BA-1.

[6] Although not a subject of review, the Constitutional Court also cites the wording of Article 223a of the BA-1, to which the assessed first paragraph of Article 350a of the BA-1 refers.

[7] As regards the reference of certain applicants to the ECtHR Judgment in *Kugler v. Austria*, dated 14 October 2010, as they substantiated the proposal for a public hearing to be carried out, the Constitutional Court stresses that the circumstances of that case are not comparable to the circumstances of deciding whether the BA-1 is in conformity with the Constitution. The ECtHR decided that the Republic of Austria violated the applicant's right determined by the first paragraph of Article 6 of the ECHR *inter alia* because the [Austrian] Constitutional Court did not carry out an oral hearing and also did not explain why it would not carry out one. In its decision, the ECtHR emphasised

the fact that, in the Austrian case, the proceedings for the review of the special act (unrelated to the concrete case) were not completely “abstract”, as it was the applicant who raised the issue of their legality in relation to the administrative procedure for issuing a building permit, in which (since also the administrative court did not carry out an oral hearing), seen as a whole, there was no oral hearing before the competent tribunal in the applicant’s case. The Constitutional Court excluded, by *mutatis mutandis* application of Article 49 of the Rules of Procedure of the Constitutional Court (Official Gazette RS, Nos. 86/07, 54/10, and 56/11 – hereinafter referred to as the Rules of Procedure), the supplement to the petition of Skupna pokojninska družba, d. d., Ljubljana, and other petitioners, dated 15 September 2016, insofar as it referred to the allegation of an inconsistency with the right to social security determined by the first paragraph of Article 50 of the Constitution, and defined it as an independent petition on which it would decide separately. Insofar as the mentioned supplement includes allegations as to an inconsistency with other constitutional provisions and does not include any substantively new arguments (i.e. arguments that the petitioners had not already submitted to the Constitutional Court), the Constitutional Court did not exclude that part as a new petition, but considered it and decided on the allegations in this Decision. The Constitutional Court served the mentioned supplement of the petition on the National Assembly exclusively in order to enable the National Assembly to reply to the allegations from the viewpoint of the first paragraph of Article 50 of the Constitution, as it had already had the possibility to reply to the other allegations, which were merely repeated in the mentioned supplement.

[8] This rule applies to both proceedings that have possibly already begun and to possible future proceedings (also actions for damages, not only those by which the decision of the Bank of Slovenia on the write-off of eligible rights is directly challenged).

[9] In this Decision, the Constitutional Court summarises them in a shortened and adapted form.

[10] The operative provisions of the ECtHR Judgment are summarised in a shortened and adapted form as well.

[11] The third paragraph of Article 3a of the Constitution determines as follows: “Legal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organisations.”

[12] The first and second paragraphs of Article 3a of the Constitution determine the procedural and substantive conditions for transferring a part of Slovenia’s sovereign rights to international organisations (M. Avbelj, *Slovensko ustavno pravo v odnosu do prava EU* [Slovene Constitutional Law in Relation to EU Law], in: I. Kaučič (Ed.), *Pomen ustavnosti in ustavna demokracija*, *znanstveni zbornik Dvajset let Ustave Republike Slovenije* [The Importance of Constitutionality and Constitutional

Democracy; Conference Proceedings – Twenty Years of the Constitution of the Republic of Slovenia], Ustavno sodišče Republike Slovenije, Ljubljana 2012, p. 346). The first paragraph of Article 3a of the Constitution enabled – and still enables – the Republic of Slovenia to constitutionally transfer the exercise of part of its sovereign rights to international organisations, primarily to the EU, and thus denies the Constitution the power attributed to it, in the classical state-centric legal spirit, at the time of its adoption (M. Cerar in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije, Dopolnitev – A* [Commentary on the Constitution of the Republic of Slovenia, Supplement – A], Fakulteta za državne in evropske študije, Ljubljana 2011, p. 74).

[13] F. Testen in: L. Šturm (Ed.), *op. cit*. 2011, p. 91.

[14] See also Order of the Constitutional Court No. U-I-65/13, dated 26 September 2013.

[15] *Cf.* S. Nerad, *Recepcija prava Evropske unije v nacionalno ustavno pravo: Ustavno sodišče med pravom Evropske unije in Ustavo* [The Reception of EU Law in National Constitutional Law: The Constitutional Court between EU Law and the Constitution], in: I. Kaučič (Ed.), *op. cit*., p. 383. See also Decision of the Constitutional Court No. U-I-146/12, dated 14 November 2013 (Official Gazette RS, No. 107/13, and OdlUS XX, 10).

