



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF PROJECT-TRADE D.O.O. v. CROATIA

(Application no. 1920/14)

JUDGMENT

Art 1 P1 • Control of the use of property • Art 6 § 1 (civil) • Access to court
• Cancellation and revocation of applicant company's shares in private bank
directly affecting their right to protection of property and going beyond
merely upsetting their position in the bank's governance structure • Victim
status upheld • Government decision not reviewable by any judicial
authority
Art 6 § 1 (civil) • Reasonable time • Excessive length of proceedings lasting
almost five years at one level of jurisdiction

STRASBOURG

19 November 2020

FINAL

19/04/2021

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Project-Trade d.o.o. v. Croatia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Krzysztof Wojtyczek, *President*,
Ksenija Turković,
Aleš Pejchal,
Pauliine Koskelo,
Tim Eicke,
Jovan Ilievski,
Raffaele Sabato, *judges*,

and Renata Degener, *Deputy Section Registrar*,

Having regard to:

the application against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Project-Trade d.o.o. (“the applicant company”), a commercial company incorporated under Croatian law, on 20 December 2013;

the decision to give notice to the Croatian Government (“the Government”) of the complaints concerning access to court, the reasoning of the Constitutional Court’s decision, the length of the proceedings and peaceful enjoyment of possessions and to declare the remainder of the application inadmissible;

the parties’ observations;

Having deliberated in private on 22 September 2020,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case mainly concerns the deprivation of property arising from the Government Decision on the restructuring and recovery of a commercial bank depriving the bank’s shareholders, including the applicant company, of their shares, and the lack of access to court in that regard.

THE FACTS

2. The applicant company is a limited liability company incorporated under Croatian law which has its registered office in Zagreb. It was initially represented by Mr J. Butigan, and then from 15 October 2018 by Mr F. Galić, both lawyers practising in Zagreb.

3. The Government were represented by their Agent, Ms Š. Stažnik.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. EVENTS GIVING RISE TO THE DISPUTE

5. The applicant company was a shareholder of Croatia Bank (*Croatia banka d.d.* – hereinafter “the bank”), a joint-stock company incorporated under Croatian law which has its registered office in Zagreb. The bank was wholly owned by private individuals and companies. The applicant company held 1,251 shares with a nominal value of 200 Croatian kunas (HRK) each.

6. On 23 February 1999 the Croatian National Bank (*Hrvatska narodna banka* – hereinafter “the CNB”) adopted a decision appointing a temporary administrator at the bank. Under section 84(2) of the Banks Act, from the date of service of such a decision, all powers of the bank’s governing bodies were transferred to the temporary administrator (see paragraph 25 below). On 23 August 1999 the CNB extended the temporary administrator’s term of office for a further two months.

7. Meanwhile, on the basis of an expert report indicating that the bank’s debts largely outweighed its share capital and that it therefore presented a risk to the general stability of the financial market, on 18 June 1999 the CNB proposed to the Government of Croatia that the process of recovery (*sanacija*) and restructuring of the bank be commenced, as provided for by domestic law.

8. In accordance with that proposal, on 23 September 1999 the Government of Croatia adopted a decision on the recovery and restructuring of Croatia Bank (*Odluka o sanaciji i restrukturiranju Croatia banke d.d., Zagreb*, Official Gazette nos. 98/99 and 53/00 – hereinafter “the Government Decision”). The Decision was published in the Official Gazette on 27 September 1999. From that date, all shares held by the bank’s shareholders were revoked and cancelled. Following the recovery process, the bank was to issue new shares, all in the name of the State Agency for Deposit Insurance and Bank Resolution (*Državna agencija za osiguranje štednih uloga i sanaciju banaka* – hereinafter “the DAB”). The powers of the bank’s governing bodies and the rights of shareholders were extinguished with the entry into force of the Decision. DAB’s director had to appoint a person responsible to represent and administer the bank during the process of recovery and restructuring. That process was completed on 13 September 2000. The Decision, which was slightly amended on 25 May 2000, and in respect of which the Constitutional Court later on held that, by its legal nature, it was subordinate legislation (*podzakonski općenormativni akt (propis)*) rather than an individual legal act (see paragraph 11 below), read as follows:

I.

“Recovery and restructuring process of Croatia bank... is hereby initiated.

PROJECT-TRADE D.O.O. v. CROATIA JUDGMENT

The process of recovery and restructuring of the bank is conducted by [DAB] in accordance with the Recovery and Restructuring of Banks Act and the State Agency for Securing Savings Deposits and Resolution of Banks Act.”

II.

“It is established that on 31 May 1999 the bank has:

- (a) risky investments and potential liabilities in the amount of 1,797.5 million kunas, including potential losses of HRK 517 million;
- (b) suspected and disputed claims ... in the amount of HRK 446 million;
- (c) business losses incurred in 1998 and between 1 January and 31 May 1999 in the amount of HRK 622.3 million.”

III.

“The operating losses are written off against the gross share capital reduced by the cost of acquiring treasury shares in the amount of HRK 264.8 million and against special reserves for non-identified losses in the amount of HRK 8.6 million.”

IV.

“[DAB] shall secure HRK 553.5 million for the recovery of the bank, including:

- (a) an amount of HRK 348.9 million to cover the operating losses which could not be written off against the gross share capital reduced by the cost of acquiring treasury shares and/or the special reserves for non-identified losses and
- (b) an amount of HRK 204.6 million as funds necessary for an initial recapitalisation of the bank.

The amount of the part of the risky investments which include potential losses of the bank in the amount of HRK 348.9 million shall be transferred to [DAB].”

V.

“For the recovery of the bank referred to in point IV. of this Decision [DAB] shall issue bonds in the amount of HRK 553.5 million with a maturity date of 20 April 2000 and an interest [rate] of 7.5%.”

VI.

“A new opening balance sheet of the bank shall be prepared to reflect the situation on 1 June 1999.”

VII.

“On the day of the publication of this Decision all existing shares of the Bank shall be revoked and cancelled. The Bank shall issue new shares in the amount of HRK 204.6 million, which shall be entirely owned by [DAB].”

VIII.

“The powers of the bank’s General Meeting, Supervisory Board and of the bank’s Management Board, as well as the rights of the bank’s shareholders based on the existing shares, shall be extinguished on the day of publication of this Decision.

The Director of [DAB] shall appoint a person authorised to manage and represent the bank during the bank's recovery process..."

9. In 1999 and 2000 five shareholders of the bank (including the applicants in the case of *Batinović and Point Trade d.o.o. v. Croatia* (dec.), no. 30426/03, 10 July 2007, see paragraphs 48-50 below), but not the applicant company, filed four separate petitions with the Constitutional Court (*Ustavni sud Republike Hrvatske*) for a review of the conformity of the Government Decision with the Constitution and with the relevant primary legislation (*prijedlog za ocjenu ustavnosti i zakonitosti*). They complained that, as shareholders of the bank, the Decision violated their constitutional rights guaranteed by Article 48 § 1, Article 49 § 4 and Article 50 of the Croatian Constitution (see paragraph 20 below). They also claimed that the bank had been in good standing and that the Decision was therefore unnecessary.

10. During the proceedings the Constitutional Court obtained opinions from two financial experts and two professors of commercial and company law. The financial experts suggested that the Government Decision was not economically justified or necessary, while the law professors suggested that it was contrary to Article 49 § 4 of the Constitution (see paragraph 20 below).

11. On 30 January 2003 the Constitutional Court discontinued the proceedings because the legislation on which the Decision was based, namely the 1994 Recovery and Restructuring of Banks Act (see paragraph 26 below), had in the meantime, on 31 May 2000, been repealed. It added:

"The contested Decision is, by its legal nature, subordinate (secondary) legislation but the legal effects [of some of its provisions] directly interfere with the individual rights of a certain category of citizens (founders and former shareholders of Croatia Bank).

...

The Constitutional Court notes that the Croatian legal system guarantees to every founder and/or shareholder of Croatia Bank who considers his or her rights to have been violated by ... the contested decisions, the ... ability to obtain judicial protection.

...

It is evident from the existing case-law that individual legal protection is also available in civil proceedings by applying the relevant provisions of the Obligations Act.

Judicial protection against possible infringements of the rights of founders and former shareholders of Croatia Bank, brought about by the contested Decision, is also available in proceedings based on section 19(2) of the [1994] Courts Act, under which the commercial courts have jurisdiction in disputes concerning the disposition of membership and membership rights in companies.

Lastly, each plaintiff (former shareholder of Croatia Bank) is entitled to lodge a constitutional complaint against the judgment of a competent court and [thereby]

institute proceedings before the Constitutional Court if he or she deems that a court judgment has violated certain human rights or fundamental freedoms guaranteed by the ... Constitution.”

12. Two judges of the Constitutional Court expressed dissenting opinions. They argued that the court could have continued the abstract review proceedings and that it had had jurisdiction to examine whether the Government Decision was in compliance with the Constitution and relevant primary legislation (statute). They also opined that the Government Decision was contrary to the Constitution. One of the dissenting judges stated that under domestic law there was no remedy, much less a judicial one, against the Decision. The other dissenting judge specifically contested the view expressed by the majority that the bank’s shareholders could seek the protection of their rights in ordinary civil proceedings. He averred that the shareholders could not successfully do so without the Constitutional Court finding that the Government Decision was unconstitutional.

II. CIVIL PROCEEDINGS IN THE APPLICANT COMPANY’S CASE

13. On 12 September 2003 the applicant company brought a civil action in the Zagreb Commercial Court (*Trgovački sud u Zagrebu*) against the bank and the DAB, asking the court to (a) issue a declaratory judgment confirming that the company was still the holder of 1,251 shares, (b) order the DAB to transfer the corresponding number of shares from its portfolio to the company, and (c) order the bank to record the company as holder of that number of shares in the bank’s register of shareholders.

14. During the proceedings, the applicant company argued that the Government Decision revoking and cancelling its shares was unjustified in economic terms because the bank had been in good standing. It further argued that relevant statutory requirements had not been satisfied, and that the Decision was contrary to Article 48 § 1, Article 49 § 4 and Article 50 of the Constitution (see paragraph 20 below), as had been acknowledged by the High Commercial Court (*Visoki trgovački sud Republike Hrvatske*) in its judgment of 21 December 2004 in another case (see paragraph 33 below).

15. By a judgment of 21 February 2006 the Zagreb Commercial Court dismissed the applicant company’s action.

16. By a judgment of 18 June 2008 the High Commercial Court dismissed an appeal by the applicant company and upheld the first-instance judgment. On 16 September 2008 it served its judgment on the applicant company’s representative. The relevant parts read as follows:

“The [applicant company] in the statement of claim states that it is a shareholder of Croatia Bank, holding 1,251 shares with a nominal value of HRK 200 each. However, on a proposal from the Croatian National Bank (hereinafter “the CNB”) of 18 June 1999, the Government of Croatia adopted on 23 September 1999, without any grounds, the Decision on the recovery and restructuring of Croatia Bank ... [The applicant company] alleges that its property was taken by that Decision and that it was

prevented beforehand from participating in the management of the bank's affairs and deciding its fate. The [applicant company] states that the Government Decision [was] based on an incorrect assumption ... because the potential losses of the bank were declared actual losses, which is not supported by any arguments or evidence. The bank's claims totalling HRK 446,000,000 were declared uncollectable by the CNB and the Government, even though potential losses are not actual losses, and all these claims were secured by various means of guaranteeing payment, such as mortgages and so forth. The [applicant company] considers that the shares of all the shareholders, including its own, were cancelled on the basis of incorrectly established facts ... The [applicant company] further submits that throughout the proceedings which preceded the adoption of the Government Decision, the shareholders did not have the opportunity to participate or ... protect their entrepreneurial or property rights attached to the shares they had lawfully obtained but which were unlawfully taken away from them. The [applicant company] considers that ... the Government Decision was adopted without satisfying the statutory requirements, that is, on the basis of an unrealistic assessment of potential losses and other arbitrary parameters.

...

The first-instance court consulted the Government Decision on the recovery and restructuring of Croatia Bank ... from which it established the bank's losses, the amount secured for its restructuring and initial recapitalisation, and established that point 7 provided that on the date of publication of the Decision all the existing shares of the bank would be revoked and cancelled, and that the bank would issue new shares in the amount of HRK 217,000,000 which would all be transferred into the ownership of [the DAB] and that ... the rights belonging to shareholders on the basis of the existing shares would be extinguished.

