

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

GRAND CHAMBER

CASE OF LEKIĆ v. SLOVENIA

(Application no. 36480/07)

JUDGMENT

STRASBOURG

11 December 2018

This judgment is final but it may be subject to editorial revision.



In the case of Lekić v. Slovenia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President,*
Angelika Nußberger,
Linos-Alexandre Sicilianos,
Ganna Yudkivska,
Robert Spano,
Ledi Bianku,
Helen Keller,
Paul Lemmens,
Valeriu Griţco,
Faris Vehabović,
Ksenija Turković,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström,
Georges Ravarani,
Jovan Ilievski,
Péter Paczolay, *judges,*
Boštjan Zalar, *ad hoc judge,*

and Søren Prebensen, Deputy Grand Chamber Registrar,

Having deliberated in private on 14 March 2018 and 19 September 2018,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 36480/07) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovenian national, Mr Ljubomir Lekić ("the applicant"), on 4 August 2007.

The applicant was represented before the Court by Mr S. Zdolšek, a lawyer practising in Ljubljana, Slovenia, then by Mr A. Saccuci, a lawyer practicing in Rome, Italy. The Slovenian Government ("the Government") were represented by their Agent, Mrs B. Jovin Hrastnik, State Attorney.

2. The applicant complained about the striking off of a limited liability company in which he was a minority member and his personal liability for a debt of that company.

3. The application was assigned to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Mr Marko Bošnjak, the judge elected in respect of Slovenia, was unable to sit in the case (Rule 28). Accordingly, the

President of the Fourth Section decided to appoint Mr Boštjan Zalar to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1). In a judgment delivered on 14 February 2017 a Chamber of the Fourth Section unanimously declared the applicant's complaint under Article 1 of Protocol No. 1 to the Convention admissible and the remainder of the application inadmissible, and found that there had been no violation of that Article. The Chamber was composed of András Sajó, President, Vincent A. De Gaetano, Nona Tsotsoria, Paulo Pinto de Albuquerque, Iulia Motoc, Gabriele Kucsko-Stadlmayer and Boštjan Zalar, judges, and Marialena Tsirli, Section Registrar. At the applicant's request, on 18 September 2017 a panel of the Grand Chamber decided to refer the case to the Grand Chamber according to Article 43 of the Convention.

4. The composition of the Grand Chamber was subsequently determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. On 18 December 2017 the Grand Chamber rejected the applicant's objections to the participation of Mr Boštjan Zalar in the proceedings before it.

5. Both parties submitted further written observations (Rule 59 § 1). In addition, third-party comments were received from the Malta Institute of Management and the Civil Initiative of Forcefully Erased Companies, which had been given leave by the President to intervene (Article 36 § 2 of the Convention and Rule 44 §§ 3 and 4).

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 14 March 2018.

There appeared before the Court:

(a) *for the Government*
Ms B. JOVIN HRASTNIK,
Ms N. PINTAR GOSENCA, *Agents*;

(b) *for the applicant*
Mr A. SACCUCCI,
Ms G. BORGNA,
Mr M. ZAMBONI, *Counsel*,
Mr D. LEKIĆ, *Adviser*.

The Court heard addresses by Mr Saccucci, Ms Borgna, Mr Zamboni and Ms Jovin Hrastnik, and also their replies to questions put by the judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1956 and lives in Ljubljana.

8. On 8 October 1992 the applicant became a member of L.E., which was at that time a public limited company operating under Slovenian law. The share capital of L.E. stood at 2,995,250 Slovenian tolars (SIT)[1] and the applicant's capital contribution was SIT 332,805.55[2] (that is, 11.11% of the company's share capital). L.E. had nine members in total.

9. On 2 February 1993 the applicant was employed by company L.E. as head of its IT department. In addition, he provided assistance to the finance director (bookkeeping).

10. On 19 February 1993 two key members and directors of company L.E., Mr J. Za. and Mr M. D., died in a car accident. The first one, however, remained registered as a member of L.E. The shares of the second were taken over by Ms D. D. Two other members, Mr J. Zu. and Mr D. P., were seriously injured, but also remained registered as members of L.E. Following those events, the applicant assumed the role of acting director of L.E. on 29 April 1993, and then of managing director on 23 February 1995. In that capacity he acted as the company's representative.

11. In 1993 the Slovenian Railways, a statutory company, initiated civil proceedings against L.E., claiming the payment of three sums arising from their business dealings, totalling approximately SIT 5,000,000. The applicant represented L.E. at all hearings held in that case except for the last hearing on 22 November 2000.

12. On 9 August 1995 Mr M. K., another member of L.E., died, but nevertheless remained registered as a member.

13. In November 1995 L.E. was aligned with the Companies Act 1993, as required (see paragraph 35 below), and at the same time converted from a public limited company into a limited liability company (see paragraph 33 below). At that time L.E. was already both illiquid and insolvent.

14. On 6 May 1996 the general meeting of L.E. dismissed the applicant from the post of managing director. Since the members failed to appoint a new director, as required (see paragraph 37 below), the applicant's dismissal was not entered in the court register and he remained registered as managing director of L.E.

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1. On 8 October 1992 this was approximately ECU 32,500. The European Currency Unit (ECU) was used as the unit of account of the European Community before being replaced by the euro (EUR) on 1 January 1999, at parity. On 11 July 2006 the ministers of finance of the EU adopted a decision allowing Slovenia to join the euro area from 1 January 2007 and fixing the conversion rate for the changeover from the old currency at 239.64 Slovenian tolars to the euro. According to that fixed rate, this amounts to approximately EUR 12,500.

2. According to the current conversion rate (see footnote no. 1 above), this is EUR 1,389.

15. On 19 June 1997, on the applicant's initiative, the general meeting of L.E. decided to start winding-up proceedings. The applicant made a winding-up petition on behalf of L.E. on 23 June 1997, declaring that the company had been insolvent for some time and that its total debt was SIT 22,393,952. On 16 July 1997 the competent court ordered L.E. to make, within 15 days, the required advance payment to cover the costs of the publication of the winding-up order in the Official Gazette in the amount of SIT 150,000[3]. The applicant alleged that some members of L.E. had refused to contribute to the advance payment and had preferred to wait for the competent court to wind up the company of its own motion, in accordance with the then applicable legislation (see paragraph 40 below).

16. On 31 July 1997 the applicant stopped working for L.E.

17. On 25 September 1997 another member of L.E., Mr J. Zu., died, but nevertheless remained registered as a member.

18. On 15 October 1997 L.E.'s winding-up petition was rejected for failure to make the required advance payment.

19. By a judgment of 22 November 2000, the District Court of Ljubljana ordered L.E. to pay the Slovenian Railways the sums claimed plus interest (see paragraph 11 above). L.E. did not appeal; the judgment became final on 12 January 2001.

20. On the basis of notification from the competent authority that L.E. had not performed any transactions through its bank account in a period of twelve consecutive months, on 19 January 2001 the Ljubljana District Court – acting in its capacity as the registry court – initiated proceedings to strike off the company from the court register pursuant to the Financial Operations of Companies Act 1999 (hereinafter "the FOCA"; paragraphs 41-52 below).

21. On the same day, the decision to initiate strike-off proceedings was entered in the court register. The decision was sent to the registered address of L.E., but since no representative of the company was there to receive it, a delivery slip was left in its mailbox, notifying the company that the relevant correspondence could be collected at the post office. On 12 February 2001 the decision was returned to the registry court with the information that the addressee had failed to collect it. The registry court then served it by posting it on its notice board, as provided for by domestic law.

22. No objection was made to the decision of 19 January 2001, either by L.E. or by its members. Consequently, on 11 May 2001 the registry court issued a decision to strike off L.E. from the court register. The decision was published in the Official Gazette on 30 May 2001[4]. The registry court also attempted to serve the decision on L.E. by sending it to the company's address, but like the previous decision, it was returned on 4 June 2001 with the information that the addressee had failed to collect it. The decision was

3. According to the current conversion rate (see footnote no. 1 above), this is EUR 626.
4. See Official Gazette no. 42/2001.

again posted on the registry court's notice board. Neither company L.E. nor any of its members, who were entitled to lodge an appeal against the strike-off decision, appealed against the decision, so on 17 August 2001 it became final.