[16] It follows from the case law of the CJEU that it is the responsibility of the Member States, i.e. the national courts as well, to ensure respect and observance of EU law on their territory (see the Judgment in *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern,* C-432/05, dated 13 March 2007, Para. 38).

[17] The Constitutional Court held thusly already in Decision No. U-I-146/12. See also Decision of the Constitutional Court No. Up-2012/08, dated 5 March 2009 (Official Gazette RS, No. 22/09, and OdlUS XVIII, 65).

[18] The third paragraph of Article 4 of the State Aid Regulation.

[19] The fourth paragraph of Article 4 of the State Aid Regulation.

[20] Article 9 of the State Aid Regulation.

[21] The first paragraph of Article 28 of the State Aid Regulation.

[22] The Communication from the Commission on the application of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ C 270, 25 October 2008), the Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition (OJ C 10, 15 January 2009), the

Communication from the Commission on the treatment of impaired assets in the Community financial sector (OJ C 72, 26 March 2009), the Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules (OJ C 195, 19 August 2009), the Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis (OJ C 329, 7 December 2010), the Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis (OJ C 356, 6 December 2011).

[23] The TFEU (namely the fifth paragraph of Article 288 thereof) expressly mentions only two forms of acts through which soft law is expressed (recommendations and opinions).

[24] D. Batta, Better Regulation and the Improvement of EU Regulatory Environment – Institutional and Legal Implications of the Use of "Soft Law" Instruments, European Parliament, Directorate−General for Internal Policies of the Union, Directorate for Citizens' Rights and Constitutional Affairs, Brussels 2007, p. 3.

[25] *Ibidem*, p. 7.

[26] *Ibidem*, p. 8.

[27] See O. A. Ştefan, European Competition Soft Law in European Courts: A Matter of Hard Principles?, European Law Journal, Vol. 14, No. 6 (2008), pp. 753–772.

[28] *Cf.* Decision of the Constitutional Court No. U-I-146/12.

[29] National courts must namely observe the Commission's recommendations when resolving disputes they consider once it transpires that they can be an appropriate tool for interpreting the provisions of national or EU law, in particular national provisions by which the recommendations are implemented, or in instances where the recommendations supplement the binding rules of EU law (see the ECtHR Judgment in *Salvatore Grimaldi v. Fonds des maladies professionnelles*, C-322/88, dated 13 December 1989).

[30] *Cf.* Decision of the Constitutional Court No. U-I-283/00, dated 13 September 2001 (Official Gazette RS, No. 79/01, and OdlUS X, 151).

[31] Due to the importance of banking in the global economy and due to the spillover effect (the demise of one financial institution in one state leads to the infection of numerous others), minimum standards (non-binding, however) have been determined since 1975 within the framework of the Basel Committee on Banking Supervision). This

is an association of the governors of central banks that determines, on the international level, minimum standards for the operation of banks that are followed by developed states. There exist three standards: Basel I (which has already been superseded), Basel II (which remains partially in force), and Basel III (which is in the implementation phase and includes, *inter alia*, higher capital requirements as regards capital that could absorb the losses of a bank, including via bail-in measures). On the EU level, at the end of June 2013, Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27 June, 2013) was published, as well as Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27. 6. 2013), which transpose in the EU banking legislation the content of Basel III, and at the same time represent an important step towards the implementation of the so-called Single Rule Book in the field of banking.

[32] In accordance with the second paragraph of Article 223 of the BA-1, these were recommendations and admonishments, orders to eliminate a violation, additional measures for implementing risk management rules, the withdrawal of authorisation or permission, the appointment of special management, the institution of liquidation, and decisions on grounds for bankruptcy.

[33] It must be taken into consideration that banks and other financial institutions carry out some fundamental tasks (providing credit, storage of deposits, managing payment systems) on which the real economy and society depend. These banking functions are a sort of a “public service,” a consequence of which is the significant influence and power of the financial sector, due to which the society is exceptionally vulnerable in the event of a crisis of this sector. Maintaining the functioning of the banking sector is thus in the manifest public interest (see B. J. Attinger, Crisis Management and Bank Resolution, Quo Vadis Europe, Legal Working Paper Series No. 13, European Central Bank, Frankfurt 2011, p. 7).