The first-instance court also consulted the Constitutional Court's decision and established that the proceedings for reviewing the conformity of the Government Decision on the recovery and restructuring of Croatia Bank with the Constitution and primary legislation had been discontinued. The [first-instance court] on the basis of point 7 of the [Government Decision] ... established that all the existing shares of the bank had been extinguished and that new shares had been issued, which were fully owned by [the DAB]. On the basis of the facts thus established, the first-instance court considered that the [applicant company's] shares no longer existed, which is evident from (point 7 of) the Government Decision ... Since the [applicant company's] shares had thus been cancelled and revoked the [first-instance court] held that the plaintiff company could not have its shares returned to it because [the DAB] had obtained its [own] shares on the basis of its capital investment during the recapitalisation process.

...

The appeal is unfounded.

...

It follows from the appeal that the [applicant company] considers that the first-instance court misapplied the substantive law because it based its decision on the Government Decision which was adopted on the basis of the [1994] Recovery and Restructuring of Banks Act... while the plaintiff company in the ... appeal gives reasons as to why the Government Decision is unconstitutional. [The applicant company] therefore argues that the Government of Croatia had to compensate it for the market value of the revoked shares, in accordance with Article 50 § 1 of the ... Constitution. For these reasons, the [applicant company] considers that the

first-instance court ... did not have to apply the Government Decision on the recovery and restructuring of Croatia Bank. This court cannot accept such ... arguments...

In examining whether the action was well- or ill-founded, the first-instance court had to assess whether the defendants, in making their decision, had acted in accordance with the Government Decision ... From the first-instance decision it is evident that the first-instance court consulted the Constitutional Court's decision and established that the proceedings for reviewing the conformity of the Government Decision ... with the Constitution and primary legislation had been discontinued. That means that the [Government Decision] was not examined by the Constitutional Court, let alone invalidated. Given that the Government Decision was fully implemented, that is, the [applicant company's] shares were cancelled and revoked, the first-instance court correctly held that the [applicant company] could no longer have its shares returned to it. This court accepts the [applicant company's] argument that the Constitutional Court's decision no. U-III-3471/03 of 16 March 2006, relied on by the defendants, is not binding for this court. However, this court accepts the view expressed in the decision of the Constitutional Court, which held that the [Government Decision] was subordinate legislation which had been adopted on the basis of the relevant provisions of the [1994 Recovery and Restructuring of Banks Act] and within the powers prescribed by that Act, which is why the Constitutional Court held that Article 48 of the Constitution had not been violated. Lastly, the [applicant company] itself claims that the Government of Croatia had to compensate it for the market value of the revoked shares, not the defendants, which had only implemented the Government Decision. This court therefore considers that the first-instance court correctly applied the relevant substantive law on the established facts when dismissing the [applicant company's] action."

17. On 14 October 2008 the applicant company lodged a constitutional complaint, claiming a violation of its constitutional rights guaranteed by the above-mentioned Articles of the Constitution (see paragraph 14 above).

18. By a decision of 2 October 2013 the Constitutional Court dismissed the applicant company's constitutional complaint and on 10 October 2013 served that decision on the company's representative.

19. That court examined the case under Article 29 § 1 of the Constitution, which guarantees the right to fair proceedings, and, referring to its findings in the case no. U-III-736/2005 (see paragraph 34 below), found no violation of that right. It held:

"Regarding the complainant's argument ... that in 'these proceedings the first-instance ... and second-instance court had to directly apply the Constitution and the law, not the [Government Decision]' the complainant is referred to points 14 to 17 of the reasons given in the Constitutional Court's decision U-III-736/2005 of 8 July 2013."

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. THE CONSTITUTION

20. The relevant Articles of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette no. 56/90 with subsequent amendments) read:

Article 48 § 1

“The right of ownership shall be guaranteed.”

Article 49 § 4

“Rights acquired through the investment of capital shall not be diminished by statute or by any other legal act ...”

Article 50

“1. Ownership may be restricted or taken in accordance with the law and in the interest of the Republic of Croatia subject to payment of compensation equal to the market value.

2. Entrepreneurial freedom and ownership rights may, on an exceptional basis, be restricted by law for the protection of the interests and security of the Republic of Croatia, nature, the environment or public health.”

21. Article 115 § 3 of the Constitution reads as follows:

Article 115 § 3

“The courts shall decide [cases] on the basis of the Constitution, statute, international agreements and other valid sources of law.”

22. Prior to its amendment by the Amendments to the Constitution (*Promjena Ustava Republike Hrvatske*, Official Gazette no. 76/10) in 2010, the provision read as follows:

Article 115 § 3

“The courts shall decide [cases] on the basis of the Constitution and statute.”

23. Article 125 of the Constitution defines the jurisdiction of the Constitutional Court. The first three subparagraphs, which specify the powers of the Constitutional Court in so-called abstract-review proceedings, read as follows:

Article 125

“The Constitutional Court of the Republic of Croatia:

- shall decide on the conformity of statute with the Constitution;
- shall decide on the conformity of subordinate legislation with the Constitution and statute;
- may examine the constitutionality of statute and the constitutionality and legality of other [subordinate legislation] which is no longer in force, provided that from the moment they were repealed until the submission of an application or a petition for [review] proceedings to be instituted [before the Constitutional Court] no more than one year has passed.

...”

24. The third subparagraph in Article 125, which allows the Constitutional Court to examine the constitutionality of statute and subordinate legislation no longer in force, was added by the 2000 Amendments to the Constitution (*Promjena Ustava Republike Hrvatske*, Official Gazette no. 113/00), which entered into force on 9 November 2000.

II. RELEVANT LEGISLATION

A. Legislation governing recovery and restructuring of banks

1. *The Banks Act*

25. The relevant provisions of the Banks Act (*Zakon o bankama*, Official Gazette no. 161/98), which was in force between 26 December 1998 and 25 July 2002, read as follows:

XV. TEMPORARY ADMINISTRATOR

Section 82

“When the Croatian National Bank establishes that the potential losses of a bank ... are higher than that bank’s share capital and in cases where a bank is insolvent, it shall appoint a temporary administrator to that bank, or shall file a petition with the competent court with a view to opening bankruptcy proceedings against that bank.”

Section 84(2)

“From the date of service of the decision on the appointment of a temporary administrator, all powers of the management board, supervisory board and shareholders’ general meeting shall cease and shall at the same time be transferred to the temporary administrator.”

XVI. RECOVERY OF BANKS

Section 90

“On the proposal of the Croatian National Bank, the Government of Croatia may decide to commence the process of recovery of a bank if it establishes that this is in the State’s special interest and if it finds that the other possibilities of preventing disturbance in the stability of the overall financial system of the State have been exhausted.”

2. *Recovery and Restructuring of Banks Act*

26. The relevant provisions of the Recovery and Restructuring of Banks Act (*Zakon o sanaciji i restrukturiranju banaka*, Official Gazette no. 44/94), which was in force between 11 June 1994 and 23 May 2000, read as follows:

Section 11(1)

“The decision on recovery and restructuring of a bank shall be given by the Government of Croatia on the proposal of the Croatian National Bank.”

B. Legislation governing the organisation of the judiciary

27. Section 5 of the 1994 Courts Act (*Zakon o sudovima*, Official Gazette no. 3/94 with subsequent amendments), in force between 22 January 1994 and 28 December 2005, provided as follows:

Section 5

“1. The courts shall decide [cases] on the basis of the Constitution and statute.

2. The courts shall also decide [cases] on the basis of international agreements which are part of the [internal] legal order of the Republic of Croatia. The courts shall also apply other [subordinate] legislation enacted in accordance with the Constitution, international agreements or statute.”

28. The wording of section 5 of the 2005 Courts Act (Official Gazette no. 150/05 with subsequent amendments), in force between 29 December 2005 and 13 March 2013, is nearly identical.

C. The Constitutional Court Act

29. Section 37 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette no. 99/99 with subsequent amendments – “the Constitutional Court Act”), which has been in force since 24 September 1999, reads as follows:

Section 37

“(1) If the [ordinary] court in proceedings finds that the statute to be applied or some of its provisions are not in accordance with the Constitution, it shall stop the proceedings and submit an application to the Constitutional Court for a review of the conformity of the statute or its provisions with the Constitution.

(2) If the [ordinary] court in proceedings finds that other [subordinate] legislation to be applied, or some of its provisions, are not in accordance with the Constitution or statute, it shall directly apply the statute [*exceptio illegalis*] and [at the same time] submit an application to the Constitutional Court for a review of the conformity of the impugned [subordinate] legislation or its provisions with the Constitution and the [relevant] statute.”

D. Other legislation

30. The relevant provisions of the 1978 Obligations Act, in force between 1 October 1978 and 31 December 2005, concerning statutory limitation periods (*zastara*), namely sections 360, 376, 388 and 392, are cited in *Baničević v. Croatia* ((dec.), no. 44252/10, § 13, 2 October 2012). In particular, section 376 provided that a claim for damages became statute-barred three years after the injured party became aware of the

damage and the identity of the wrongdoer and, in any event, five years after the damage occurred.

31. The relevant provision of the Civil Procedure Act concerning the reopening of proceedings following a final judgment of the European Court of Human Rights, namely section 428a, is cited in *Lovrić v. Croatia* (no. 38458/15, § 24, 4 April 2017).

32. The relevant legislative provisions concerning length-of-proceedings remedies in Croatia in the period between 29 December 2005 and 13 March 2013 are set out in the case of *Vrtar v. Croatia* (no. 39380/13, §§ 52-55, 7 January 2016).

III. RELEVANT PRACTICE

A. Relevant practice concerning civil actions of Croatia Bank's former shareholders against the bank and the DAB

33. In judgments nos. Pž-6234/04-2 of 21 December 2004 and Pž-6233/04-3 of 19 January 2005 the High Commercial Court ruled in cases where the plaintiffs, shareholders of Croatia Bank, had sued the bank and the DAB in the competent commercial court, claiming that they had been deprived of their shares and the rights attached to them without any compensation. They asked the court to (a) issue declaratory judgments confirming that they were still holders of a specific number of shares, (b) order the DAB to transfer the corresponding number of shares from its portfolio to them, and (c) order the bank to record them as holders of the specified number of shares in the bank's register of shareholders. Finding for the plaintiffs, the High Commercial Court directly applied Article 48 § 1 and Article 49 § 4 of the Constitution (see paragraph 20 above). It expressly stated that the Government Decision of 23 September 1999 was contrary to the latter Article. It reasoned as follows:

“In particular, any restriction or deprivation of the rights attached to shares would be contrary to that provision of the Constitution, as it would constitute diminution or deprivation of membership rights acquired through the investment of capital in a joint-stock company.”

34. Both judgments were, following constitutional complaints by Croatia Bank, subject to a review by the Constitutional Court. In decisions nos. U-III-736/2005 and U-III/1706/2005, adopted on 8 July 2013 and published in the Official Gazette on 24 and 31 July 2013 respectively, the Constitutional Court found for the bank. It quashed the High Commercial Court's judgments and remitted the cases. The Constitutional Court held, *inter alia*, that it had never decided on the conformity of the Government Decision of 23 September 1999 with the Constitution or with primary legislation because the relevant abstract constitutional review proceedings had been discontinued (see paragraph 11 above). This meant that the

Decision had to be presumed to be in conformity with the Constitution. By calling into question the constitutionality of the Decision, the High Commercial Court had exceeded its jurisdiction. In so holding the Constitutional Court did not in any way refer to its decision no. U-III-3471/2003 of 16 March 2006 (see paragraph 36 below).

B. Relevant practice concerning civil actions for compensation of Croatia Bank's former shareholders against the State

35. In judgment no. Rev-x 1053/15-2 of 24 May 2016 the Supreme Court (*Vrhovni sud Republike Hrvatske*) dismissed an appeal on points of law (*revizija*) lodged by a former shareholder of Croatia Bank against judgments of the lower courts dismissing his civil action for compensation against the State. The relevant part of its judgment reads as follows:

“What is disputed in the proceedings on the appeal on points of law is whether the plaintiff is entitled to compensation for the damage sustained by the revocation and cancellation of 2,079 shares of Croatia Bank, a revocation which was effected pursuant to the Government Decision on the recovery and restructuring of Croatia Bank of ... 23 September 1999 ...