23. On 25 September 2001 L.E. was struck off from the court register and thus ceased to exist. Notification of the strike-off was published in the Official Gazette on 6 February 2002[5]. At the time of the strike-off, L.E. had nine registered members (including the applicant). The applicant stated that he had become aware that his company had been struck off on 22 December 2004, when a writ was served on him (see paragraph 24 below).

24. On 5 April 2002 the above-mentioned creditor applied to the Ljubljana Local Court for the judgment mentioned in paragraph 19 above to be enforced. On 5 June 2002 the court issued a writ of execution, ordering the seizure and sale of all tangible movable property of the applicant and six other members of L.E. It later revoked the writ in respect of Mr J. Za., Mr M. K. and Mr J. Zu., as they had died (see paragraphs 10, 12 and 17 above). At the request of the creditor, on 30 November 2004 the court expanded the writ, ordering the payment of the judgment debt by direct deduction from the earnings of the applicant and of three other members of L.E. The writ was served on the applicant on 22 December 2004.

25. On 29 December 2004 the applicant lodged an objection to the writ, arguing that the Local Court had failed to establish his actual role in company L.E. or to acknowledge his status as a passive member (see paragraph 51 below), which would have exonerated him from liability for the debts of the company. He maintained that the creditor's claim against the company had arisen before he had joined it. Moreover, the applicant was of the view that the onus was on the creditor to establish that he had been an active member of the company. Lastly, he applied for a stay of enforcement.

26. In its judgment of 12 March 2005, the Ljubljana Local Court found that the onus of proving his status as passive member was on the applicant and that he had failed to prove that he had not been an active member of L.E. The court established that with his 11.11% share in the company, the applicant had enjoyed the rights of a minority member, and furthermore, he had been employed by the company and actively involved in its management since April 1993. In his capacity as acting director and later managing director, he had been authorised to act on behalf of the company. Moreover, even after he had resigned as managing director, he had still been active in the running of the company and had also signed the winding-up petition. Lastly, the court considered that, as a minority member, the applicant could have and should have proposed the appointment of a new director at a general meeting of the company, since pursuant to domestic law all companies had to have a director. For those reasons, the applicant's

5. See Official Gazette no. 10/2002.

objection was rejected. The court also dismissed the applicant's request for a stay of enforcement, as he had failed to demonstrate that the enforcement would have caused him irreparable or serious damage.

27. On 9 February 2006 the Ljubljana Higher Court rejected an appeal lodged by the applicant on essentially the same grounds as the first-instance court. It observed, *inter alia*, that the Constitutional Court had found the measure of lifting the corporate veil under the FOCA to be in line with the principle of the separation of a company's assets from those of its members and thus consistent with the Constitution. The court considered it irrelevant whether the applicant had become a member of L.E. before or after the creditor's claim had arisen. Having joined the company, he had assumed its assets as well as its liabilities. It further held that it was not decisive that the applicant had not remained a director of L.E. until the dissolution of that company. What was crucial was that the applicant had been actively involved in its management and that he had had the rights of a minority member pursuant to section 445 of the Companies Act 1993 (see paragraph 37 below). The court noted that, in contrast to section 6 of the Companies Act 1993 which required the creditors of a company to prove that a member of the company had abused the corporate form (see paragraph 34 below), the FOCA had introduced a "non-rebuttable" presumption that the members of a struck-off company were deemed to have undertaken joint and several liability for any outstanding debts of the company. In accordance with the Constitutional Court's ruling, they could be exonerated from their personal liability only if they demonstrated that they were "passive members" of the company (see paragraphs 46 and 51 below). Lastly, the court took note of the fact that the applicant had indeed made a winding-up petition on behalf of L.E., but it considered this irrelevant because L.E. had at the time failed to make the required advance payment and the petition had therefore been rejected (see paragraphs 15 and 18 above).

28. On 5 May 2006 the applicant lodged two constitutional complaints. In one of them, he complained that the decisions rendered in the strike-off proceedings against L.E. had been served on that company alone and not on him personally. In the other one, he complained about the outcome of the enforcement proceedings against him.

29. On 31 January 2007 the Constitutional Court rejected the applicant's complaint regarding the strike-off proceedings. The decision was served on the applicant on 5 February 2007. It found that the applicant lacked legal interest in challenging those proceedings, since L.E. had already been struck off from the court register. Consequently, even a positive outcome of the constitutional complaint could not improve the applicant's position.

30. On 9 July 2007 the Constitutional Court also rejected the complaint regarding the enforcement proceedings as manifestly ill-founded. It held that the lower courts had correctly applied the Constitutional Court's criteria

for differentiating between active and passive members to the applicant's individual situation.

31. In 2010 the judgment of 22 November 2000 was enforced in part by direct deduction from the applicant's salary. On 23 September 2011 the applicant reached an out-of-court settlement with the creditor and paid the agreed amount. The enforcement proceedings against the applicant were terminated on 28 September 2011. In total, the applicant paid EUR 32,795 to the Slovenian Railways. It is not clear how much other members of L.E. have paid to the Slovenian Railways in this connection.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Companies Act 1988[6]

32. This Act entered into force in the former Socialist Federal Republic of Yugoslavia, which at that time included Slovenia, on 1 January 1989. It provided a legal framework for the private ownership of companies: private companies could be instituted by a wide range of investors with a relatively low share capital. This Act remained in force even after Slovenia became independent in 1991 and was repealed only by the Companies Act 1993 (see paragraph 33 below).

B. Companies Act 1993[7]

33. Slovenia enacted this Act after it had become independent. It was in force from 10 July 1993 until 4 May 2006. It provided for two main types of companies whose members were, as a rule, not liable to creditors for the obligations of the companies: public limited companies (*delniška družba*; listed on the stock exchange) and limited liability companies (*družba z omejeno odgovornostjo*; not listed). The share capital had to be at least SIT 6,000,000 for public limited companies and SIT 2,100,000 for limited liability companies (pursuant to sections 172 and 410 of this Act, respectively)[8]. As the company under consideration in the present case was converted from a public limited company into a limited liability company in 1995 (see paragraph 13 above), only the legal regime applicable to the latter type of companies is set out below.

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6. *Zakon o podjetjih*; published in the Official Gazette of the Socialist Federal Republic of Yugoslavia no. 77/88 of 31 December 1988; amendments published in the Official Gazette of the Socialist Federal Republic of Yugoslavia nos. 40/89, 46/90 and 61/90.

7. *Zakon o gospodarskih družbah*; published in the Official Gazette of the Republic of Slovenia no. 30/93 of 10 June 1993; a consolidated version thereof published in the Official Gazette of the Republic of Slovenia no. 15/05 of 17 February 2005.

8. According to the current conversion rate (see footnote no. 1 above), this is EUR 25,038 and EUR 8,763, respectively.

34. As mentioned above, members of limited liability companies were, as a general rule, not liable to creditors for the obligations of the companies (see section 407 of the Act). The lifting of the corporate veil was permitted only in the following circumstances: if members had abused the corporate form in order to attain an objective that was forbidden to them as individuals; if they had abused the corporate form such as to cause damage to their creditors; if they had used the assets of the company, in breach of the law, as their own personal assets; or if they had reduced the assets of the company, for their own benefit or for the benefit of another person, where they knew or should have known that the company would not be capable of meeting its liabilities to third persons (see section 6 of the Act). Such cases are dealt with by the ordinary courts.

35. In addition, members of a limited liability company were liable for the debts of the company if the competent court had struck off the company of its own motion for failure to align itself with the new rules within approximately a year and a half from the entry into force of the Act (see section 580(6) of the Act). On 9 October 2002 the Constitutional Court amended the provision in part, distinguishing between members who were actively involved in the operation of a company and so-called passive members. In accordance with that decision of the Constitutional Court, only active former members could be held personally liable for debts of a company (see paragraph 51 below).

36. Pursuant to section 413 of the Act, a company director was required to enter the company in the court register. Sections 47, 48 and 413 of the Act provided that an application for entry in the register had to include*, inter alia*, a list of members, their contributions and the address of the company's registered office. Furthermore, any change in the data entered in the court register had to be notified to the registry court within three days (for the list of members and their contributions) or within fifteen days (for the company's registered office).