[34] The possible additional measures determined by Article 248 of the BA-1 were, *inter alia*, the prohibition or restriction of payments to shareholders, including the payment of profit; requiring the bank to include net profit and profit brought forward in the calculation of capital if this was necessary to improve the capital adequacy of the bank; requiring the bank to provide some additional capital exceeding the minimum capital; and requiring the bank to cover its losses by financial instruments available for that purpose at the time of regular operations.

[35] Including the prohibition on paying out a hybrid instrument prior to its maturity date and the requirement that the bank cancel the payment of interest, dividends, or other forms of payments connected with hybrid instruments.

[36] The Bank of Slovenia chose this path in particular if it assessed that, due to the general circumstances on the financial market, the increase in the bank's share capital would not be successful or that, despite the increase in the bank's share capital, it would not be possible to ensure the long-term capital adequacy or adequate liquidity of the bank.

[37] By this measure, the Bank of Slovenia was able to require the management board of a bank to convene, before a certain time limit, the general meeting of shareholders and propose that an order on an increase in the bank's share capital be adopted.

[38] It was possible for the extraordinary authorised representative to have different authorisations, depending on the decision of the Bank of Slovenia, and such could also perform the role of a member of the bank's management board.

[39] The Bank of Slovenia also withdrew authorisation to provide banking services if the bank failed to fulfil the conditions regarding capital adequacy and other conditions for operation in accordance with the rules on risk management.

[40] See Article 271 of the BA-1.

[41] Article 263 of the BA-1 determined that, on the basis of the reports of the special management, that the Bank of Slovenia shall, at least every three months, evaluate the success of the extraordinary measures, compared to their objectives. If it assessed that for the duration of the extraordinary measures the bank's situation did not improve enough for the bank to be able to ensure successful long-term operations in accordance with the BA-1 and other regulations in force, the Bank of Slovenia issued a decision to initiate compulsory liquidation or on the establishment of conditions for the initiation of the bank's bankruptcy. Naturally, it depended on the concrete circumstances whether a bank that found itself in circumstances of either bankruptcy or compulsory liquidation would sooner be subject to extraordinary measures or whether this step would be "skipped", as extraordinary measures would not have been successful even theoretically.

[42] See Note No. 3.

[43] Except insofar it was possible to classify some of these instruments under the obligations or rights of the first or second class.

[44] In fact, since the BA-2 entered into force, the Order on the Calculation of Capital is no longer in force (point 10 of the second paragraph of Article 405 of the BA-1). However, since it formed a part of the aggregate regulatory framework of the write-off or conversion of eligible liabilities together with the assessed provisions of the BA-1, the Constitutional Court presents its content herein.

[45] Especially with regard to banks, the reduction in the share capital was conditional upon the authorisation that the Bank of Slovenia issues if the reduced share capital suffices in view of the bank's business strategy and the assumed risks and regulatory requirements (the second and third paragraphs of Article 12 of the Order on the Calculation of Capital).

[46] As determined by point 4 of the first paragraph of Article 248 of the BA-1.

[47[The Bank of Slovenia must prohibit the payment of a non-mature hybrid instrument if the bank's capital is lower than the minimum capital (or would be reduced below this level following the payment thereof), adequate internal capital, adequate internal capital based on the calculations of the bank or based on the assessment of the Bank of Slovenia, or necessary capital in accordance with the order of the Bank of Slovenia.

[48] See Articles 190 and 190a of the BA-1.

[49] Articles 261a through 261e of the BA-1.

[50] Articles 253b, 347, and 350a of the BA-1.

[51] Article 346 of the BA-1.

[52] Article 253a of the BA-1.

[53] The second paragraph of Article 262b of the BA-1.

[54] See the Draft Act Amending the Banking Act – urgent procedure, Gazette of the National Assembly, 10 October 2013, EPA 1513-VI, pp. 1–4 (hereinafter referred to as the BA-1L Draft Act). The proposer of the draft of the statutory amendment stresses that there is a banking crisis in the Republic of Slovenia, therefore measures for the recovery of the banking sector must be carried out. The proposer alleges that the Government already decided that the three biggest banks are suitable for carrying out the measures determined by the AMSSBS. The proposer explains that it must observe the Banking Communication and the rule that the use of public funds for resolving a bank's issues is only admissible when also the shareholders and certain categories of the bank's creditors have sufficiently contributed to ensuring the capital adequacy of the bank on the basis of the write-off or conversion of eligible liabilities into ordinary shares. The proposer assesses that the BA-1 should be amended in order to "establish a legal framework for burden-sharing."