...

The first-instance court clearly listed the requirements which had to be met for the awarding of compensation: the existence ... of the wrongdoer and the injured party, the wrongful act committed by the wrongdoer, the damage sustained by the injured party, the causal link between the ... wrongful act and the damage sustained by the injured party, and the unlawfulness of the wrongful act.

The plaintiff's arguments set out in the appeal on points of law may in essence be reduced to the argument that ... [the State] is liable because the Government of Croatia adopted an allegedly illegal and unconstitutional Decision on the recovery and restructuring of Croatia Bank. By that allegedly unlawful act the plaintiff sustained damage in that he was deprived of his ownership of shares without either financial compensation or compensation in the form of new shares [the bank] had issued in the recovery process.

In this case, however, what is missing is unlawfulness in the actions of [the State] as one of the key elements for establishing ... the right of the plaintiff to obtain compensation from the defendant.

... it should first be noted that the Constitutional Court ... discontinued the proceedings for reviewing the conformity of the Government Decision ... with the Constitution and primary legislation ...

However, it should also be noted that the Constitutional Court nevertheless expressed its view on that issue in a case brought before it by means of an individual constitutional complaint. The legal opinion of the Constitutional Court is expressed in [its] decision no. U-III-3471/2003, according to which the [Government Decision] revoking and cancelling the shares of Croatia Bank, including those of the plaintiff, without compensation, is not contrary to Article 48 § 1 or Article 49 § 3 of the ... Constitution.

...

Therefore, in [order to] resolve this dispute, the legal opinion expressed in the above-mentioned decision of the Constitutional Court must be taken into account.

As regards the plaintiff's argument that the courts should have ... applied the *exceptio illegalis* rule and refused to apply the Government Decision in the instant case, that is, [that they] should have awarded [him] compensation ..., the [Supreme Court] refers to the legal opinion expressed in the Constitutional Court's decisions nos. U-III-736/2005 and U-III-736/2005 [both] of 8 July 2013, in which the possibility of applying the *exceptio illegalis* rule was explicitly excluded...

This court did not examine whether the State could be held liable for the effects of the enactment of unconstitutional [primary] legislation or subordinate legislation, because that unconstitutionality was not established in the present case by the Constitutional Court, which was the only [authority] that could have taken such a decision. All constitutional-review proceedings of the Government Decision on the recovery and restructuring of Croatia Bank were discontinued by the Constitutional Court's decision ... of 30 January 2003.

[Under] sections 56, 57 and 58 of the Constitutional Court Act, the finding that a piece of subordinate legislation is unconstitutional or contrary to primary legislation is the key prerequisite for the protection of rights infringed by allegedly unconstitutional subordinate legislation.

Therefore, regardless of whether the plaintiff's ownership rights could have been breached by the implementation of the [Government's] decision revoking and cancelling the shares of Croatia Bank ... it must be taken into account that there was no unlawfulness in the actions of [the State] authorities. The Constitutional Court never rendered a decision finding that the Government Decision on the recovery was unconstitutional or contrary to primary legislation, nor did it [invalidate] that Decision. ... [T]herefore by implementing [it], the State did not act unlawfully.

Since one of the general requirements for tort liability under section 154(1) of the Obligations Act was therefore not met, it was unnecessary to examine whether other requirements set out in the Obligations Act or specific legislation governing State liability were satisfied.

For these reasons, the appeal on points of law has to be dismissed."

C. Other relevant practice

36. In decision no. U-III-3471/2003 of 16 March 2006, which was published in Official Gazette no. 43/06 of 19 April 2006, the Constitutional Court dismissed a constitutional complaint lodged by Miljenko Kovač (see paragraphs 48 and 51-52 below), a former shareholder of Croatia Bank, against judgments of the lower courts dismissing his civil action for unjust enrichment against the bank. The relevant part of that decision reads as follows:

"The complainant considers that his constitutional rights guaranteed by Article 48 § 1, Article 49 §§ 1, 2 and 4 and Article 50 of the ... Constitution were breached by the judgment of the Bjelovar County Court at issue.

He points out that he purchased ordinary shares in the value of HRK 37,200.00 from the defendant bank and that, by the [Government Decision] of 23 September 1999 on the recovery and restructuring of Croatia Bank, he was deprived of ownership of those

shares. The complainant alleges that by that Decision he ... lost his shares, while the defendant bank kept the amount paid for the shares purchased. He considers this to be a clear example of unjust enrichment.

...

The complainant in the constitutional complaint alleges a violation of Article 48 § 1 of the Constitution, which guarantees the right of ownership, and explains that that constitutional right was breached because by the Government Decision, he lost his right of ownership to the disputed shares.

...

In the present case, the complainant's membership rights, which belonged to him as a shareholder, were extinguished by the cancellation of the shares.

Given ... that the Government Decision [cancelling] the complainant's shares is subordinate legislation enacted on the basis of the relevant provisions of the [1994] Recovery and Restructuring of Banks Act, and within the powers prescribed by that Act, the Constitutional Court finds that the provision of Article 48 § 1 of the Constitution was not violated in the present case.

...

Section 90 of the Banks Act provides that the Government of Croatia may, on a proposal from the Croatian National Bank, decide to initiate bank recovery proceedings if it considers it to be of specific interest to the State and if other options for preventing the disruption of the stability of the country's overall financial system have been exhausted. The Government Decision on the recovery and restructuring of Croatia Bank was adopted on the basis of the [1994 Recovery and Restructuring of Banks Act] and on a proposal from the Croatian National Bank, which considered that the recovery process was possible and economically justified. The bank recovery process is not carried out to protect the interests of shareholders, but to protect specific State interests and prevent disruption of the stability of the country's overall financial system.

In view of the above ... the Constitutional Court finds that the judgment at issue did not violate the complainant's rights guaranteed by Articles 49 § 4 and 50 § 2 of the Constitution."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE LACK OF ACCESS TO COURT AND OF ARTICLE 1 OF PROTOCOL NO. 1 THERETO

37. The applicant company complained that, on the basis of the Government Decision of 23 September 1999 (see paragraph 8 above), it had been deprived of its shares without good reason or compensation. In particular, the applicant company complained that the decision in question had been unconstitutional and that the domestic courts had refused to examine its conformity with the Constitution, and consequently, to examine whether it had been justified. The applicant company relied on Article 1 of Protocol No. 1 to the Convention, which reads as follows:

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

38. Being master of the characterisation to be given in law to the facts of the case (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports* 1998-I, and *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 124, 20 March 2018), and having regard to its case-law (see *Capital Bank AD v. Bulgaria*, no. 49429/99, §§ 98-166, ECHR 2005 XII (extracts)), the Court, when giving notice of the application to the respondent Government, considered that this complaint should also be examined under Article 6 § 1 of the Convention as an access-to-court complaint. The relevant part of that Article reads as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ...hearing within a reasonable time by [a] ... tribunal ...”

A. Admissibility

1. Submissions by the parties

39. The Government disputed the admissibility of the complaint under Article 1 of Protocol No. 1 to the Convention, arguing that the applicant company had not properly exhausted domestic remedies.

40. They argued that the applicant company had had an effective remedy for the protection of its constitutional and Convention rights but had instituted incorrect civil proceedings in which its crucial complaint concerning a violation of its constitutional rights had not and could not have been examined.

41. The Government submitted that once the recovery and restructuring process of Croatia Bank initiated by the Government Decision of 23 September 1999 had been completed on 13 September 2000 (see paragraph 8 above), and after the Constitutional Court had on 30 January 2003 discontinued the proceedings to review the constitutionality and legality of that Decision (see paragraph 11 above), its legal effects had become irreversible. The former shareholders, who had considered that their rights had been violated, could have only sought compensation from the State under the general rules of civil and company law. However, the applicant company had not brought a civil action against the State but against the bank and DAB, and had not sought compensation but restitution of its shares (see paragraph 13 above), which had been impracticable because the shares had been cancelled and had no longer existed.

42. In its observations, the applicant company referred to the arguments it had raised in its application to the Court, contested in general terms the

Government's arguments and submitted that they did not cast any doubt on the admissibility of this complaint.

2. *The Court's assessment*

(a) **The applicant company's victim status**

43. The Government did not raise an objection concerning the applicant company's victim status. However, the issue whether an applicant can claim to be a victim of the violation complained of is a matter which goes to the Court's jurisdiction, and which the Court must thus examine of its own motion (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 70, ECHR 2016 (extracts), and *A and B v. Croatia*, no. 7144/15, § 88, 20 June 2019).

44. Having regard to its case-law (see *Albert and Others v. Hungary* [GC], no. 5294/14, §§ 119-169, 7 July 2020), the Court considers that in the present case it must itself examine whether the applicant company, as a former shareholder of Croatia Bank, can claim to be a victim of the alleged violation of Article 1 of Protocol No. 1 (see paragraph 37 above).

45. When it comes to cases brought by shareholders of a company, it is crucial to draw a distinction between complaints brought by shareholders about measures affecting their rights as shareholders and those about acts affecting companies, in which they hold shares (see *Albert and Others*, cited above, § 122, and the cases cited therein). In the former group, shareholders themselves may be considered victims whereas in the latter group the general principle is that shareholders of companies cannot be seen as victims within the meaning of Article 34 of the Convention (see *Albert and Others*, cited above, §§ 123-124). For shareholders to be able to claim to be the victims the impugned measures or acts must impact their legal rights both directly and personally and go beyond merely disturbing their interests in the company by upsetting their position in the company's governance structure (see *Albert and Others*, cited above, § 134).

46. Like in the case of *Olczak v. Poland*, in the present case the measure complained of, namely the impugned Government Decision on the recovery and restructuring of Croatia Bank, consisted of the revoking and cancellation of all shares held by the bank's shareholders (see paragraph 8 above), including those belonging to the applicant company (see *Olczak v. Poland* (dec.), no. 30417/96, §§ 15-16 and 58, ECHR 2002-X (extracts)). The applicant company thus undeniably lost its property as a result of that Decision (ibid., § 61). Accordingly, the applicant company's rights protected by Article 1 of Protocol No. 1 were directly affected (ibid., § 58, and *Albert and Others*, both cited above, § 130) in a manner that went beyond merely upsetting the applicant company's position in the Croatia Bank's governance structure (contrast with *Albert and Others*, cited above, §§ 148-155).

47. The Court therefore concludes that the applicant company may claim to be a victim of the violation complained of (see paragraph 37 above).

(b) Exhaustion of domestic remedies and compliance with the six-month rule

48. As regards the Government's inadmissibility objection (see paragraphs 39-41 above), the Court observes that it has already had the opportunity to examine issues related to the exhaustion of domestic remedies in cases brought by former shareholders of Croatia Bank complaining that they had been deprived of their property by the Government Decision of 23 September 1999 (see paragraph 8 above) in that their shares had been revoked and cancelled without good reason or compensation (see *Batinović and Point Trade d.o.o. v. Croatia* (dec.), no. 30426/03, 10 July 2007, and *Miljenko Kovač v. Croatia* (dec.), no. 39739/06, 15 January 2009). In those cases the applicants argued, like the applicant company in the present case, that the bank had been in good standing and that its recovery had thus been unnecessary.

49. The Court further notes that in the case of *Batinović and Point Trade d.o.o.* – where the applicants lodged petitions with the Constitutional Court for abstract review of the conformity of the Government Decision with the Constitution and with the relevant primary legislation (see paragraph 9 above) – the Government argued that the applicants' complaint under Article 1 of Protocol No. 1 to the Convention was inadmissible for non-exhaustion of domestic remedies because, in order to protect their rights as shareholders of the bank, they could have resorted to the relevant commercial court and relied on the Constitution, the Convention or the Companies Act. In support of their argument that this would have had reasonable prospects of success and thus constituted an effective remedy that should have been used, the Government specifically referred to the High Commercial Court's judgment no. Pž-6234/04-2 of 21 December 2004 (see paragraph 33 above and *Batinović and Point Trade d.o.o.*, cited above).

50. In the above case the Court held that the applicants had not presented their arguments to any domestic court of full jurisdiction, which would have been far better placed than the Court to examine the factual background of their case. The only instance the applicants had resorted to by filing an abstract petition for review of constitutionality and legality of the Government Decision of 23 September 1999 had been the Constitutional Court (see paragraphs 9 and 49 above), which could not have assessed facts or evidence pertaining to the applicants' specific situation. The Constitutional Court could only have invalidated the Decision had it found that it had been contrary to the law or to the Constitution. The Court had thus accepted the Government's argument that the relevant commercial court had been a forum where the applicants could have presented their arguments with reasonable prospects of success (see paragraph 49 above),

and declared the case inadmissible for non-exhaustion of domestic remedies (see *Batinović and Point Trade d.o.o.*, cited above).