37. Pursuant to section 449 of the Act, a limited liability company had to have at least one director. Certain key decisions regarding the management and operation of a company (such as the appointment of directors or distribution of profits) would be adopted by the company members at a general meeting. In accordance with section 445 of the Act, members whose capital contributions amounted to at least one tenth of the total share capital could demand the convening of a general meeting; if so, they were required to specify the issues on which the general meeting should decide, and the reasons for calling a meeting. Moreover, such members could also request that a specific issue be included on the agenda of a general meeting that had already been convened. In addition, pursuant to section 446 of the Act, a company director had to inform members of the company's affairs at their request, and allow them access to the company's records and files.

38. The dissolution of companies was regulated by sections 371-98 and 455-56 of the Act. First, a company could resolve by special resolution that it be wound up. In this case, a majority representing at least three-quarters of the share capital was required. Secondly, a company could be wound up by the court, *inter alia*, if its share capital had been reduced below the statutory limit or if it was unable to pay its debts. Thirdly, any member whose shareholding amounted to at least one tenth of the total share capital could lodge an action with the competent court requesting that the company be wound up, if he or she considered that the company's aims could not be achieved to a sufficient degree, or if there were any other reasonable grounds for the dissolution of the company. In any of those cases, the creditors of the company were entitled to notify their claims to the liquidator and to enforce their claims against the assets of the company. Lastly, the members of a company could dissolve the company, without winding it up, by requesting that it be struck off from the court register and by attaching to their application a statement made by all members in the form of a notary deed to the effect that all the company's obligations had been met, that any disputes with employees had been settled and that the members assumed joint and several liability for any outstanding debts of the company. Unlike the winding-up procedure set out above, creditors were not entitled to enforce their claims in the strike-off procedure. Instead, they were able to enforce their claims against the former members of a struck-off company within one year of the publication of the strike-off notice in the court register.

39. In accordance with section 436(2) of the Act, any company member could withdraw from the company if there were good reasons for doing so.

C. Insolvency Act 1993[9]

40. This Act was in force from 1 January 1994 until 1 October 2008. In 1997 the legislature responded to the problem of a high number of dormant and insolvent companies by amending this Act. An amendment of 1 July 1997 authorised the courts to start, of their own motion, winding-up proceedings against companies which had failed to pay salaries for three consecutive months, or which, for twelve consecutive months, had been illiquid or had had its accounts blocked. Insolvent companies which themselves initiated winding-up proceedings were required to make an advance payment covering the costs of publishing the winding-up order in the Official Gazette. The provisions on winding-up proceedings initiated of a court's own motion were repealed by another amendment to this Act,

9. *Zakon o prisilni poravnavi, stečaju in likvidaciji*; published in the Official Gazette of the Republic of Slovenia no. 67/93 of 17 December 1993; amendments published in the Official Gazette of the Republic of Slovenia nos. 39/97 and 52/99.

which entered into force on 1 July 1999, after it had been established that this process for dealing with dormant companies was not feasible given their large number (more than 6,000 dormant companies at the beginning of 1999) and the high costs of instituting winding-up proceedings which would have to be incurred by the State (around SIT 900,000,000[10] according to the preparatory work in respect of the FOCA).

D. Financial Operations of Companies Act 1999[11]

41. This Act was in force from 23 July 1999 until 15 January 2008. It introduced new means of dealing with dormant companies. The legislature observed that a great number of private companies were unable to meet their liabilities, thus contributing to poor financial discipline in corporate legal transactions and putting their creditors in a precarious position. Indeed, it would appear from the preparatory work relating to the adoption of the FOCA that on 28 February 1999 6,587 companies had accounts frozen for more than one year; their debts amounted to SIT 84,452,000,000[12]; and 6,083 of them (92%) had no employees. Therefore, the Act required companies to conduct their business in such a manner that they were able at all times to fulfil their obligations in due time (section 5). Moreover, they were required to maintain adequate capital in proportion to the volume and type of operations and activities they carried out and to the risks to which they were exposed (section 6). In this connection, the company's management had to ensure that the company conducted its business in accordance with the law and the principles of financial operations (section 8), that it regularly monitored the risks incurred in conducting those operations and that it took appropriate measures to hedge against such risks (section 9).

42. If a company became illiquid and thus unable to meet its maturing liabilities on time, the management had to adopt the necessary measures to re-establish liquidity and, if those measures did not bring results within the next two months, to make a winding-up petition (section 12). Likewise, if a company became insolvent and its assets were no longer sufficient to meet its liabilities, the management was required to make a winding-up petition within two months at the latest (section 13). If the management failed to comply with those obligations, they could be found personally liable for any damage caused to the company's creditors as a result of such a failure; in

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10. According to the current conversion rate (see footnote no. 1 above), this is approximately EUR 3,756,000.

11. *Zakon o finančnem poslovanju podjetij*; published in the Official Gazette of the Republic of Slovenia no. 54/99 of 8 July 1999; amendments published in the Official Gazette of the Republic of Slovenia nos. 110/99 and 31/07.

12. According to the current conversion rate (see footnote no. 1 above), this is approximately EUR 352,412,000.

addition, under certain conditions, the supervisory board and the members of a company could also be found personally liable for any damage caused to the creditors (sections 19-22).

43. Companies that failed to follow the prescribed procedures in order to re-establish solvency or terminate their operations in cases of insolvency were to be struck off the court register systematically without a prior winding-up procedure. That allowed companies to be dissolved without their assets being collected and used to pay creditors. Strike-off proceedings were to be initiated if, *inter alia*, it could be presumed that the company in question had no assets, which was deemed to be the case if a company had made no transactions through its registered account for twelve consecutive months (section 25). Organisations effecting payment transactions for the company were required to inform the competent registry court of the existence of such circumstances within a month from their onset (section 26(2)).

44. The registry court was to commence strike-off proceedings of its own motion after establishing that the conditions for striking off the company from the register had been met. The decision on the institution of proceedings was served on the company concerned and entered in the court register (section 29). An objection could be lodged within a two-month time-limit by either the company itself, a member of the company or a creditor, on the grounds that (i) the conditions for the strike-off had been erroneously established or were incomplete; (ii) another procedure for the dissolution of the company, notably winding-up, had been initiated; or (iii) a petition for winding-up had been filed on behalf of the company, and advance payment had been made or the petitioner had been relieved from making that payment (section 30).

45. If no objection was made to a decision to start strike-off proceedings or if such an objection had been dismissed, the registry court was to issue a decision to strike off the company from the court register, which was served on the company concerned and published in the Official Gazette (sections 32 and 33). An appeal against such a decision could be lodged by the company concerned within thirty days of its service on the company or by members or creditors of the company within thirty days of its publication in the Official Gazette (section 34). If no appeal was lodged against a decision to strike off the company or if such an appeal had been dismissed, the strike-off decision became final and the registry court struck off the company from the court register; a notice was published in the Official Gazette (section 35).

46. In order to ensure that the creditors of struck-off companies were protected, the FOCA provided for personal liability of company members: pursuant to section 27(4) of the FOCA in conjunction with section 394 of the Companies Act 1993, company members were deemed to have agreed to assume joint and several liability for any outstanding debts of the struck-off

company. The company's creditors could pursue their claims against the members for up to a year after the publication of the strike-off notice in the Official Gazette.

47. Due to the wide-reaching consequences of the FOCA, the provisions on measures to be taken in order to ensure that a company had adequate capital and was solvent became operational six months after the Act entered into force. The provisions regulating the strike-off procedure took effect even later. In this regard, the presumption that a company had no assets only took effect when the company had failed to make payments through its bank account for twelve consecutive months after the Act had entered into force (namely, on 23 July 2000).

48. The regulation introduced by the FOCA was challenged before the Constitutional Court by many former members of struck-off companies. On 9 October 2002 the Constitutional Court dismissed the challenge in part (see decision U-I-135/00), holding that the measure of striking off a dormant company which had no assets was consistent with the Constitution. An economically dormant company did not conduct business operations, nor did it generate income or make payments. At the same time, its financial situation was not known to its creditors, who relied on the presumption that it had at least a minimum amount of assets. For those reasons, non-operating companies posed a threat to the security of corporate legal transactions and to the position of their creditors.