[55] See the Report of the Committee on Finance and Monetary Policy as regards the Draft Act Amending the Banking Act – supplemented Draft Act (the BA-1L Draft Act), Gazette of the National Assembly, 25 October 2013, EPA 1513-VI, p. 2. The representative of the Government, as the proposer of the Act, said that it was clear that

the new rules on state aid for banks will be used for state aid granted to NLB, NKBM, and Abanka. To this end, Slovenia allegedly “has to enable a statutory possibility for the holders of hybrid, i.e. subordinated instruments, to contribute to the resolution of banks, which at the same time represents the key purpose of the considered statutory proposal.”

[56] Only such a regulation would interfere with Article 155 of the Constitution. In Decision No. U-I-65/08, dated 25 September 2008 (Official Gazette RS, No. 96/08, and OdlUS XVII, 49), the Constitutional Court deemed it to be inconsistent with the prohibition determined by Article 155 of the Constitution that the legislature changed the conditions for the temporary or permanent revocation of a license from a private security company in such a manner that the position of the holders of a license deteriorated under the new regulation; a lesser number of violations of statutory provisions sufficed for there to arise an obligation of the competent authority to temporarily or permanently revoke the license. The matter at issue was that prior to the modification of the law, and given the same state of the facts, some private security companies did not fulfil the conditions for the temporary or permanent revocation of a license, whereas afterwards, merely due to the modification of the law, without there being any new legal fact after the moment the amendment entered into force, they fulfilled the conditions for the temporary or permanent revocation of a license, and hence their license had to be temporarily or permanently revoked. In such a manner, the legislature retroactively disproportionally interfered with the statutorily obtained right to carry out private security operations.

[57] Understandably, once it is applied in a concrete situation.

[58] It is characteristic of eligible rights that the expectation of the holder to receive from the debtor (to regularly receive) payments on the basis of the principal and periodic yields is always uncertain to some extent, conditional, and subject to a certain risk. This applies to all eligible rights, be it shares (the expectation of the payment of possible dividends), hybrid instruments (some of these instruments become due for payment after a unilateral decision by the bank; the Bank of Slovenia can prohibit the payment of hybrids that are already due), or subordinated debt (there are no payments of the principal or interest if such resulted in the capital of the bank being reduced below the minimum capital).

[59] Hence, in accordance with the terminology of the Constitutional Court (applied in this paragraph of the reasoning also insofar as the ECtHR Judgment is summarised) – the holders of eligible rights.

[60] This point reads as follows: “In cases where the bank no longer meets the minimum regulatory capital requirements, subordinated debt must be converted or written down, in principle before State aid is granted. State aid must not be granted before equity, hybrid capital and subordinated debt have fully contributed to offset any

losses.” Paragraph 43 of the Banking Communication reads as follows: “Where the capital ratio of the bank that has the identified capital shortfall remains above the EU regulatory minimum, the bank should normally be able to restore the capital position on its own, in particular through capital raising measures as set out in point 35. If there are no other possibilities, including any other supervisory action such as early intervention measures or other remedial actions to overcome the shortfall as confirmed by the competent supervisory or resolution authority, then subordinated debt must be converted into equity, in principle before State aid is granted.”

[61] “[…] The purpose of the Act is to enable the implementation of measures for strengthening the stability of banks in accordance with the AMSSBS and consequently to increase the credit ratings of the state and of individual banks. The European Commission (DG COMP) notified the Republic of Slovenia that new state aid rules to support measures in favour of banks in the context of the financial crisis will be applied in carrying out the measures in Slovene banks. The new rules include provisions on burden-sharing between shareholders and subordinated creditors […],” see Draft Act of the BA-1L, p. 4.

[62] The same as the Banking Communication, whose point 46 determines as follows: “In the context of implementing points 43 and 44, the ‘no creditor worse off principle’ should be adhered to. Thus, subordinated creditors should not receive less in economic terms than what their instrument would have been worth if no State aid were to be granted.”

[63] B. J. Attinger, *op. cit*., pp. 11–12, states that the “no creditor worse off principle” is an important element of every legal regime regulating bank insolvency. Such approach towards the recovery of banks ensures that creditors who lend money to the bank do not have to include in the price of the money the premium for the risk (expecting measures such as the challenged one). The creditors can namely count on the fact that no legal regime will treat them worse than in the event of the regular winding up of the debtor in insolvency proceedings.