51. Relying on the above findings by the Court, and on the High Commercial Court's judgment no. PŽ-6234/04-2 of 21 December 2004 (see paragraph 33 above), in the case of *Miljenko Kovač* (cited above, see also paragraph 36 above) the Government argued that the applicant's complaint under Article 1 of Protocol No. 1 to the Convention was inadmissible for non-exhaustion of domestic remedies because, instead of instituting civil proceedings for unjust enrichment before the civil courts, the applicant should have instituted civil proceedings before the commercial courts.

52. The Court noted that the applicant in that case, unlike the applicants in *Batinović and Point Trade d.o.o.*, had instituted civil proceedings before a domestic court of full jurisdiction. However, he had brought a misconceived action for unjust enrichment against the bank in an ordinary court. The Court therefore again accepted the Government's argument (see paragraph 51 above) and declared the case inadmissible because the applicant had failed to exhaust domestic remedies properly (see *Miljenko Kovač*, cited above).

53. Turning to the present case, the Court notes that the applicant company resorted precisely to the same remedy the Government claimed, and the Court considered to have been effective in the *Batinović and Point Trade d.o.o.* and *Miljenko Kovač* cases. Specifically, it instituted civil proceedings before the commercial courts against the same defendants and sought the same type of relief (see paragraphs 33 and 49-52 above). Yet, in the present case the Government argued that this remedy had in fact not been effective (see paragraph 41 above).

54. The Court reiterates that if more than one potentially effective remedy is available, the applicant is only required to have used one of them (see *Moreira Barbosa v. Portugal* (dec.), no. 65681/01, ECHR 2004-V (extracts); *Jeličić v. Bosnia and Herzegovina* (dec.), no. 41183/02, ECHR 2005-XII (extracts); *Karakó v. Hungary*, no. 39311/05, § 14, 28 April 2009; and *Aquilina v. Malta* [GC], no. 25642/94, § 39, ECHR 1999-III). Therefore it cannot be said that by resorting to the remedy which at the time seemed to have reasonable prospects of success (see paragraphs 49-53 above), instead of using the remedy for the first time suggested by the Government in the present case (see paragraph 41 above), the applicant company failed to comply with its obligations under Article 35 § 1 of the Convention.

55. The Court further notes that the Government submitted that the Constitutional Court had for the first time clarified the *exceptio illegalis* rule (see section 37(2) of the Constitutional Court Act in paragraph 29 above) and the powers and jurisdiction of the lower courts in its application in its decision of 8 July 2013 adopted in a leading case (see paragraph 34 above

and paragraph 96 below). By that decision the Constitutional Court quashed the judgment of the High Commercial Court relied on by the Government and the Court in the *Batinović and Point Trade d.o.o.* and *Miljenko Kovač* cases (see paragraphs 33 and 49-52 above).

56. It follows that the fact that the remedy used by the applicant company lacked any prospects of success and was therefore ineffective was established only on 24 July 2013 when that decision by the Constitutional Court was published in the Official Gazette (see paragraphs 34 and 55 above). That was some two months before the same court on 2 October 2013 adopted the decision in the applicant company's case (see paragraph 18 above).

57. At that time the proceedings in the applicant company's case had already been pending for about nine years and ten and a half months, including four years and more than nine months before the Constitutional Court (see paragraphs 13-18 above). Therefore, to ask the applicant company in these circumstances to institute another set of civil proceedings by bringing a civil action for compensation against the State and await their outcome before applying to the Court would have overstretched its duties as applicants under Article 35 § 1 of the Convention. If the applicant company had at that time started using that remedy, a remedy which was suggested by the Government for the first time in the present case (see paragraph 41 above), its action would have been dismissed as time-barred because by then the objective five-year statutory limitation period applicable to compensation claims would have elapsed (see paragraphs 8, 30 and 34 above).

58. By way of observation, the Court also notes that even if the civil action were brought within the statutory limitation period the relevant case-law of the domestic courts as it currently stands seems to suggest that even the remedy in question would not offer reasonable prospects of success (see the Supreme Court's judgment cited in paragraph 35 above upholding the lower courts' judgments dismissing a civil action for compensation brought against the State by a former shareholder of Croatia Bank).

59. It follows that the Government's objection as to the exhaustion of domestic remedies must be rejected. It further follows that the applicant company, by lodging its application with the Court on 20 December 2013, complied with the six-month rule regardless of whether the relevant starting date is 24 July 2013, when the Constitutional Court's decision of 8 July 2013 adopted in a leading case was published in the Official Gazette (see paragraphs 34 and 55 above), or 10 October 2013, when the same court served its decision of 2 October 2013 adopted in the applicant company's case on the company's representative.

(c) Conclusion as regards admissibility

60. The Court further notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Alleged violation of Article 6 § 1 of the Convention on account of the lack of access to court

(a) Submissions by the parties

61. The Government, relying on the same arguments put forward in support of their non-exhaustion objection (see paragraphs 40-41 above), submitted that the applicant company had had access to court but had used the wrong avenue of redress. The applicant company made no comments specifically on the issue of access to court.

(b) The Court's assessment

62. The Court reiterates that for the determination of civil rights and obligations by a tribunal to satisfy Article 6 § 1, the tribunal in question must have jurisdiction to examine all questions of fact and law relevant to the dispute before it (see, among many other authorities, *Capital Bank AD*, cited above, § 98, and the cases cited therein).

63. The Court notes that when examining the applicant company's civil action the commercial courts, as is apparent from their reasoning, considered that they were precluded from conducting their own examination of whether Croatia Bank had been in need of recovery and whether the other statutory requirements for initiating the recovery process had been satisfied, after this had been established by the Government Decision of 23 September 1999 (see paragraph 16 above). As a result, those courts did not examine the applicant company's arguments that Croatia Bank had been in good standing and that those requirements had not been met (see paragraphs 14 and 16 above). The outcome of the case was thus in the end determined solely on the basis of the finding by the Government of Croatia, based on the proposal by the Croatian National Bank (see paragraph 7-8 above), that Croatia Bank was in need of recovery (see, *mutatis mutandis*, *Capital Bank AD*, cited above, § 99).

64. These issues were not examined either in the proceedings instituted upon civil actions for compensation brought by the Croatia Bank's former shareholders against the State in which the domestic courts also considered themselves precluded from doing so (see paragraph 35 above).

65. Such decisions by domestic courts have already been considered by the Court (*ibid.*, § 100, and the cases cited therein). In those cases the Court

found violations of Article 6 § 1 because the scope of jurisdiction exercised by the domestic courts did not meet the requirements of Article 6 § 1 (*ibid.*).

66. The present case is very similar. As noted above (see paragraph 63), the commercial courts that examined the applicant company's action declined to examine the issues raised by the applicant company which were crucial to the determination of the case, namely whether Croatia Bank had been in need of recovery and whether the other statutory requirements had been satisfied. Instead, those courts chose to defer to the findings of the Government of Croatia. They did not, therefore, exercise jurisdiction to examine all the questions relevant to the dispute before them, as they were required to do by Article 6 § 1 (see, *mutatis mutandis*, *Capital Bank AD*, cited above, § 101).

67. Nevertheless, the conditions laid down in Article 6 § 1 would have been met in the present case if the Government Decision on the recovery and restructuring of Croatia Bank, and in particular the finding that the bank was in need of recovery – which was considered as binding by the commercial courts – was subject to review by a court having full jurisdiction (see, *mutatis mutandis*, *Capital Bank AD*, cited above, § 104), that is, by a court which would have reviewed the relevant evidence and the application of the relevant law to the facts of the case (see paragraph 63 above).

68. That is so regardless of the fact that the Government Decision, unlike that in the case of *Capital Bank AD*, constituted, under domestic law, subordinate legislation (see paragraph 11 above) in the formal sense. Article 6 of the Convention does not guarantee a right of access to court with power to invalidate or override a law enacted by the legislature (see, for example, *Posti and Rahko v. Finland*, no. 27824/95, § 52, ECHR 2002 VII, and *Ruiz-Mateos v. Spain*, no. 14324/88, Commission decision of 19 April 1991, Decisions and Reports (DR) 69, p. 227). However, where a piece of subordinate legislation (decree, decision or other measure), albeit not formally addressed to any individual natural or legal person, affects in substance the “civil rights” solely of such a person or group of persons in a similar situation, whether because of certain attributes specific to them or because of a factual situation which differentiates them from all other persons, Article 6 § 1 may require that the substance of the measure in question is capable of being challenged before a “tribunal” (see *Posti and Rahko*, cited above, §§ 53-54). This is all the more so where, as in the present case, the Decision in question is not legislation in the substantive sense (a normative act of general application which applies to objectively determined situations), but a decision applying the relevant legislation solely to a particular case.

69. In examining whether the Decision of 23 September 1999 was subject to judicial review of the scope required by Article 6 § 1 (see paragraph 67 above), the Court first notes that in 1999 and 2000 a

number of the bank's shareholders, but not the applicant company, instituted abstract constitutional review proceedings asking the Constitutional Court to review the conformity of the Government Decision with the Constitution and the relevant primary legislation (see paragraph 9 above). The Constitutional Court obtained opinions from several experts and law professors, who all suggested that the Government Decision was unnecessary and unjustified in economic terms, as well as unconstitutional (see paragraph 10 above).

70. However, after some three to four years that court, in its decision of 23 January 2003, decided to discontinue the above-mentioned abstract constitutional review proceedings because the primary legislation on which the Government Decision was based had in the meantime been repealed (see paragraph 11 above). It thus did not examine whether the Government Decision was in compliance with the Constitution or with the relevant primary legislation.

71. It is true that, subsequent to that Constitutional Court's decision (see paragraphs 11 and 70 above), in some cases similar to that of the applicant company the commercial courts took the view that it was unconstitutional and thus ruled for the Croatia Bank's former shareholders (see paragraph 33 above). However, the Constitutional Court put an end to that practice in its decision of 8 July 2013 by quashing the commercial courts' judgments in those cases and strongly criticising the approach taken by those courts (see paragraph 34 above). It held that it had never decided on the conformity of the Government Decision with the Constitution or with primary legislation because the relevant abstract constitutional review proceedings had been discontinued. This meant that the Decision had to be presumed to be in conformity with the Constitution and that by calling its constitutionality into question commercial courts had exceeded their jurisdiction (*ibid.*).

72. The Court thus finds that the Government Decision of 23 September 1999 on the recovery and restructuring of Croatia Bank was never subject to judicial review of the scope required by Article 6 § 1 (see, *mutatis mutandis*, *Capital Bank AD*, cited above, § 108). Specifically, no judicial authority has ever reviewed the evidence on which the Government of Croatia based its finding that Croatia Bank had been in need of recovery or reviewed whether the other statutory requirements had been met, that is, whether the relevant law was correctly applied to the facts of the case.

73. In view of the foregoing (see paragraphs 62-72 above) and having regard to its case-law on the subject (see *Capital Bank AD*, cited above, §§ 98-116) the Court considers that the inability to effectively challenge the Government Decision before the courts was in breach of the applicant company's right of access to court.

74. There has accordingly been a breach of Article 6 § 1 on that account in the present case.

2. *Alleged violation of Article 1 of Protocol No. 1 to the Convention*

(a) **Whether there was an interference**

75. It was not disputed between the parties that the Government Decision of 23 September 1999 on the recovery and restructuring of Croatia Bank (see paragraph 8 above) and the resulting revocation and cancellation of shares belonging to the applicant company constituted an interference with the company's right to peaceful enjoyment of its possessions, and that Article 1 of Protocol No. 1 was therefore applicable. Having regard to its case-law on the subject (see, for example, *Cingilli Holding A.Ş. and Cingillioğlu v. Turkey*, nos. 31833/06 and 37538/06, § 49, 21 July 2015, and *Reisner v. Turkey*, no. 46815/09, § 47, 21 July 2015), and its findings above (see paragraphs 43-47), the Court sees no reason to hold otherwise.