49. The claimants also alleged that they could not effectively protect their rights in the strike-off proceedings, as the decisions on the initiation of proceedings and on the strike-off had not been served on them personally. In response to that argument, the Constitutional Court held that the service of decisions on the company, together with a notification in the court register or in the Official Gazette, was adequate. It observed that the measure was applicable to different forms of companies, some of which belonged to a multitude of members. The personal service of decisions would be too time-consuming, and in certain cases impossible.

50. As to the personal liability of former members, the Constitutional Court reiterated that, indeed, in principle they could legitimately expect that their liability for the company's obligations would not exceed the value of their capital contributions. However, companies were required to ensure that they were operating with adequate capital, and that it did not fall below the statutory minimum. Companies which operated with insufficient capital were weaker economically than those which operated in line with the law, and this affected the overall security of legal transactions. The Constitutional Court held:

> "...
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> 37. In view of the above, the introduction of the lifting of the corporate veil was indeed a measure that allowed for the greatest possible protection of the threatened legal good, creditors, and general security of legal transactions. The position of

company members was aggravated for the overriding reason of general interest (protection of creditors); the aggravation was made known in advance and was entirely dependent on the reason controlled by companies and/or their members. They were given sufficient time to adjust to new requirements and avoid the aggravation of their legal position. Therefore, the enactment of the lifting of the corporate veil based on the aforementioned reasons does not constitute a violation of the principle of the rule of law.

...

49. ...Indeed, the need for the additional protection of creditors is even stronger under the [FOCA], which envisages no procedures to ensure repayment to creditors in the event of the dissolution of companies, and in case of potential over-indebtedness of a company, also no procedures to at least ensure the regular responsibility of limited liability companies (namely, that claims are repaid from the companies' assets and that the equality of the companies' creditors is ensured).

..."

51. Nevertheless, the Constitutional Court recognised the variety of legal and factual positions of members of struck-off companies and established a distinction between "active members", who were in a position to influence the operation of a company, and "passive members", who exerted no such influence. It upheld the law in so far as it applied to the former category, but repealed it in respect of passive members. In accordance with that decision of the Constitutional Court, the courts deciding on the personal liability of former members were primarily required to establish whether an individual member had exerted any influence on the operations of the company in issue. They were to base their assessment on a number of criteria, notably the type of company (public limited company or limited liability company), the status of a member (individual or legal entity), and the internal relations between the members. The courts deciding on the issue of personal liability could in addition rely on the general criteria with regard to the lifting of the corporate veil set out in the Companies Act 1993 (see paragraph 34 above). As to the distinction between a public limited company (*delniška družba*) and a limited liability company (*družba z omejeno odgovornostjo*), such as L.E., the Constitutional Court held as follows:

"44. Members of limited liability companies are in a different position regarding the management of the company. ... Typically, [a limited liability company] has a smaller number of members with closer links to the company (in contrast to public limited companies with greater autonomy of the management board and reduced importance of the general meeting). A director of a limited liability company is subordinate to its members because they appoint and discharge the director. Members also have the right of access to information concerning the company and the company's records, which enables them to responsibly participate in the management. It is a basic statutory, membership and contractual right of company members to manage the company; company members are individual holders of the right to manage the company, while the general meeting is a mere form of adopting decisions and is not even mandatory. One of the fundamental obligations of company members is the requirement to maintain the share capital [footnote: The maintenance of the share capital prevents, *inter alia*, capital decrease in companies. In cases of undercapitalised

companies the sanction of lifting of the corporate veil may be instituted in respect of their members].”

52. Finding that the FOCA constituted an interference with a number of principles of company law and was having far-reaching and adverse effects on the position of former members of struck-off companies, in 2007 the legislature decided to amend the Act and relieve company members of their personal liability for their company’s debts. The amendment to the FOCA provided that all pending judicial and administrative proceedings in which creditors of struck-off companies were enforcing their claims against former members of the companies were to be terminated systematically. A number of creditors, whose proceedings against members of struck-off companies were pending and who were thus about to lose all possibility of repayment, lodged a complaint challenging the amendment. The Constitutional Court upheld their complaint and revoked the impugned provisions, finding that they did not afford appropriate protection to creditors (decision U-I-117/07 of 21 June 2007). In particular, it held as follows (§§ 15-17):

“...

15. ... In the absence of winding-up, the consequence of relieving active members from unlimited joint and several liability, as laid down in the [impugned amendment], is that, upon the striking-off of such companies, no procedure is envisaged to ensure at least the regular responsibility of limited liability companies (namely, that claims are repaid from the companies’ assets and that the equality of the companies’ creditors is ensured).

16. The Government maintain that the creditors have the possibility of protecting their rights by other means, such as presenting a winding-up petition. However, once strike-off proceedings have been initiated, a winding-up petition may no longer be presented. ...

17. The Constitutional Court therefore finds that in respect of the dissolution of a company by striking it off from the court register without winding it up, the legislature did not envisage a procedure which would enable ... the protection of the company’s creditors ...

...”

E. Financial Operations and Insolvency Act 2007[13]

53. This Act has been in force since 15 January 2008. It was enacted to replace the FOCA. It retained the possibility of striking off a company from the register without winding it up, but under slightly different conditions.

13. *Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju*; published in the Official Gazette of the Republic of Slovenia no. 126/07 of 31 December 2007; a consolidated version thereof published in the Official Gazette of the Republic of Slovenia no. 13/14; subsequent amendments published in the Official Gazette nos. 10/15 and 27/16.

F. Liability for Corporate Obligations Act 2011[14]

54. The Act has been in force since 17 November 2011. It again relieved former members of struck-off companies from personal liability for debts of the companies. Since the legislative solutions provided for in the Act were similar to those in the amendment to the FOCA (see paragraph 52 above), the Constitutional Court was once again called upon to decide if the Act struck a fair balance between the interests of former members of struck-off companies and the companies' creditors. The Constitutional Court held that in cases where a creditor's claims had been recognised by a judicial decision or where the judicial proceedings were pending, as well as in cases where a creditor had not yet lodged a claim against former members of a struck-off company but had a legitimate expectation to be able to do so, there were no constitutionally admissible reasons for interfering with his or her acquired rights. However, it allowed exoneration for members of companies which had been struck off after the entry into force of this Act.

G. Proceedings against Members of Struck-Off Companies (Stay of Proceedings) Act 2018[15]

55. This Act entered into force on 27 April 2018, staying all proceedings against members of struck-off companies, initiated under the FOCA or the Financial Operations and Insolvency Act 2007, pending the outcome of the present case. If the Court finally decides that there has been no violation of the Convention in the present case, the proceedings will resume.

III. COMPARATIVE LAW

56. The parties and the Malta Institute of Management provided information on the legal regime applicable to the liability of members of limited liability companies for the debts of the companies in the five former republics of the SFRY other than Slovenia[16] (namely, Bosnia and Herzegovina, Croatia, Montenegro, Serbia and the former Yugoslav Republic of Macedonia), Austria, the Czech Republic, Estonia, Germany,

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14. *Zakon o postopkih za uveljavitev ali odpustitev odgovornosti družbenikov za obveznosti izbrisanih gospodarskih družb*; published in the Official Gazette no. 87/11 of 2 November 2011.

15. *Zakon o prekinitvi postopkov proti družbenikom izbrisanih družb*; published in the Official Gazette no. 30/18 of 26 April 2018.

16. The former Socialist Federal Republic of Yugoslavia consisted of six Republics – Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia – as well as two Autonomous Provinces – Kosovo and Vojvodina. The dissolution of the SFRY took place in 1991/92 (see Opinion No. 11 of the Arbitration Commission of the International Conference on the Former Yugoslavia – "the Badinter Commission").

Italy, Malta, the Netherlands, Poland, Romania, Russia and Sweden. In most of them (including all former republics of the SFRY), domestic law (statutory or case-law) provides for the lifting of the corporate veil in case of abuse of the corporate form. The grounds for the lifting of the corporate veil are along the lines of those listed in section 6 of the Slovenian Companies Act 1993 (see paragraph 34 above): members have abused the corporate form in order to attain an objective that was forbidden to them as individuals; members have abused the corporate form such as to cause damage to creditors; members have used the assets of a company, in breach of the law, as their own personal assets; or members have reduced a company's assets, for their own benefit or for the benefit of another person, where they knew or should have known that the company would not be capable of meeting its liabilities to third persons.