[64] The General Court *inter alia* stressed that the purchase by an investor of State bonds is by definition a transaction entailing a certain financial risk, because it is subject to the hazards of movements in the capital markets, and some of the applicants even acquired Greek bonds during the period when the financial crisis of the Hellenic Republic was at its peak.

[65] The holders of converted rights namely receive shares in the reorganised bank, which should in fact continue to function as a company that is a going concern.

[66] The established interpretation of the ECHR is that shares as an entirety of entitlements are protected as private property in Article 1 of the First Protocol to the ECHR. See in particular the Order of the European Commission for Human Rights in

Bramelid and Malmström v. Sweden, dated 12 October 1982, the Judgment of the ECtHR in *Sovtransavto Holding v. Ukraine*, dated 25 July 2002, the Order of the ECtHR in *Olczak v. Poland*, dated 7 November 2002, and the Judgments of the ECtHR in *Trippel v. Germany*, dated 4 December 2003, *Freitag v. Germany,* dated 19 July 2007, *Marini v. Albania*, dated 18 December 2007, and *Shesti Mai Engineering OOD and Others v. Bulgaria,* dated 20 September 2011.

[67] The Constitutional Court has already adopted the position that Article 33 of the Constitution also protects claims; see Decision No. U-I-267/06, dated 15 March 2007 (Official Gazette RS, No. 29/07, and OdlUS XVI, 20) and Decision No. U-I-117/07, dated 21 June 2007 (Official Gazette RS, No. 58/07, and OdlUS XVI, 64). *Cf.* G. Virant and L. Šturm in: L. Šturm (Ed.), *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, pp. 342–343. Similarly also J. Zobec in: L. Šturm (Ed.), *op. cit.* 2011, pp. 452–453. Also the ECtHR recognises the protection of claims under Article 1 of the First Protocol to the ECHR. *Cf.,* for instance, the Judgment in Kopecký v. Slovakia, dated 28 September 2004, Para. 35.

[68] Since the CJEU differentiates, as regards the right to private property, between the position of shareholders and the position of other categories of beneficiaries who can potentially be affected by the burden-sharing measures, the Constitutional Court draws attention to the fact that the term “subordinated creditors” as applied by the CJEU and insofar it refers to the Slovene legal regulation must be understood as including all holders of eligible rights who are not shareholders.

[69] If a part of the principal has already been paid by amortisation instalments prior to the extraordinary measure taking effect, the beneficiary keeps it, naturally.

[70] The position of the legislature, with which the Government and the Bank of Slovenia concur, is that the measures for the recovery of banks on the basis of the AMSSBS entail measures that are deemed to be state aid under EU rules. This position cannot be disputed. The question at issue is primarily whether the measures have been carried out under market conditions or not. The AMSSBS only envisages measures for the recovery of banks in difficulty in which it is no longer possible to carry out measures under market conditions (*cf.* AMSSBS Draft Act, Gazette of the National Assembly, 21 September 2012). Therefore, the allegation of the applicants that the recapitalisation of a bank with predominant state ownership cannot be deemed to be state aid does not hold true.

[71] In a conversion of instruments, the holders thereof retain a certain value, as the economic function of the property is preserved to a certain degree.

[72] The Constitutional Court adopted the mentioned position already in Paragraph 19 of Decision No. U-I-18/02.

[73] *Cf.* Para. 12 of Decision of the Constitutional Court No. U-I-169/00, dated 14 November 2002 (Official Gazette RS, No. 105/02, and OdlUS XI, 231).

[74] Such entails that it is the Administrative Court that decides on actions against decisions of the Bank of Slovenia on extraordinary measures (Article 11 of the AJRAA-1).

[75] Not only the bank but also the members of the management board of the bank were parties to the supervision procedure against the bank (Article 352 of the BA-1). The extraordinary measure of the write-off or conversion of eligible rights was also a supervisory measure (see point 5 of the second paragraph of Article 223 of the BA-1).

[76] In this context, it is important that no appeal was allowed against decisions of the Bank of Slovenia (the second paragraph of Article 334. of the BA-1).

[77] In the event of actually carried out write-offs of eligible liabilities, the adoption of decisions on the cessation of extraordinary measures in banks did not entail the "restoration" of eligible liabilities; it only entailed that the effects determined by Article 255a of the BA-1 ceased for the bank, i.e. the cessation of the authorisations and competences of supervisory boards and general assemblies of banks was terminated (see, e.g., Decision No. 24.20-021/13-012 on the termination of extraordinary measures in NLB, dated 18 December 2013).