76. As regards the issue of which of the three rules contained in Article 1 of Protocol No. 1 applies in the instant case, the Court observes that the Government Decision of 23 September 1999 was clearly taken as a measure to control the banking sector in the country. It is true that it involved a deprivation of property, but in the circumstances, the deprivation formed a constituent element of a scheme for controlling the banking industry. The measure in question therefore constituted control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 (see *Cingilli Holding A.Ş. and Cingillioğlu*, § 49, and *Reisner*, § 47, both cited above).

(b) **Whether the interference was lawful**

(i) *Submissions by the parties*

77. The Government submitted that the applicant company had been deprived of its possessions in accordance with the conditions provided for by law. In particular, they argued that the process of recovery of Croatia Bank had been carried out in accordance with the relevant provisions of the 1998 Banks Act and the 1994 Recovery and Restructuring of Banks Act (see paragraphs 25-26 above) and that the resulting interference with the applicant company's right to the peaceful enjoyment of its possessions had therefore been based in law. Furthermore, there was nothing to suggest that the relevant provisions of domestic law at the time had been unclear or unforeseeable in their application.

78. As regards the further requirement inherent in the principle of lawfulness and the rule of law in a democratic society that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, the Government referred to their arguments above (see paragraphs 40-41 and 61) that the applicant company had had such a remedy at its disposal but, instead of using it, had resorted to another, entirely misconceived remedy.

79. The applicant company did not submit any further arguments in its observations on the issue of lawfulness of the interference in addition to those already set out in its application to the Court, where it averred that the Government Decision of 23 September 1999 was contrary both to the Constitution and the relevant primary legislation, namely the Commercial Companies Act and the 1994 Recovery and Restructuring of Banks Act.

(ii) The Court's assessment

80. The Court notes that the Government Decision of 23 September 1999 had basis in domestic law as it was based on the relevant provisions of the 1994 Recovery and Restructuring of Banks Act (see paragraphs 9 and 26 above). The Court also considers that the legislation in question met the qualitative requirements of accessibility and foreseeability.

81. The Court does not find it necessary to address the applicant company's arguments that the Government Decision of 23 September 1999 was not in accordance with the relevant domestic law (see paragraph 79 above) because it considers that this interference in any event did not meet the requirement of lawfulness for the reasons set out below (see paragraphs 82-86).

82. It reiterates that in order for an interference to be lawful, it must be accompanied by sufficient procedural guarantees against arbitrariness including an opportunity to effectively challenge the measure in question (see *Capital Bank AD*, cited above, § 134; and *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 97, 25 October 2012). In particular, in the case of *Capital Bank AD* (ibid.) the Court held:

“The requirement of lawfulness, within the meaning of the Convention, presupposes, among other things, that domestic law must provide a measure of legal protection against arbitrary interferences by the public authorities with the rights safeguarded by the Convention. Furthermore, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights be, in certain cases, subject to some form of adversarial proceedings before an independent body competent to review the reasons for the measures and the relevant evidence ... It is true that Article 1 of Protocol No. 1 contains no explicit procedural requirements and the absence of judicial review does not amount, in itself, to a violation of that provision ... Nevertheless, it implies that any interference with the peaceful enjoyment of possessions must be accompanied by procedural guarantees affording to the individual or entity concerned a reasonable opportunity of presenting their case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable judicial and administrative procedures ...”

83. In this connection, the Court first notes that the fact that the Government Decision of 23 September 1999 on the recovery and restructuring of Croatia Bank constituted, under domestic law, subordinate

legislation (see paragraphs 8 and 11 above) meant, *inter alia*, that it could not be reviewed by any administrative authority.

84. The Court further refers to its findings above concerning the issue of access to court (see paragraphs 62-74) to the effect that in the present case no judicial authority has ever reviewed that Decision, which in essence had the character of individual legal act (see paragraph 68 above).

85. In these circumstances it must be concluded that the procedural guarantees afforded to the applicant company before the domestic authorities did not offer it an opportunity to challenge effectively the impugned measure and could not therefore satisfy the requirements of Article 1 of Protocol No. 1 either (see paragraph 82 above).

86. In the light of those findings, and having regard to its case-law on the matter (see, *mutatis mutandis*, *Capital Bank AD*, cited above, §§ 135-40), the Court concludes that the interference with the applicant company's possessions was not accompanied by sufficient procedural guarantees against arbitrariness and was thus not lawful within the meaning of Article 1 of Protocol No. 1.

87. This conclusion means that it is neither necessary nor, due to limited information, possible for the Court to ascertain whether the other requirements of that provision have been complied with. The Court thus refrains from expressing any opinion on the expediency of the Government Decision of 23 September 1999 to recover and restructure Croatia Bank or on the issue of whether that measure was in the general interest and, if so, whether a fair balance has been struck between the demands of the general interest of the community, and the protection of the applicant company's right to peaceful enjoyment of its possessions (see, *mutatis mutandis*, *Capital Bank AD*, cited above, § 139).

88. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention in the present case.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE EXCESSIVE LENGTH OF THE PROCEEDINGS

89. The applicant company further complained that it had taken more than ten years for the domestic courts to decide its civil action and that therefore the length of the proceedings in its case had been incompatible with the "reasonable time" requirement laid down in Article 6 § 1 of the Convention.

90. The Government contested that submission.

91. The Court notes that on 1 February 2017 notice of the applicant company's complaints concerning access to court, the reasoning of the Constitutional Court's decision (see paragraph 105 below), the length of the proceedings and peaceful enjoyment of possessions was given to the

Government. The President of the Section, acting as a single judge pursuant to Rule 54 § 3 of the Rules of Court, declared the company's length-of-proceedings complaint inadmissible for non-exhaustion of domestic remedies in so far as it concerned the period during which the proceedings at issue were pending before the commercial courts. That period lasted some five years at two levels of jurisdiction (see paragraphs 13-16 above).

92. It follows that the relevant period to be examined is the period during which the proceedings at issue were pending before the Constitutional Court, namely the period between 14 October 2008 (when the applicant company lodged its constitutional complaint – see paragraph 17 above) and 10 October 2013 (when the Constitutional Court's decision of 2 October 2013 was served on the applicant's representative – see paragraph 18 above). It thus lasted almost five years at one level of jurisdiction.

A. Admissibility

93. The Court notes that this complaint, to the extent that it concerns the relevant period (see paragraph 92 above), is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

94. The Government argued that length of the proceedings before the Constitutional Court of some five years had been justified. They pointed out that, according to the Court's case-law, the obligation to hear cases within a reasonable time, when applied to constitutional courts, could not be interpreted in the same way as for ordinary courts. The role of constitutional courts as guardians of the Constitution made it particularly necessary for those courts to sometimes take into account considerations other than the mere chronological order of cases, such as the nature of a case and its importance in political and social terms. In that regard, they referred to the Court's rulings in *Süßmann v. Germany*, 16 September 1996, §§ 55-56, *Reports of Judgments and Decisions* 1996-IV, and *Pitra v. Croatia*, no. 41075/02, § 22, 16 June 2005.

95. The Government emphasised that the applicant company's case had not been the only case before the Constitutional Court concerning the rights of former shareholders of Croatia Bank. In particular, in the period between 2005 and 2009 the Constitutional Court had received five constitutional complaints, two of which had been lodged by former shareholders against judgments of the lower courts dismissing their civil actions and three of

which had been lodged by the bank itself against judgments in favour of its former shareholders (see paragraph 34 above). The court had had to comprehensively address the legal issues raised by the cases and adopt a leading decision. It had also had to suspend the examination of the leading case in order to receive other similar constitutional complaints with a view to analysing all the remedies used by the shareholders and their different outcomes and thereby obtain a more comprehensive overview of the situation.

96. The Government also pointed to the particular factual and legal complexity of the cases generated by the recovery of Croatia Bank. They involved complex economic issues such as the bank's insolvency and its consequences for the country's banking and financial system, as well as complex legal issues involving the balancing of the interests of the State (and its citizens), the bank itself and the interests of the bank's shareholders. In addition, they had also carried specific weight in terms of constitutional law because the Constitutional Court had for the first time been required to clarify the *exceptio illegalis* rule and the powers and jurisdiction of the lower courts in its application (see paragraphs 33-34 above).

97. The Government submitted that, in view of the above, and the fact that the Constitutional Court had delivered its decision in the applicant company's case (see paragraph 18 above) within three months of adopting the decision in the leading case (see paragraph 34 above), the proceedings before that court had not exceeded a reasonable time.

98. The applicant company did not comment on this issue in its observations.

2. The Court's assessment

99. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Süßmann*, cited above, § 48).

100. In a number of cases the Court had an opportunity to examine complaints concerning length of proceedings before constitutional courts (see, for example, *Süßmann*, cited above, §§ 55-56; *Tričković v. Slovenia*, no. 39914/98, § 63, 12 June 2001; *Voggenreiter v. Germany*, no. 47169/99, §§ 46-53, ECHR 2004-I (extracts); *Von Maltzan and Others v. Germany* (dec.) [GC], nos. 71916/01 and 2 others, §§ 125-37, ECHR 2005-V; *Oršuš and Others v. Croatia* [GC], no. 15766/03, § 109, ECHR 2010; and *Pittra*, cited above, §§ 14-25). In only one case (see *Von Maltzan and Others*, cited above, §§ 125-137) in which the proceedings complained of lasted longer (nearly five years and five months) than those in the present case (almost five years, see paragraph 92 above) the Court found that their length had not

been excessive as it had been justified by exceptional circumstances (in that case the process of German reunification).

101. The Court takes due note of the arguments raised by the Government (see paragraphs 94-97 above). It however considers that the specificity of the Constitutional Court's role and status and the complexity of the case cannot sufficiently explain the delay in the proceedings complained of. In particular, it cannot be said that the complexity of the issues the Constitutional Court had to examine in the present case (see paragraph 96 above) was comparable to those which the German Federal Constitutional Court had to examine in the case of *Von Maltzan and Others* (cited above, § 131).

102. Although it might have been appropriate to obtain a comprehensive view of the matter and address legal issues arising in similar cases, the Court sees no reason why, after waiting for four years (2005-2009, see paragraphs 95 above) to receive a sufficient number of such cases and identify a leading one, it took another four years (2009-2013, see paragraph 34 above) for the Constitutional Court to process those cases. In particular, the Government did not argue that a public hearing had been held, that there had been a need to obtain expert reports or observations from various authorities or third parties, or that some other procedural steps had been taken, nor did they argue that several deliberations had been held.

103. Having regard to its case-law on the subject (see paragraph 100 above), the Court therefore considers that in the instant case the length of the proceedings before the Constitutional Court was excessive and failed to meet the "reasonable time" requirement.

104. There has accordingly been a breach of Article 6 § 1 on account of the excessive length of the proceedings.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF INADEQUATE REASONING

105. Lastly, the applicant company complained, also under Article 6 § 1 of the Convention, that the Constitutional Court's decision in its case had not been adequately reasoned because that court had examined the company's constitutional complaint in the light of Article 29 § 1 of the Constitution and not in the light of the Articles on which the company had actually relied (see paragraphs 18-19 above).

106. Having regard to the facts of the case, the submissions of the parties and its findings under Article 6 § 1 of the Convention concerning access to court and the length of the proceedings and those under Article 1 of Protocol No. 1 thereto (see paragraphs 62-74, 75-76, 80-88 and 99-104 above), the Court considers that it has examined the main legal questions raised in the present application and that it is not necessary to examine the admissibility and merits of this remaining complaint (see, for example,

Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania [GC], no. 47848/08, § 156, ECHR 2014, and *Kamil Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

107. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

1. Submissions by the parties

108. The applicant company claimed 85,692.39 euros (EUR) in respect of pecuniary damage: EUR 27,335.81 corresponding to the value of its shares and EUR 58,356.58 for dividends not received. The applicant company made no claim in respect of non-pecuniary damage.

109. The Government contested that claim, arguing that the applicant company had not suffered any damage on account of the cancellation of its shares, and had furnished no evidence as to the existence of the damage or as to quantum.