In addition, in Serbia, members having a controlling interest in a limited liability company which has been struck off of the court's own motion are liable for its debts regardless of whether they have committed abuse of the corporate form or not.

THE LAW

57. The applicant complained that the failure to serve on him personally the decisions rendered in the strike-off proceedings against company L.E. had amounted to a violation of his right of access to a court under Article 6 § 1 of the Convention. That Article, in so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

Furthermore, relying on Article 1 of Protocol No. 1, he complained, in essence, about his personal liability for a debt of L.E. That Article provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

I. SCOPE OF THE CASE BEFORE THE GRAND CHAMBER

58. The Government submitted that the Court should deal in the present case only with the striking-off of L.E. and not with the applicant's complaint about his liability for a debt of L.E., a matter which it should rather address in another case that the applicant had lodged under the Convention (application no. 3292/08); they added that they had not yet been given notice of the latter application.

59. The applicant did not make any comments on this particular issue.

60. The Court has held on many occasions that the "case" referred to the Grand Chamber embraces all aspects of the application examined by the Chamber in its judgment (see, among other authorities, *K. and T. v. Finland* [GC], no. 25702/94, §§ 140-41, ECHR 2001-VII). While it is true that the applicant has lodged two applications with the Court and that his liability complaint is more developed in the second case, the applicant outlined his liability complaint already in the present case, the Court gave notice of it to the respondent Government and the Chamber dealt with it in its judgment. In view of the above, it falls within the Grand Chamber's jurisdiction also to examine that complaint.

II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. As regards the strike-off proceedings against L.E.

1. The parties' submissions

61. The Government maintained that a constitutional complaint was not an effective remedy in respect of the strike-off proceedings and that it could not therefore have secured a fresh six-month time-limit for lodging an application with the Court. In this connection, they emphasised that the strike-off proceedings against L.E. and the subsequent enforcement proceedings against the applicant were entirely independent. The latter proceedings, unlike the former, had not been initiated of the court's own motion, but at the request of a creditor of L.E. Moreover, the outcome of the enforcement proceedings could not have had any impact on the outcome of the strike-off proceedings: even if the enforcement court had acknowledged the applicant's status as a passive member (which would have absolved him from liability), company L.E. would not have been restored to the register.

62. The applicant argued that a constitutional complaint was in principle an effective remedy and referred to the Chamber's finding in the present case that the Constitutional Court had not rejected his complaint as out of time.

2. The Court's assessment

63. In accordance with Article 35 § 4 of the Convention, the Court may "at any stage of the proceedings" reject an application which it considers inadmissible. Thus, even at the merits stage, the Court may reconsider a decision to declare an application admissible where it concludes that it should have been declared inadmissible for one of the reasons given in the first three paragraphs of Article 35 of the Convention (see *Azinas v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004-III, and *Sabri Güneş v. Turkey* [GC], no. 27396/06, §§ 28-31, 29 June 2012). Accordingly, the Grand Chamber has jurisdiction to examine the issue of compliance with the six-month rule.

64. The object of the six-month time-limit under Article 35 § 1 of the Convention is to promote legal certainty, by ensuring that cases raising issues under the Convention are dealt with in a reasonable time and that past decisions are not continually open to challenge. It marks out the temporal limits of supervision carried out by the organs of the Convention and signals to both individuals and State authorities the period beyond which such supervision is no longer possible (see *Sabri Güneş*, cited above, §§ 39-40).

65. The requirements contained in Article 35 § 1 as to the exhaustion of domestic remedies and the six-month period are closely interrelated, as they are not only combined in the same Article, but also expressed in a single sentence whose grammatical construction implies such a correlation. Thus, as a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Article 35 § 1 cannot be interpreted in a manner which would require an applicant to inform the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level, otherwise the principle of subsidiarity would be breached. However, this provision allows only remedies which are normal and effective to be taken into account, as an applicant cannot extend the strict time-limit imposed under the Convention by seeking to make inappropriate or misconceived applications to bodies or institutions which have no power or competence to offer effective redress for the complaint in issue under the Convention (see, among many other authorities, *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, §§ 130-32, 19 December 2017). It follows that if an applicant has recourse to a remedy which is doomed to fail from the outset, the decision on that appeal cannot be taken into account for the calculation of the six-month period (see *Jeronovičs v. Latvia* [GC], no. 44898/10, § 75, 5 July 2016).

66. In the Chamber judgment, the Government's objection with regard to the six-month time limit was dismissed because the application had been lodged within six months following the service of the Constitutional Court's decision concerning the strike-off proceedings.

67. The Court reiterates that, in cases against Slovenia, applicants are in principle required to lodge a constitutional complaint before applying to the Court (see *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 296,

ECHR 2012). In the present case, the Constitutional Court's decision rejecting the applicant's constitutional complaint was rendered on 31 January 2007 and served on the applicant on 5 February 2007. The applicant then lodged his application with the Court on 4 August 2007, that is, within six months from the service of the Constitutional Court's decision.

68. The Court has noted that the applicant became aware of the strike-off decision on 22 December 2004 and that he introduced a constitutional complaint against that decision on 5 May 2006. The Court cannot speculate whether the applicant's constitutional complaint was out of time pursuant to domestic law and whether it was for that reason bound to fail from the outset, given that the Constitutional Court did not reject his complaint as out of time (see paragraph 29 above). The Court therefore cannot accept that the constitutional complaint should be disregarded for the purpose of calculating the six-month time-limit for lodging the application.

69. Accordingly, the Court dismisses this preliminary objection.

B. As regards the enforcement proceedings against the applicant

1. The parties' submissions

70. The Government submitted that the applicant could not claim to be a victim because he had reached a settlement with his creditor in 2011 and had paid the debt.

71. The applicant did not make any comments on this particular issue.

2. The Court's assessment

72. The Court observes that, in the Chamber judgment, the Government's objection with regard to the applicant's victim status was dismissed because prior to the settlement the applicant had used all the domestic legal avenues available to him for the purpose of challenging his liability for the payment of the debt in question. In addition, he had lodged the present application before the Court. As explained by the applicant, the terms of the settlement were more favourable to him than the liability imposed on him by virtue of domestic law and he accepted the settlement only to avoid incurring greater damage. The Court sees no reason to disagree. Indeed, the mere fact that the applicant discharged the duty imposed on him does not deprive him of his victim status within the meaning of Article 34 of the Convention.

73. The Court therefore dismisses this preliminary objection.

III. MERITS

A. The Chamber judgment

74. The Chamber held that the applicant's responsibility for the payment of his company's debts could be regarded as a sanction for his failure, in his capacity as a member with influence on the company's business operations, to comply with the corporate obligations of the company of which he was a member. The impugned measure thus constituted a measure of State control over the operation of the market, corporate practices and the management of corporate property. However, also taking into account the complaint about the strike-off proceedings, the Chamber decided to examine the case in the light of the general rule set out in Article 1 of Protocol No. 1.

75. As to lawfulness, the Chamber concluded "that the regulation introduced by the FOCA and amended by the Constitutional Court was adequately accessible and foreseeable; thus the measure complained of had a sufficient legal basis in Slovenian law to comply with the requirements of Article 1 of Protocol No. 1". Furthermore, in view of the conclusion that the due diligence required of the applicant would have enabled him to participate effectively in the strike-off proceedings, the Chamber accepted the pragmatic approach of the domestic authorities to the service of documents in strike-off proceedings, especially since service on companies was coupled with relatively long time-limits for appealing against the initiation of strike-off proceedings as well as the strike-off decisions themselves. It found that the strike-off proceedings provided sufficient procedural guarantees to the applicant and were thus lawful within the meaning of Article 1 of Protocol No. 1.

76. In the Chamber's opinion, the FOCA constituted an attempt to restore stability to the commercial market and thus pursued a legitimate aim.