[78] The above-stated does not mean that the legislature could not ensure (considering the predominant public interest) constitutionally consistent (administrative and) judicial protection of the holders of (equity) securities whose position was interfered with by decisions of the Bank of Slovenia on extraordinary measures; the Constitution, however, does not require such a regulation.

[79] The above-mentioned applies all the more if the fundamental requirements for imposing the write-off or conversion of eligible bank liabilities determined by Article 253a of the BA-1 are taken into consideration, as well as the obligations of the Bank of Slovenia to impose the mentioned measure determined by Article 261a of the BA-1. In conditions where bankruptcy is looming over a bank, even the complex entirety of the property and managing rights of shareholders can be reduced to their interest in securing the possibly still existing property value of their investment in the bank (if the conditions for such are fulfilled).

[80] In this respect, the Constitutional Court draws attention to the fact that, in an action for damages, courts apply the provisions of the Civil Procedure Act (Official Gazette RS, No. 73/07 – official consolidated text and 45/08 – hereinafter referred to as the CPA), which enable plaintiffs to obtain all evidentially important documents from both the opposing party (the Bank of Slovenia) and third persons (Articles 226 through 228 of the CPA). If any of the documents that refer to the concrete write-off or conversion

of eligible liabilities concern classified data in accordance with the Classified Information Act (Official Gazette RS, Nos. 50/06 – official consolidated text, 9/10, and 60/11 – CInfA), also Decision of the Constitutional Court No. U-I-134/10, dated 24 October 2013 (Official Gazette RS, No. 92/13, and OdlUS XX, 9) must be taken into account with regard to the access to such documents of parties to civil proceedings.

[81] With regard to the regulation of the issue of information imbalance in the event of the protection of competition, see, for instance, Article 5 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5 December 2014).

[82] A disproportionate burden on the judiciary can potentially have negative effects on the constitutionally guaranteed effectiveness of judicial protection.

[83] Already in the sense of providing minimum arguments in order for their action to even be considered complete, and also more broadly in the context of the entire dispute.

[84] In this respect, see, e.g., the procedure for the judicial review of the appropriateness of severance pay in accordance with Article 388 in conjunction with Articles 605 through 615 of the CA-1 and other procedures for the collective legal protection of groups of plaintiffs in equal or similar factual or legal positions in some legal orders.

[85] The Draft Act of the BA-1L (p. 2) states that it is a condition for carrying out measures for strengthening the stability of banks that, once the measures are carried out, the bank will be able to function independently, i.e. without any further state aid, or a controlled liquidation of the bank will be carried out. “The purpose of the act is to enable the implementation of measures to strengthen the stability of banks in accordance with the AMSSBS and to consequently increase the credit ratings of the state and of individual banks. The European Commission (DG COMP) notified the Republic of Slovenia that new state aid rules to support measures in favour of banks in the context of the financial crisis will be applied in carrying out the measures in Slovene banks. The new rules include provisions on burden-sharing between shareholders and subordinated creditors.” See the Draft Act of the BA-1L, p. 4.

[86] See point 4 of the first paragraph of Article 253a of the ZBan-1 and the second and third paragraphs of Article 254 of the BA-1.

[87] The Draft Act of the BA-1L, p. 3, states that, due to the intertwinement of banks with other financial institutions, these other financial institutions would become infected by the bankruptcy of the bank. The symptoms of the infection would be a decrease in

solvency and the level of capital. The bankruptcy of banks would result in the cessation of some critical functions (e.g. payment services), which would additionally burden the economy and weaken financial stability. The operations of other banks would also be infected due to the bank run, as the savers therein would withdraw their deposits expeditiously.

[88] Article 4 of the ASRPPI only allows for expropriations if they are in the public interest, have a statutory basis, there is no discrimination, and immediate, appropriate, and effective compensation is provided in accordance with the market value. In principle, the same is determined by Article 4 of the ASPRPPI, Article 5 of the ASAMPPI, and Article 4 of the ASTPPI (treaties only differ between themselves in minor details as regards this issue, such as calculating interest on due compensation, the time limit for the payment thereof, etc.).

[89] Which include decision-making on the constitutionality of laws.

[90] See Order of the Constitutional Court No. U-I-197/97, dated 21 May 1998 (OdlUS VII, 93).

[91] See the Draft Act of the BA-1L.