2. The Court's assessment

110. The Court reiterates that in the present case it had found violations of Article 6 § 1 of the Convention on account of the lack of access to court and on account of the excessive length of proceedings (see paragraphs 62-74 and 99-104 above), as well as a violation of Article 1 of Protocol No. 1 on account of the breach of the State's procedural obligations under that Article (see paragraphs 75-76 and 80-88 above). While the applicant company's shares were indeed revoked and cancelled by the Government Decision of 23 September 1999 on the recovery and restructuring of Croatia Bank (see paragraph 8 above), the Court cannot speculate as to what the eventual result might have been if the applicant company had been able to effectively challenge that Decision in proceedings that had been in compliance with the requirements of Article 6 § 1 of the Convention and the State's procedural obligations under Article 1 of Protocol No. 1 thereto (see, *mutatis mutandis*, *Capital Bank AD*, cited above, § 144).

111. In these circumstances, having regard to the possibility under the domestic law for the applicant company to request the reopening of the proceedings at issue (see paragraph 31 above), and given that those proceedings concern the remedy the Government in earlier similar cases

claimed to have been effective (see paragraph 49-53 above), the Court rejects this claim.

B. Costs and expenses

112. The applicant company also claimed EUR 9,850.00 for “representation costs for the period 12 September 2003 to 2013”.

113. The Government contested this claim, arguing that it was unsubstantiated and had been formulated in such a way that it was impossible to determine whether it related to the costs and expenses incurred in domestic proceedings or those before the Court. Moreover, the applicant company had not provided itemised particulars of its claim or any supporting documents.

114. The Court observes that the applicant company failed to comply with the requirements set out in Rule 60 § 2 of the Rules of Court in that it did not submit itemised particulars of its claim for costs and expenses or any relevant supporting documents, even though it was invited to do so. In these circumstances, the Court makes no award under this head (Rule 60 § 3).

C. Default interest

115. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. *Declares*, by a majority, the application admissible;
2. *Holds*, by five votes to two, that there has been a violation of Article 6 § 1 of the Convention on account of the lack of access to court;
3. *Holds*, by five votes to two, that there has been a violation of Article 1 of Protocol No. 1 to the Convention;
4. *Holds*, by five votes to two, that there has been a violation of Article 6 § 1 of the Convention on account of the excessive length of the proceedings;
5. *Holds*, unanimously, that it is not necessary to examine the admissibility and merits of the complaint under Article 6 § 1 of the Convention concerning inadequate reasoning;

6. *Dismisses*, unanimously, the applicant company's claim for just satisfaction.

Renata Degener
Deputy Registrar

Krzysztof Wojtyczek
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) Concurring opinion of Judge Turković;
- (b) Joint concurring opinion of Judges Pejchal and Wojtyczek;
- (c) Joint dissenting opinion of Judges Koskelo and Eicke.

K.W.O.
R.D.

CONCURRING OPINION OF JUDGE TURKOVIĆ

1. Whilst I agree with the Court's conclusion I would like, however, to make several remarks relating to the Constitutional Court's decision no. U-III-3471/2003 of 16 March 2006, published in the Official Gazette on 19 April 2006 (see paragraph 36 of the judgment) in which that court stated that the Government Decision of 23 September 1999 was not in breach of Article 48 § 1 of the Croatian Constitution.

2. I would first point out that the Government in their observations did not in any way rely on the Constitutional Court's decision in question (see paragraphs 39-41 of the judgment). Moreover, that decision was adopted in the case of Miljenko Kovač, who then, within six month of its adoption, i.e. on 7 September 2006, lodged his application with the Court (see *Miljenko Kovač v. Croatia* (dec.), no. 39739/06, 15 January 2009). In that case the Government claimed that civil proceedings before the commercial courts were the right remedy to be used (see paragraphs 49 and 51 of the judgment).

3. I will explain why the said decision of 16 March 2006 is indeed of no relevance in the present case.

4. Under Croatian law, subordinate legislation can be contested only on the grounds of its non-conformity with primary legislation and/or the Constitution. Such a challenge can be mounted either:

- directly in abstract-review proceedings, in which the Constitutional Court can invalidate the contested subordinate legislation if it finds that it is not in conformity with the primary legislation and/or the Constitution: or
- indirectly before any other court in civil, criminal or judicial-review (administrative-dispute) proceedings, in which the courts can disapply the impugned subordinate legislation (which they would otherwise have to apply), if they find that it is not in conformity with the primary legislation and/or the Constitution (the so-called *exceptio illegalis* rule).

5. The Constitutional Court's decision no. U-III-3471/2003 of 16 March 2006 was adopted in proceedings initiated by an individual constitutional complaint in which the complainant contested judgments of ordinary courts.

6. In proceedings upon an individual constitutional complaint, the Constitutional Court can only review the contested individual legal acts (judgments or decisions) for their compliance with the Constitution. It cannot examine whether the primary legislation applied was in conformity with the Constitution or whether the subordinate legislation applied was in conformity with primary legislation or with the Constitution. Its review is confined to examining whether the way in which the courts interpreted and applied the relevant legislation is in compliance with the Constitution.

7. If the Constitutional Court in the proceedings upon an individual constitutional complaint suspects that the primary legislation applied is

incompatible with the Constitution, or that the subordinate legislation applied is incompatible with primary legislation or with the Constitution, it can institute abstract-review proceedings of its own motion.

8. The Constitutional Court had an opportunity to examine the Government Decision of 23 September 1999 in abstract-review proceedings (see paragraphs 9-11 of the judgment). In its decision of 30 January 2003 that court, however, decided to discontinue those proceedings because the primary legislation on which the decision was based had in the meantime been repealed (see paragraph 11 of the judgment).

9. In these circumstances, the Constitutional Court's statement in its decision of 16 March 2006 (see paragraph 36 of the judgment) that the Government Decision was not in breach of Article 48 § 1 of the Constitution can only be seen as an *obiter dictum* which merely highlighted the legal consequences for the case in question of its earlier decision of 30 January 2003 and reflected the scope of its jurisdiction in the type of the proceedings at issue. Specifically, in the proceedings concerning an individual constitutional complaint, the Constitutional Court could not in any event examine the conformity of the Government Decision with the Constitution or with the relevant primary legislation, let alone do so after it had, in its earlier decision of 30 January 2003, discontinued the relevant abstract-review proceedings.

10. The following facts further suggest that the above statement was indeed an *obiter dictum* and thus could not prejudice the outcome of the applicant company's case:

- the Constitutional Court did not even mention it in its decisions in the leading cases concerning the application of the *exceptio illegalis* rule (see paragraph 34 of the judgment) to which decisions that court referred when dismissing the applicant company's constitutional complaint (see paragraphs 18-19 of the judgment); and

- in its judgment of 18 June 2008, adopted in the applicant company's case, the High Commercial Court, even though it accepted the said statement, expressly stated that it did not consider itself bound by it (see paragraph 16 of the judgment).

11. In view of the above, after the Constitutional Court's decision of 30 January 2003 the only possible way to challenge the Government Decision was to do so indirectly, namely, in the civil proceedings before commercial or civil courts, relying on the *exceptio illegalis* rule.

12. However, as explained in the judgment (see paragraph 56), the fact that this remedy used by the applicant company lacked any prospects of success and was therefore ineffective was not established until 24 July 2013 when the Constitutional Court's decision of 8 July 2013, adopted in a leading case, was published in the Official Gazette. That was some two months before the same court, on 2 October 2013, adopted the decision in the applicant company's case.

13. It follows that, as the Court has correctly concluded in paragraph 59 of the judgment, the applicant company, by lodging its application with the Court on 20 December 2013, complied with the six-month rule regardless of whether the relevant starting date was 24 July 2013, when the Constitutional Court's decision of 8 July 2013 in a leading case was published in the Official Gazette (see paragraphs 34 and 55 of the judgment), or 10 October 2013, when the same court served its decision of 2 October 2013 in the applicant company's case on the company's representative.

14. Furthermore, I subscribe entirely to the reasoning of my learned colleagues Judges Pejchal and Wojtyczek relating to the exhaustion of remedies and the six-month rule as expressed in paragraphs 4 and 5 of their concurring opinion.

JOINT CONCURRING OPINION OF JUDGES WOJTYCZEK AND PEJCHAL

1. Economic liberty is a fundamental human right which is an essential element of the right to protection of possessions enshrined in Article 1 of Protocol No. 1 (see the dissenting opinion of Judge Wojtyczek appended to the judgment in the case of *Könyv-Tár Kft and Others v. Hungary*, no. 21623/13, 16 October 2018; compare also the view expressed by the Court in the judgment in the case of *Doğan and Others v. Turkey*, nos. 8803/02 and 14 others, § 139 *in fine*, ECHR 2004-VI (extracts): “all these economic resources and the revenue that the applicants derived from them may qualify as ‘possessions’ for the purposes of Article 1”).

Economic liberty is also protected by EU law (Article 16 of the Charter of Fundamental Rights of the European Union) and by most of the constitutions of the High Contracting Parties. Constitutional provisions protecting economic liberty exist in particular in Albania (Article 11), Andorra (Article 28), Armenia (Article 59), Austria (Article 6 of 1867 *Staatsgrundgesetz*), Azerbaijan (Article 59), Bulgaria (Article 19), Croatia (Article 49), Cyprus (Article 25), the Czech Republic (Article 26 of the Charter of Fundamental Rights and Freedoms), Denmark (Article 74), Estonia (§ 31), Finland (Article 18), Georgia (Article 6), Hungary (Article XII), Ireland (Article 45 3), Italy (Article 41), Liechtenstein (Article 36), Lithuania (Article 46), Luxembourg (Article II, 11 sub. 6), Malta (Article 18-21), Montenegro (Article 59), Poland (Article 20), Portugal (Article 61), Romania (Article 45), Russia (Article 34), San Marino (Article 10), Slovakia (Article 35(1)), Slovenia (Article 74), Spain (Article 38), Sweden (Article 17), Switzerland (Article 27), Turkey (Article 49), and Ukraine (Article 42). In some States, constitutional protection of business freedom stems from the constitutional court’s case-law. This is the case of, *inter alia*, France (decision of the Constitutional Council, no. 81-132 DC, 16 January 1982) and Germany (judgment of the Federal Constitutional Court, 8 February 1972, *Steinmetz Wettbewerb*, BVerfGE 32, 31; joint reading of Articles 2, 12 and 14 of the Basic Law). In all High Contracting Parties economic liberty is protected by ordinary legislation.

This short survey shows the European consensus that economic liberty should be effectively protected as an essential element of social order. The market economy, based upon economic liberty and private entrepreneurship, is the only economic system compatible with the Convention.

The potential of Article 1 of Protocol No. 1 for protecting economic liberty has long been left under-exploited both by potential applicants and by the Court. The instant case constitutes an important step towards developing a more efficient protection of economic liberty and towards transforming the Convention into a business-friendly international

instrument, serving prosperity as one of the pre-conditions for the effective exercise of all other human rights and in particular social rights. In our view, the Court should, however, have gone one step further and should have explicitly recognised economic liberty as a fundamental human right protected by Article 1 of Protocol No. 1. To do this, it is not necessary to invoke the so-called “living instrument” argument, it suffices to rely upon the letter of this provision.

2. The Preamble to the Convention refers to the ideal of “effective political democracy” and Article 3 of Protocol No. 1 guarantees the right to vote in elections to the legislative bodies and to determine – through elections – legislative policies. In an effective political democracy the citizens’ right to determine policies encompasses economic and social policies. The people have, in particular, the right to define the precise scope of the market economy’s social dimension.

The Court’s case-law takes into account the rights enshrined in Article 3 of Protocol No. 1, without mentioning this provision, when it stresses the power of the State to regulate freely economic and social matters. Thus, for instance, in its judgment in the case of *James and Others v. the United Kingdom* (21 February 1986, § 46, Series A no. 98) the Court expressed the following view:

“The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment be manifestly without reasonable foundation.”

Indeed, in economic and social matters as well as on societal issues the Court should exercise particular caution and show deference to the choices of the people. However, the regulative freedom left to national parliaments is not unlimited and any interference with possessions in general and economic liberty in particular should comply with the principles stemming from the Convention and, *inter alia*, with the principles of legality (see, for instance, *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 95, 25 October 2012) and proportionality (see, for instance, *Gáll v. Hungary*, no. 49570/11, § 41, 25 June 2013: “there must be a reasonable relationship of proportionality between the means employed and the aims pursued”). The Court, while exercising judicial self-restraint, cannot refrain from ensuring effective protection of fundamental freedoms protected by Article 1 of Protocol No. 1 against excessive restrictions. The Convention mechanism is aimed at striking a proper balance between the rights of citizens to political participation and other rights protected by the Convention and the Protocols thereto (see the dissenting opinion of Judge Wojtyczek appended to the judgment in the case of *Firth and Others v. the United Kingdom*, nos. 47784/09 and 9 others, 12 August 2014). In our view, in order to achieve this balance it is necessary to heighten the existing scrutiny standards under Article 1 of Protocol No. 1 and revise the

“manifestly without reasonable foundation” test, which may amount to an almost irrebuttable presumption of compatibility with the Convention of any interference with possessions.