77. Turning to the proportionality of the impugned measure, the Chamber held that the disregard of company law on the part of L.E. and the principles of good corporate governance warranted a strong response by the authorities, including the imposition of personal liability on any member who was found to be responsible for irregularities in the operation of the company. In that regard, it referred, *inter alia*, to inadequate capitalisation, a prolonged state of insolvency and inactivity on the part of the company's management (see, in particular, paragraphs 122-28 of the Chamber judgment). The Chamber further noted that the effect of reducing the capital below the statutory threshold and ultimately exhausting it completely, coupled with prolonged failure to institute winding-up proceedings, had had considerable adverse effects on the position of the company's creditor. It concluded that, "given the wide margin of appreciation which the Contracting States enjoy in matters of economic policy systems, ... the measure complained of did not represent an excessive individual burden for

the applicant in the particular circumstances of the present case." Accordingly, there had been no violation of Article 1 of Protocol No. 1.

B. The parties' submissions

1. The applicant

78. As mentioned above, the applicant complained that the failure to serve personally on him the decisions rendered in the strike-off proceedings against company L.E. had amounted to a violation of his right of access to a court under Article 6 § 1 of the Convention. He emphasised that his address as indicated in the court register was correct. Indeed, the notices issued in the civil proceedings between the Slovenian Railways and L.E. had been served on him at that address without any problem (see paragraph 11 above). There was therefore no justification in this case for serving the decisions rendered in the strike-off proceedings on company L.E. alone, knowing that L.E. had ceased to operate four years prior to the strike-off. The applicant referred to a number of judgments of the Court finding a breach of Article 6 § 1 of the Convention because of a lack of personal service of court documents, such as *Díaz Ochoa v. Spain* (no. 423/03, 22 June 2006), *S.C. Raisa M. Shipping S.R.L. v. Romania* (no. 37576/05, 8 January 2013), *Zavodnik v. Slovenia* (no. 53723/13, 21 May 2015), and *Aždajić v. Slovenia* (no. 71872/12, 8 October 2015).

79. The applicant further claimed that the decision to hold him personally liable for a debt of L.E., taken in the context of enforcement proceedings pursued by the Slovenian Railways against him, amounted to an interference with the peaceful enjoyment of his possessions under Article 1 of Protocol No. 1. More specifically, it constituted a measure of control of the use of property for the purposes of the second paragraph of that Article. Nevertheless, the applicant invited the Court to examine his liability complaint in the wider context, including notably the 2001 decision to strike off L.E., in the light of the general rule set out in that Article.

80. The impugned measure was unlawful in the applicant's opinion, as the domestic law was not sufficiently precise and foreseeable. As regards the requirement of foreseeability, he submitted that when the FOCA entered into force, it was not clear that he could ultimately be held personally liable for any debt of L.E. Indeed, the FOCA did not expressly provide for any such liability, but only referred to another piece of legislation: in accordance with section 27(4) of the FOCA, the members of a company which had been struck off pursuant to the FOCA were presumed to have made a statement provided for in section 394(1) of the Companies Act 1993, which, in turn, provided that a company could be struck off at the request of its members, without any winding-up proceedings, on the condition that the members made a statement in the form of a notary deed to the effect that all the

company's obligations had been fulfilled, that any disputes with the employees had been settled and that the members assumed joint and several liability for any potential outstanding obligations of the company. As to the requirement of precision, the applicant claimed that the criteria established by the Constitutional Court in the 2002 decision were far from clear. He added that the impugned regime of personal liability for debts of struck-off companies had undergone a number of reforms which further contributed to the overall confusion.

81. Arguing that the respondent State should not be accorded a wide margin of appreciation in this case, the applicant invited the Court to find that the impugned measure had not pursued a legitimate aim. The present case should, in his opinion, be distinguished from both *Berger-Krall and Others v. Slovenia* (no. 14717/04, 12 June 2014), which concerned occupancy rights in respect of socially-owned flats established in the former Socialist Federal Republic of Yugoslavia, and *Jahn and Others v. Germany* ([GC], nos. 46720/99 and 2 others, ECHR 2005-VI), which dealt with the unique context of German reunification.

82. The applicant also submitted that the measure was disproportionate. Referring to *Agrotexim and Others v. Greece* (24 October 1995, § 66, Series A no. 330 A) and a number of later decisions, the applicant pointed out that according to the Court's case-law, the lifting of the corporate veil was only justified in exceptional circumstances. In his view, there were no such circumstances in the present case. Referring to the judgment of the Court of Justice of the European Union (CJEU) of 21 October 2010 in *Idryma Typou AE v. Ypourgos Typou kai Meson Mazikis Enimerosis* (C-81/09, EU:C:2010:622), he argued that the impugned measure was likewise contrary to the fundamental principles of company law in the European Union. He invited the Court to apply the *Vaskrsić* jurisprudence (*Vaskrsić v. Slovenia*, no. 31371/12, 25 April 2017) and find a breach of Article 1 of Protocol No. 1, despite the fact that he had been relatively passive with regard to the destiny of L.E. and its outstanding debt. In the applicant's view, what was crucial was that he had not acted in bad faith. In this connection, he pointed out that he had attempted to have L.E. dissolved by instituting winding-up proceedings, but his attempt had failed because L.E. was not able to cover the related costs. The applicant further maintained that a fair balance between the general interest and his property rights was upset by imposing on him the onus of demonstrating his "passive" status. In any event, he emphasised that he had held a managerial position in company L.E. for only a couple of years. This was not sufficient, in his opinion, to hold him liable for debts of the company. The applicant concluded that the impugned measure was profoundly unfair because the Slovenian Railways had fully realised its claim, whereas he had been left with nothing. He had, therefore, been made to bear an excessive burden.

2. The Government

83. As regards the applicant's alleged lack of access to the strike-off proceedings, the Government submitted that he had had a fair opportunity to participate in the proceedings, regardless of the fact that neither the decision to institute strike-off proceedings nor the decision on the strike-off had been served on him personally. Both documents had been duly served on L.E. at its registered address, which was a normal practice. In addition, the decision to institute strike-off proceedings had been published in the court register, an easily accessible public register, whilst the decision on the strike-off had been published in the Official Gazette. The Government argued that, had the applicant and other members of company L.E. acted with due diligence, they could have acquainted themselves with both decisions in two different manners. They also emphasised that the time-limits for lodging an objection to the institution of proceedings and an appeal against the strike-off decision had been extensive, namely two months and thirty days, respectively. The Constitutional Court of Slovenia had likewise held that the personal service of decisions rendered in strike-off proceedings against dormant companies on all members of the companies would be very time-consuming, and in certain cases impossible, given the numbers involved and the fact that companies did not always notify the register of all relevant changes (see paragraph 49 above). Mr J. Za., Mr M. K. and Mr J. Zu. had thus remained registered as members of L.E. after their deaths (see paragraphs 10, 12 and 17 above) and the applicant had remained registered as managing director of L.E. after his dismissal (see paragraph 14 above).

84. The Government further argued that the applicant's personal liability for a debt of L.E. amounted to a measure of control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1. As regards the lawfulness of the measure, the Government claimed that the relevant provisions of domestic law were accessible, clear and foreseeable. They referred, in this regard, to a number of decisions which had consistently applied the test established by the Constitutional Court. In all those decisions, the domestic courts had found that members of struck-off companies who held at least a 10% share were personally liable for debts of the companies and that those with a smaller shareholding were not personally liable. As to the applicant's submission that the impugned regime of personal liability had undergone many reforms, the Government emphasised that the reforms in question had taken place after the closure of the enforcement proceedings in the present case and were therefore irrelevant.

85. The Government further argued that the impugned measure was in accordance with the general interest. The official data taken into account in the preparation of the FOCA revealed that, as at 28 February 1999, 6,587 companies had accounts frozen for more than a year, their debts amounted to SIT 84,452,000,000, and 6,083 of them (namely, 92%) had no

employees. The only solution available to the Slovenian authorities at that time was to start winding-up proceedings of their own motion, but that would have taken 30 years and would have cost the State around SIT 900,000,000. The Constitutional Court held that the impugned measure was indeed in the general interest: for the protection of creditors and the security of legal transactions in general (see paragraphs 48 and 50 above).

86. In the Government's view, the impugned measure was proportionate. As director of the company, the applicant had had a duty either to ensure the company's liquidity and solvency or to have it wound up. Moreover, having an 11.11% share, he had been able to influence the company's operation. He could also have withdrawn from L.E. at any time (they referred to decision of the Ljubljana Higher Court II Ip 2915/2010). The applicant had had enough time to acquaint himself with the FOCA (the relevant provisions started to apply one year after the entry into force of the Act) and circumvent the impugned measure. However, he had failed to act with due diligence.