3. At the same time, no one can question that nowadays banks perform functions which are essential for economic activity and that the States bear responsibility for enacting a legal framework ensuring the development and stability of the private banking sector and a fair balance between the different conflicting private and public interests at stake. Under Article 1 of Protocol No. 1, as interpreted in the present opinion, the weight of the public interests may justify – in a market economy – far-reaching State intervention in the functioning of banks, if the circumstances so require. Moreover, entrepreneurs have to bear in mind that failure on the market may mean that they will definitely lose their assets.

4. The first issue which arises in the present case is the question of exhaustion of remedies and compliance with the six-month time-limit for lodging an application with the Court. We find it necessary to reiterate the following views expressed by the Court. In *Lopes de Sousa Fernandes v. Portugal* ([GC], no. 56080/13, § 134, 19 December 2017), it stated:

“At the outset, the Court stresses that determining whether a domestic procedure constitutes an effective remedy within the meaning of Article 35 § 1, which an applicant must exhaust and which should therefore be taken into account for the purposes of the six-month time-limit, depends on a number of factors, notably the applicant’s complaint, the scope of the obligations of the State under that particular Convention provision, the available remedies in the respondent State and the specific circumstances of the case.”

In *Vučković and Others v. Serbia* (nos. 17153/11 and 29 others, §§ 74-76, 25 March 2014), it explained:

“To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004, and *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II). However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress (see *Akdivar and Others*, cited above, § 71, and *Scoppola v. Italy* (no. 2) [GC], no. 10249/03, § 70, 17 September 2009). ... The Court has, however, also frequently underlined the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism (see *Ringeisen v. Austria*, 16 July 1971, § 89, Series A no. 13, and *Akdivar and Others*, cited above, § 69) ...”

Moreover, the “effectiveness” of a remedy for the purposes of Article 13 does not depend on the certainty of a favourable outcome for the applicant (*Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI and cases cited therein). In its judgment in the case of *Červenka v. the Czech Republic* (no. 62507/12, § 121, 13 October 2016), the Court expressed the following view concerning the question of the effectiveness of a remedy:

“The Court notes that it was not clear from the outset (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 157, ECHR 2009, with further references) that the constitutional appeals would be ineffective in the applicant’s case. Taking also into account that in [case of] doubt about its effectiveness, the remedy in question should be tried, the Court cannot blame the applicant for having tried to exhaust it.”

In *El-Masri v. the former Yugoslav Republic of Macedonia* ([GC], no. 39630/09, § 141, ECHR 2012), the Court confirmed the established approach in the following terms:

“The Court considers that it could not have been reasonably presumed that, when it was introduced in October 2008, a criminal complaint was a clearly ineffective remedy. There were merely some doubts about its effectiveness, and the applicant was required under Article 35 § 1 of the Convention to attempt it before submitting his application to the Court. It would be unreasonable to expect the applicant to bring his complaints to the Court before his position, in connection with the matter, had been finally settled at domestic level in line with the principle of subsidiarity, according to which it is best for the facts of cases to be investigated and issues to be resolved in so far as possible at the domestic level.”

If the ineffectiveness of a remedy is not clearly established, that remedy should be used for the purposes of exhaustion.

5. For an understanding of the instant case, it is important to highlight that, at the material time, there was in the domestic legal system a high level of uncertainty concerning the effectiveness of different remedies. The applicants chose a legal avenue which could not be seen from the outset, at the material time, as devoid of any prospects of success. The question whether the constitutional complaint was an effective remedy became clear only with decisions nos. U-III-736/2005 and U-III/1706/2005, adopted on 8 July 2013 and published in the Official Gazette on 24 and 31 July 2013 respectively (see paragraph 34).

We cannot agree with the view that with decision no. U-III-3471/2003 of 16 March 2006 (presented in paragraph 36) it became clear that a constitutional complaint in the instant case would be ineffective. Firstly, this last judgment was issued in the context of a lawsuit founded upon a different legal basis. Applicants should not be required to predict the prospects of success of a remedy on the basis of judgments and decisions concerning claims that relied upon different legal provisions, even if certain constitutional issues may be common to all such cases. Secondly, in a legal system which does not adhere to the principle of *stare decisis* or recognise the binding force of precedent, there is always a certain level of uncertainty as to whether a first judgment or decision concerning a legal issue will be followed. In particular, a court sitting in a different composition may interpret the relevant legal provisions differently. Applicants should be encouraged to plead on the basis of the Convention in order to seek to trigger changes in the domestic case-law, especially in States where the Convention is directly applicable. One has to note in this context that, in

general, domestic courts in Europe develop attitudes that are favourable to the effective enforcement of the Convention rights and the Court should take this into account when assessing the question whether the applicants should have exhausted specific remedies (compare the partly dissenting opinion of Judge Wojtyczek appended to the judgment in the case of *Camelia Bogdan v. Romania*, no. 36889/18, 20 October 2020 (not yet final)). Thirdly, outcomes of cases may depend upon the quality of the pleadings. A party convincingly pleading a new case may obtain a different outcome. Fourthly, what matters here is not whether the Constitutional Court would have examined the gist of the applicant's case but whether the possible quashing of the final judgment by this domestic court could result in the examination of the gist of the grievance by any domestic court.

In such circumstances, it would be difficult to blame the applicants for not lodging their application earlier. Had it been lodged before July 2013, pending the examination of the constitutional complaint, it would have been declared premature. At the same time, respondent States should not take advantage of the uncertainties concerning domestic remedies to get applications rejected as being lodged outside the six-month time-limit.

6. In the instant case, the Chamber decided not to address the issue whether the nationalisation as such of the bank had been compatible with Article 1 of Protocol No. 1 (paragraph 87). We would have preferred this issue to be explicitly addressed. Under Article 1 of Protocol No. 1, as interpreted in the Court's case-law, if the domestic authorities interfere with the right to protection of possessions, they should observe in particular the principle of proportionality (as already mentioned) and should justify the interference. Under both the Convention and domestic law (see paragraph 25), nationalisation should be seen as a measure of last resort (compare also the standards set forth subsequently in 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 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, in particular recital 13 and Article 32; it must be stressed that at the material time Croatia was not a member of the European Union).

The domestic authorities made a number of factual findings concerning the bank's financial situation at the time of nationalisation. There is no doubt that its financial situation deteriorated severely and that it was facing serious difficulties. It appears that the conditions set forth in the domestic legislation for recovery and restructuring proceedings were fulfilled. However, the question whether the bank should have been nationalised is a different matter. It is necessary to note that several crucial issues connected with this question have not been addressed in the domestic proceedings. In

particular, the authorities did not examine whether any means less restrictive than nationalisation were available. They did not assess with precision the real level of the risk of insolvency. They did not consider the possible evolution of the bank's condition, taking into account its real capacity to recover uncertain debts and to develop other profit-making activities. Without taking a firm stance on the question whether the impugned interference was objectively justified, one has to conclude that the reasons adduced by domestic authorities to justify the bank's nationalisation are not sufficient. The Court should have found a violation of Article 1 of Protocol No. 1 also for this reason.

When assessing the objective necessity of the interference, it is important to note that all four expert opinions commissioned by the Croatian Constitutional Court, for the purpose of the proceedings before it, show that the interference was disproportionate (see paragraph 10). The views and arguments presented by the national experts were not rebutted by any argument or evidence put forward by the Government before this Court. There are therefore strong indications that the impugned measures were not objectively justified. Under the Court's case law, if the authorities do not justify an interference with a Convention right, the Court may find this interference disproportionate (see, for instance, *Association Rhino and Others v. Switzerland*, no. 48848/07, § 65, 11 October 2011; *Biblical Centre of the Chuvash Republic v. Russia*, no. 33203/08, § 58, 12 June 2014; *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, § 193-199, 23 February 2016; *Biržietis v. Lithuania*, no. 49304/09, § 58, 14 June 2016; *Antonov and Others v. the Republic of Moldova and Russia*, no. 315/10 1153/10 1158/10, § 90 2 July 2019; and *P.T. v. the Republic of Moldova*, no. 1122/12, § 29-33, 26 May 2020). However, one has to recognise that, upon the basis of the evidence presented to the Court in the instant case, it is impossible to establish all the relevant factual elements and thus to draw definitive conclusions in this regard.

JOINT DISSENTING OPINION OF JUDGES KOSKELO AND EICKE

1. We regret that we are unable to agree with the conclusions reached by the majority in this case. For the reasons explained below, we are firmly of the opinion that the applicant company's complaint is inadmissible under Article 35 § 1 on the grounds that it has failed to exhaust domestic remedies and/or that the complaint was lodged out of time. As the majority's conclusions on the merits of this complaint, both under Article 6 § 1 and under Article 1 of Protocol No. 1, are closely linked to their approach on the issue of admissibility, we have also voted against the findings of a violation of Article 6 § 1 and Article 1 of Protocol No. 1 on the merits.

2. Moreover, we consider that the position taken by the majority raises some serious concerns because of its potentially wider implications, especially in respect of measures (frequently historic) aimed at the restructuring of financial institutions or other companies, particularly public ones, in the event of their insolvency or similar circumstances of crisis.

Whether the applicant company had victim status

3. When considering the question of who may qualify as a "victim" for the purposes of Article 34 of the Convention, in the specific context of matters relating to companies, and thus who is entitled to lodge a complaint before it, the Court has consistently acknowledged the need to maintain a firm distinction between the rights of the company (as a "legal person" in its own right) and those of its shareholders. Only the company, endowed with legal personality and acting through its competent governing bodies, can take action in respect of corporate matters (see *Olczak v. Poland* (dec.), no. 30417/96, § 59, ECHR 2002-X, and *Albert and Others v. Hungary* [GC], no. 5294/14, §§ 126, 140-41, 7 July 2020). Accordingly, in respect of measures *directly affecting the company*, victim status before the Court can only be claimed by the *company itself*. It is only in certain very exceptional situations that the Court has accepted that shareholders may be entitled to bring a complaint *on behalf of the company* (see *Albert and Others*, cited above, §§ 139, 142-45). By contrast, the possibility for a shareholder to submit complaints *in his or her own right* is limited to circumstances where his or her rights as shareholder were directly affected as such, e.g., where the measures complained of were *directly aimed at the applicant's rights as shareholder* and where, therefore, the applicant's own rights as protected under Article 1 of Protocol No. 1 were directly affected (see *Olczak*, cited above, § 58, and *Albert and Others*, cited above, §§ 126-27).

4. It is worth noting that, in the context of measures necessitated by insolvency or a similar financial crisis affecting a company, a specific situation frequently arises. After all, such measures primarily concern, and

are aimed at, the company itself and not its shareholders. The purpose of such measures and procedures is to organise, as a matter of law, either the liquidation of the company to satisfy its creditors, or its reorganisation to enable it to overcome the financial difficulties and to resume its operations as a “going concern”. In such a situation, shareholders will, inevitably (albeit indirectly), be affected by such measures because, applying the most fundamental features of company law, the losses of share capital incurred must ultimately be attributed to the holders of the shares; as the lowest ranking stakeholders they will have to suffer the inevitable consequences of the company’s financial failure, thus incurring the risk inherent in their investment.

5. In this context, the assessment of victim status calls for careful reflection. When a company is liquidated and wound up, its dissolution automatically entails the extinction of its shares and shareholdings. The measure is not directly aimed at the shareholders but its effect on them is a legal consequence of the measure taken in respect of the company as the debtor entity. While the company must remain entitled to challenge and complain of the opening and outcome of such proceedings, it would not be compatible with the economic and legal fundamentals of the situation also to treat the shareholders as having victim status, allowing them to bring complaints before the Court in their own right regarding the extinction of their shares as the inevitable result of the dissolution of the company itself; the only exception being where (unusually) they can lay claim to a residual value remaining due for distribution to them as shareholders.