87. The Government invited the Court to take into account the following additional factors: besides their debts, the members of struck-off companies also inherited any and all assets of those companies; the creditors of struck-off companies had a limited time of one year to seek enforcement of their claims from the members of those companies; and the applicant was able to argue his case in the enforcement proceedings and before the Constitutional Court. As to the *Vaskrsić* jurisprudence, to which the applicant referred, the Government claimed that it was irrelevant: the *Vaskrsić* case had concerned the selling of the applicant's home at public auction in order to enforce a minor claim (EUR 124) although there were other means of enforcement available. They added that if the applicant considered that he had paid more than other active members of L.E., he should have lodged a civil action against them seeking to be reimbursed.

88. Lastly, the Government stated that the written comments of the Civil Initiative of Forcefully Erased Companies (summed up in paragraph 90 below) were full of false information. In particular, its claim that even those who were no longer members when a company was struck off were nevertheless held liable for debts of the company and that they were, moreover, unable to put forward any arguments to the contrary in judicial proceedings pursued against them by the creditors of the company, was in clear contradiction with the case-law of domestic courts.

3. The third parties

89. The Malta Institute of Management submitted that disregarding a company's legal personality would be justified only in exceptional situations, when it was proven beyond reasonable doubt that the corporate form had been subject to abuse. The onus of proof of such abuse should be

on whoever alleged it; that is, abuse should not be inferred or presumed. It went on to set out the situation in Malta in this connection.

90. The Civil Initiative of Forcefully Erased Companies claimed that the FOCA imposed an excessive burden on the members of dormant companies. One of the key principles of company law was that members of companies were not personally liable for the debts of the companies, unless there was proof that they had acted in abuse of the corporate form (the so-called lifting or piercing of the corporate veil). The FOCA disregarded that principle. Pursuant to section 37(3) of that Act, the FOCA started to apply only three months after its introduction[17]. The companies therefore had no time to act in order to escape its application. According to the association, since the court register was not up to date (the companies did not always notify the court register of all relevant changes), even those who were no longer members when a company was struck off were held liable for debts of the company; moreover, they were unable to put forward any arguments to the contrary in judicial proceedings pursued against them by the creditors. The association acknowledged that the Constitutional Court in the 2002 decision had limited the liability for debts of struck-off companies to active members only (that is, those who were able to influence the operation of the company), but argued that this had created confusion in the Slovenian legal system. Further confusion had purportedly been created by attempts to abolish the impugned regime of personal liability introduced by the FOCA. The third-party association further submitted that whereas the members of struck-off companies were held liable for the companies' debts, they were not able to realise the companies' claims. It acknowledged that the Association of Judges, the Judicial Council, the Institute for Comparative Law of the Faculty of Law of the University of Ljubljana and the Chamber of Commerce and Industry[18], among others, had expressed support for the FOCA, but claimed that all of them were acting in collusion with leftist political structures. The association, lastly, provided the following figures: almost 25,000 companies were struck off; assuming that each of them had at least two responsible members, about 50,000 people were affected (2.5% of the Slovenian population).

17. Section 37(3) of the FOCA concerned the striking-off of companies which failed to align themselves with the Companies Act 1993. However, the relevant provision in the present case is section 40(3) of the FOCA which provided for a one-year *vacatio legis* in respect of the striking-off of dormant companies.

18. The Chamber of Commerce and Industry of Slovenia (CCIS) was founded more than 160 years ago and now has 7,000 member companies of all sizes and from all regions. It is a non-profit, non-governmental, independent business organisation representing the interests of its members and is Slovenia's most influential business association.

C. The Court's assessment

1. Scope of the Court's assessment

91. The applicant complained that the failure to serve on him personally the decisions rendered in the strike-off proceedings against company L.E. had amounted to a breach of Article 6 § 1 of the Convention (see paragraph 78 above). Being the master of the characterisation to be given in law to the facts of the case (see, for example, *Radomilja and Others v. Croatia* [GC], no. 37685/10, § 124, 20 March 2018) and bearing in mind the procedural requirements inherent in Article 1 of Protocol No. 1 (see paragraph 95 below), the Court finds it appropriate to examine that complaint together with the applicant's liability complaint under Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Forminster Enterprises Limited v. the Czech Republic*, no. 38238/04, § 59, 9 October 2008).

2. Applicable rule

(a) General principles

92. As the Court has stated on many occasions, Article 1 of Protocol No. 1 comprises three rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers the deprivation of property and subjects it to conditions; the third rule, stated in the second paragraph, recognises that the States are entitled, among other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, must be read in the light of the general principle laid down in the first rule (see, among other authorities, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, § 98, ECHR 2014).

(b) Application of the general principles to the present case

93. There is no dispute that the decision to hold the applicant personally liable for a debt of L.E. amounted to an interference with the peaceful enjoyment of his possessions under Article 1 of Protocol No. 1. The parties also agreed that the measure in issue, taken in isolation, should be considered as a measure of control over the use of property. However, bearing in mind the wider context, including notably the 2001 decision to strike off L.E. from the register, the Court will examine the case in the light of the general principle laid down in the first rule of Article 1 of Protocol No. 1.

3. Lawfulness of the interference

(a) General principles

94. The Court reiterates that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises a deprivation of possessions only "subject to the conditions provided for by law" and the second paragraph recognises that States have the right to control the use of property by enforcing "laws". Moreover, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see, for instance, *Former King of Greece and Others v. Greece* [GC] (merits), no. 25701/94, § 79, ECHR 2000-XII, and *Broniowski v. Poland* [GC], no. 31443/96, § 147, ECHR 2004-V).

95. The principle of lawfulness also presupposes a certain quality of the applicable provisions of domestic law. In this regard, it should be pointed out that when speaking of "law", Article 1 of Protocol No. 1 alludes to the very same concept as that to which the Convention refers elsewhere when using that term (see, for example, *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 96, 25 October 2012). It follows that the legal norms upon which the interference is based should be sufficiently accessible, precise and foreseeable in their application (see, among many other authorities, *Beyeler v. Italy* [GC], no. 33202/96, §§ 109-10, ECHR 2000-I). In particular, a norm is "foreseeable" when it affords a measure of protection against arbitrary interferences by the public authorities (see *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 143, 7 June 2012). Any interference with the peaceful enjoyment of possessions must, therefore, 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 that provision. In ascertaining whether that condition has been satisfied, a comprehensive view must be taken of the applicable judicial and administrative procedures (see *Jokela v. Finland*, no. 28856/95, § 45, ECHR 2002-IV; *Capital Bank AD v. Bulgaria*, no. 49429/99, § 134, ECHR 2005-XII; and *Stolyarova v. Russia*, no. 15711/13, § 43, 29 January 2015).

(b) Application of the general principles to the present case

96. Turning to the circumstances of the present case, the Court notes, at the outset, that the applicant's personal liability for a debt of company L.E. was based on section 27(4) of the FOCA, which provided that the members of a company which had been struck off from the court register because of a failure to perform payments through its accounts for twelve consecutive months would be deemed to have made the statement envisaged in

section 394(1) of the Companies Act 1993 (namely, that they assumed joint and several liability for any and all unsettled debts of the company). The FOCA was published in the Official Gazette on 8 July 1999 and entered into force on 23 July 1999. The Court considers that the regulation introduced by the FOCA was accessible to the applicant and that the content of the Act was sufficiently clear to enable him to foresee that his company ran the risk of being struck off from the court register and that he ran the risk of being held personally liable for its debts.

97. The Court has held that a law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true with regard to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails (see, among other authorities, *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 125, 17 May 2016, and *Cantoni v. France*, 15 November 1996, § 35, *Reports of Judgments and Decisions* 1996-V). The same may be said to apply to persons engaging in commercial activities (see, by analogy, *Špaček, s.r.o., v. the Czech Republic*, no. 26449/95, § 59, 9 November 1999, and *Forminster Enterprises Limited*, cited above, § 65). As a minority member of L.E. and its former managing director, the applicant must have been well aware not only of the state of the company, but also of the civil proceedings brought against it by its creditor (see paragraph 11 above). As a result, the Court is of the view that the applicant could have been expected to devote his attention in no small measure to the outstanding issues facing the company. It considers that the applicant must have been acquainted with the domestic law applicable to companies, and in particular to insolvent companies, and that no specific warning as to the impact of the FOCA had to be provided to him.