6. The situation is different where the resolution takes the form of a restructuring, whereby the extinction of shares and shareholder rights is not an automatic consequence of the company being dissolved, but a measure adopted as a necessary element of the capital restructuring of the company. The opening of a procedure for restructuring, of course, remains a measure which concerns, and is aimed at, the company and therefore can only be subject to challenge by the company itself, not the shareholders. However, it is justified to treat the shareholders as having victim status to the extent that the resolution involves aspects (and only in respect of those aspects) which directly concern and affect their rights as shareholders, albeit that they are part of a package of measures aimed at the reorganisation of the financial situation and the capital structure of the company.

7. The present case falls into this latter category. After all, paragraph VII of the Government Decision of 23 September 1999 (see paragraph 8), concerning the restructuring and recapitalisation of the bank, expressly provides that “[o]n the day of the publication of this Decision all existing shares of the Bank shall be revoked and cancelled”; a decision which clearly and directly affected – even if the overall measure was not primarily aimed at – the rights of the shareholders. As the judgment makes clear, in paragraph 37, it was this aspect of the Government Decision and the fact

that “it had ... deprived [the applicant company] of its shares without good reason or compensation” which formed the basis of its complaint before the Court. As a consequence, we agree that in the particular circumstances of this case the applicant company has victim status under Article 34 of the Convention and the Court is, therefore, competent *ratione personae* to receive and consider the complaint before it.

8. It goes without saying that this conclusion regarding *locus standi* in no way detracts from the substantive principle that losses of share capital must be attributed to the holders of the shares. The protection of rights arising under the Convention would not justify lending support to the moral hazard that would otherwise arise. Losses should land where they rightly belong, and the Convention should not stand in the way of that happening.

Exhaustion of domestic remedies and compliance with the six-month rule

9. We would like to begin this part with the following observations regarding the context of the present complaint.

10. The applicant company’s grievance arises from the fact that by the Government Decision of 23 September 1999 concerning the recovery and restructuring of Croatia Bank, all the shares held by the bank’s shareholders were “revoked and cancelled” (see paragraph 8 of the judgment). The specific features of the present case are illustrated by the fact that, as the majority note in paragraph 48 of the judgment, the key argument relied on by the applicant company is that the “bank had been in good standing and that its recovery had thus been unnecessary”. Apparently, the applicant company, like some of the other investors concerned, did not believe that there were any actual losses of capital which had to be covered, and which fell to be absorbed by them as shareholders.

11. It is obvious as a matter of principle that such an allegation, contesting the bank’s financial situation and thus the fundamental factual basis for the measures taken for its restructuring, is one which is primarily for the bank’s competent organs to raise on behalf of the institution as a whole. Those organs are bound by the duty to act in the best interests of the bank, and thus in the collective interest of its shareholders, which would normally include a duty to oppose and challenge any unlawful and unjustified action taken against the bank. In the event of a failure of the competent organs to act, the shareholders would have to exercise remedies against the members of those organs.

12. In this case, the bank’s organs took no action to challenge the Decision of the Croatian National Bank of 23 February 1999 concerning the appointment of a temporary administrator (see paragraph 6), or the Government Decision of 23 September concerning the recovery and restructuring measures. Even if the decision of 23 February 1999 had entailed the transfer of the powers of the bank’s governing bodies to the

administrator, normally such an act should not be capable of preventing the bank's organs from taking judicial action to challenge the lawfulness of the measure. However, if indeed it was the case that the bank's competent organs were also stripped of any right to take action against the measures imposed by the Decision of 23 February 1999 and/or the Decision of 23 September 1999, the issue could have arisen as to whether and in what manner the shareholders might have been able to step in to take action in lieu of the bank's organs to defend its rights and interests. It is clear from the judgment (paragraphs 9-12) that some shareholders (other than the applicant company) did indeed bring proceedings to challenge the lawfulness and constitutionality of the Government Decision of 23 September 1999 before the Constitutional Court, and that their petition was not found to have been inadmissible for lack of *locus standi*. Those proceedings were discontinued for other reasons.

13. In any event, what is crucial to note is that, as the applicant company itself asserts (see paragraph 37), the extinction of its shares, together with those of all the other shareholders, was the direct result of the Government Decision of 23 September 1999. Therefore, any remedy capable of being effective for the purposes of Article 35 § 1 (as well as, on the substance, Articles 6 § 1 and/or Article 1 of Protocol No. 1) would have had to exist against that decision, primarily by an action both (a) against the decision-maker responsible for the Decision in question (i.e. the Government of Croatia) and (b) directed at the annulment of that decision in whole or in part and/or an action for damages against the State for having imposed an allegedly unlawful or unconstitutional measure. If such a remedy was available but has not been exercised, the problem arises that the applicant will have failed to exhaust domestic remedies. If, on the other hand, no such remedy was available, there will be a problem of failure to comply with the six-month rule, which the Court is required to apply even in the absence of an objection raised by the respondent Government.

14. In this context, we would recall the key principles of the Court's established case-law on these points. The requirements contained in Article 35 § 1 as to the exhaustion of domestic remedies and the six-month period are closely interrelated. Normally, the six-month period runs from the date of the final decision in the process of the exhaustion of domestic remedies. However, in application of this provision the Court will only have regard to domestic remedies which are normal and effective. Thus, an applicant cannot extend the strict six-month time-limit imposed under the Convention by seeking to make inappropriate or misconceived applications which are unable to offer effective redress for the complaint in issue under the Convention. It follows that if an applicant has recourse to a remedy which is doomed to fail from the outset, the decision on that remedy cannot be taken into account for the calculation of the six-month period (see, among many other authorities, *Lekić v. Slovenia* [GC], no. 36480/07, § 112, 11 December

2018). Furthermore, where no effective remedy is available at the domestic level, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect or prejudice on the applicant (see, among many other authorities, *Jeronovičs v. Latvia*, no. 547/02, § 75, 1 December 2009).

15. In the present case, however, the applicant company did not, initially, seek to bring an action against the relevant decision-maker. On the contrary, the first action it brought was an action before the commercial courts against the bank and the DAB (the State Agency for Deposit Insurance and Bank Resolution), respectively the subject of the Decision of 23 September 1999 and the agency directed by that decision to fund the bank's recapitalisation and to become the holder of the new shares that were to be issued by virtue of that decision. It appears that, in this action, the applicant company sought (a) a declaratory judgment to be issued against the bank "confirming" that the applicant company remained the holder of the portion of shares in the bank that had belonged to it before the Decision of 23 September 1999; (b) an order for the DAB to "transfer" the corresponding number of shares from its portfolio to the applicant company; and (c) an order for the bank to record the applicant company as holder of those shares (see paragraph 13 of the judgment). In other words, what the applicant company attempted was to obtain a judgment by which the bank and the DAB would have been required to "undo" the effects of the Decision of 23 September 1999, which itself remained in force and which the commercial courts had no jurisdiction to quash.

16. In our view, it must have been clear from the outset that having recourse to such a civil action was doomed to fail. Firstly, the shares had been extinguished by the Government's Decision of 23 September 1999, which was not annulled at any stage, nor otherwise found to have been unlawful or unconstitutional, and thus continued to produce its legal effects. Secondly, it would have been incompatible with the fundamental principles pertaining to public companies for the bank to "restore" the shares extinguished by the above Decision. A company cannot issue new shares unless it obtains a corresponding cash payment toward its share capital. Otherwise, the result would be either a fictitious increase of the nominal capital or the dilution of the value of all existing shares. Nor could it be envisaged that the civil/commercial courts would or could order the "transfer" of shares from one shareholder, the DBA, which, by virtue of a measure which remains legally valid, had obtained title to those shares, for the benefit of a person (the applicant company) whose shareholdings had been extinguished through that very same measure. In our view, the attempted remedy was not and could not have been effective. Its anomaly is so blatant that, even making allowance for the fact that we are concerned here with a legal system that is not our own, we cannot see any reasonable excuse for the postponement of the complaint before this Court beyond the

six months provided for in Article 35 § 1 by reference to the pursuit of such proceedings.

17. Furthermore, we note that by a decision taken on 16 March 2006 and published in the Official Gazette on 19 April 2006, the Constitutional Court had – in the context of proceedings brought by another former shareholder of the bank – confirmed that the Decision of 23 September 1999, by which all the old shares had been revoked, had fallen within the powers set out in the applicable statute and had not been in violation of the relevant constitutional provisions (see paragraph 36 of the judgment). As stated above, we consider that the originally attempted remedy was clearly futile from the outset. However and in any event, it must have become clear at the very latest through the publication of this decision by the Constitutional Court that the applicant company could not entertain any expectation either that (a) the High Commercial Court, in the context of the proceedings on appeal (see paragraph 16 of the judgment), could revisit the question of the lawfulness or constitutionality of the Decision of 23 September 1999; or that (b) its own constitutional complaint initiated on 14 October 2008 (see paragraph 17), more than nine years after the Government’s Decision and more than two years after the decision of the Constitutional Court confirming its constitutionality, would subsequently result in a reversal of the position taken. Thus, even assuming that the applicant company could not have realised from the outset that no remedy would be effective without the prior annulment of the Decision of 23 September 1999, or else an incidental finding to the effect that the Decision was unconstitutional or otherwise unlawful, this must at the very latest have become clear at the time of the publication of the above decision by the Constitutional Court (compare *Edwards v. the United Kingdom* (dec.), no. 46477/99, 7 June 2001).

18. Thus, our conclusion is that, even on the most indulgent view, there is no way around the fact that the applicant company has failed to comply with the requirements of Article 35 § 1 of the Convention. The application is therefore plainly inadmissible.

Concluding remarks and concerns

19. The Croatia Bank, a public company, was bailed out by measures taken by the State authorities more than 20 years ago. Such rescues are undertaken to protect the depositors who have entrusted their funds to the bank, and to prevent adverse systemic repercussions in the financial system more broadly arising from the bank’s collapse.

20. It goes without saying that even in such a context, adequate procedural safeguards must be put in place to ensure that the powers entrusted to the competent authorities cannot be abused and that the stakeholders which are adversely affected by their exercise have at their disposal appropriate means of access to judicial review and protection. In

these kinds of situations, however, both time and legal certainty are very much of the essence. It seems clear that there were certain deficiencies in the Croatian legal framework, including importantly the availability of and access to timely and effective remedies, at the time when the restructuring measures regarding Croatia Bank were taken (see in particular paragraphs 83-84 of the judgment). This in turn has without doubt contributed to a situation where some of the original shareholders have attempted to have recourse to “surrogate” remedies which, however, have been without any prospect of success. Nevertheless and in any event, the bottom line is that the historic underlying problems cannot now be rectified through the vehicle of a judgment of the Court addressing complaints based, not on the substance of the underlying decision, but solely on the recourse to such futile “surrogate” remedies.

21. We have previously written about our general concern with the Court’s frequent practice of recommending the reopening of proceedings (see our respective concurring opinions in *Romić and Others v. Croatia*, nos. 22238/13 and 6 others, 14 May 2020). However, our specific concern in the present context is that the application of this practice in the present case (see paragraph 111) is particularly inappropriate. In our view, it is highly problematic if shareholders, who are bound to be the first to suffer the losses of a company’s failure, can first spend (many) years pursuing domestic legal proceedings which, from the outset, had no real prospect of success, thereafter bringing their complaints before this Court, and after yet more time has passed obtain a finding of a (procedural) violation of the Convention, the only remedy for which is said to be a request for the reopening of the same (futile) proceedings. After all, although these proceedings were always (and have proved to be) unsuited to their intended purpose, and although the Croatian Constitutional Court has since ruled conclusively on the substantive validity of the Government’s Decision of 23 September 1999, this Court’s recommendation nonetheless appears to raise the prospect (or at the very least an expectation) that the restructuring effected more than two decades ago will now be called into question and somehow “undone” for the benefit of the original shareholders. Such a scenario fundamentally undermines legal certainty in a manner which in our view is wholly unacceptable.

22. The outcome is even more problematic in so far as such a prospect or expectation created by this judgment might be read as supporting a scenario where shareholders would ultimately not end up bearing the losses that are incumbent on them to bear, or an implication that the bail-out of a bank should also involve a bail-out of its shareholders. In our opinion, any such development would be inconsistent with the Court’s approach to date and, as a matter of principle, profoundly unsound. As a result, the Court should do what it can to avoid such a situation; something it will unfortunately have failed to do if the present judgment should become final.