98. In this regard, the present case must be distinguished from the case of *Zolotas v. Greece (no. 2)* (no. 66610/09, ECHR 2013), which concerned a piece of legislation introduced in 1942 (during the occupation of Greece by the Axis Powers) and ratified in 1946, under which all bank deposits which had not been claimed by the account holder or had not been the subject of any transactions for a period of twenty years were transferred permanently to the State. The Court held in that case, *inter alia*, that the fact that the applicant had not been informed when the limitation period was due to expire, or therefore afforded the possibility of stopping the limitation period running, had upset the fair balance required by Article 1 of Protocol No. 1. It is significant that, unlike the present applicant, the applicant in that case was an ordinary citizen unversed in civil or banking law. The present case has more in common with *J.A. Pye (Oxford) Ltd*

and J.A. Pye (Oxford) Land Ltd v. the United Kingdom ([GC], no. 44302/02, ECHR 2007-III). In that case, the Court examined the proportionality of the taking-away of land belonging to the applicant companies on account of twelve years' adverse possession. It held, *inter alia*, that the lack of notice to a paper owner before the expiry of the limitation period at the relevant time had not upset the fair balance required by Article 1 of Protocol No. 1.

99. It is true that, as argued by the applicant, the legislative conception of personal liability for the debts of struck-off companies introduced by the FOCA, pursuant to which all members were liable irrespective of their roles in the companies, was mitigated by the 2002 decision of the Constitutional Court (see paragraphs 48-51 above). However, the fact that the said decision was given more than two years after the relevant provisions of the FOCA had become applicable did not affect the applicant in any way, as the issue of his own personal liability for the debts of company L.E. was established in the enforcement proceedings which began in April 2002 (see paragraph 24 above) and ended in July 2007 (see paragraph 30 above). Throughout those proceedings, of which he only became aware in December 2004 (see paragraph 24 above), the applicant argued that he had not been an active member of company L.E., relying on the very decision of the Constitutional Court to support his main argument against the enforcement. Therefore, the Court cannot discern that the applicant was in any way adversely affected in the exercise of his rights by the fact that the distinction between active and passive members was not introduced until October 2002.

100. Furthermore, the test developed by the Constitutional Court in this regard, establishing a distinction between "active members", who were in a position to influence the operation of a company, and "passive members", who exerted no such influence, was clear (see paragraph 51 above). Indeed, it led to the development of consistent domestic jurisprudence according to which the members of struck-off companies holding at least a 10% share were personally liable for the debts of the companies and those holding less than a 10% share were, as a rule, not liable. The Court considers this 10% threshold not to be arbitrary given the statutory rights enjoyed by members of limited liability companies with at least a 10% share: the right to be informed of the company's affairs; the right to access the company's records and files; the right to request the convening of a general meeting; the right to request that a specific issue be included on the agenda of a general meeting; and the right to lodge an action with the competent court requesting that the company be wound up (see paragraphs 37-38 above). Relevant international organisations, such as the Organisation for Economic Co-operation and Development (OECD) and the International Monetary Fund (IMF), use a similar test in order to distinguish between investors who do not control a company (portfolio investors) and those who do (direct investors). In this regard, the relevant part of OECD Benchmark Definition

of Foreign Direct Investment, Fourth Edition 2008, reads as follows (pp. 22-23)[19]:

> "29. ... The motivation to significantly influence or control an enterprise is the underlying factor that differentiates direct investment from cross-border portfolio investments. For the latter, the investor's focus is mostly on earnings resulting from the acquisition and sales of shares and other securities without expecting to control or influence the management of the assets underlying these investments. Direct investment relationships, by their very nature, may lead to long-term and steady financing and technological transfers with the objective of maximising production and the earnings of the MNE over time. Portfolio investors do not have as an objective any long-term relationship. Return on the assets is the main determinant for the purchase or sale of their securities.
>
> ...
>
> 31. It has been argued that in practice there are several factors which may determine the influence a direct investor has over the direct investment enterprise. However, for the sake of consistency and cross-country comparability of the FDI statistics, a strict application of a numerical guideline is recommended to define direct investment. Accordingly, direct investment is considered evident when the direct investor owns directly or indirectly at least 10% of the voting power of the direct investment enterprise. In other words, the 10% threshold is the criterion to determine whether (or not) an investor has influence over the management of an enterprise, and, therefore, whether the basis for a direct investment relationship exists or not."

101. As regards the applicant's submission that the subsequent reforms of the regime of personal liability for debts of struck-off companies had led to overall confusion, the Court fully agrees with the Government that the reforms in question were irrelevant as they had taken place after the closure of the enforcement proceedings in the applicant's case (in other words, after the decision on his personal liability for a debt of L.E. had become final).

102. Turning now to the applicant's complaint about the failure to serve personally on him the decisions rendered in the strike-off proceedings (see paragraph 91 above), the Court has found in paragraphs 96-97 above that the applicant should have foreseen that his company ran the risk of being struck off from the court register and that he ran the risk of being held personally liable for its debts. Thus, either by himself or together with the other members of the company, he should have taken the necessary steps to collect any letters addressed to his company (see *Hennings v. Germany*, 16 December 1992, § 26, Series A no. 251-A). Indeed, for as long as the members of L.E. maintained the company's existence, albeit only formally, and because they failed to find a way to dissolve it, they should have ensured some basic management. Taking into account, in addition, the reasonably long time-limits for appealing against decisions rendered in strike-off proceedings (see paragraphs 44-45 above), the Court considers the

19. See also IMF "Balance of Payments and International Investment Position Manual", Sixth Edition (BPM6), 2009.

service of the decisions on L.E., together with a notification in the court register or in the Official Gazette, as applicable, to have been adequate.

103. The present case can be distinguished from the cases to which the applicant referred in his submissions (see paragraph 78 above). Those cases dealt with civil proceedings brought against the applicants themselves under the general legislation. In contrast, the strike-off proceedings at issue in the present case were conducted against company L.E. (that is, not against the applicant) under a special law, the aim of which was precisely to dissolve the numerous dormant companies as quickly as possible. That measure was considered to be necessary in the period of transition from a socialist to a free-market economy (see the findings of the Constitutional Court in this connection in paragraphs 48-49 above). Moreover, the applicant was not found to be personally liable for a debt of L.E. in the strike-off proceedings, but in the subsequent enforcement proceedings brought against him by a creditor of L.E., in which he was at all stages able to submit the arguments he considered relevant to the case.

104. In view of the foregoing, the Court finds that the interference was lawful within the meaning of Article 1 of Protocol No. 1.

4. Aim of the interference

(a) General principles

105. Any interference by a public authority with the peaceful enjoyment of possessions can only be justified if it serves a legitimate general interest. For the purposes of the present analysis, the Court finds it useful to reiterate the following passages from *Jahn and Others* (cited above, § 91):

> "91. The Court is of the opinion that, because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures of deprivation of property. Here, as in other fields to which the safeguards of the Convention extend, the national authorities, accordingly, enjoy a certain margin of appreciation.
>
> Furthermore, the notion of 'public interest' is necessarily extensive. In particular, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues. 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 is manifestly without reasonable foundation (see *James and Others*, cited above, p. 32, § 46; *The former King of Greece and Others*, cited above, § 87; and *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, § 67 *in fine*, ECHR 2002-IX). The same applies necessarily, if not *a fortiori*, to such radical changes as those occurring at the time of German reunification, when the system changed to a market economy."

(b) Application of the general principles to the present case

106. It transpires from the preparatory work relating to the adoption of the FOCA that the main purposes of that Act were to ensure stability in the commercial market and financial discipline. One of the side effects of the transition from a socialist to a free-market economy was the existence of a large number of dormant companies with debts, but no assets, which had been created under the legislation of the former Socialist Federal Republic of Yugoslavia. The legislature considered that the initiation by the courts of winding-up proceedings against such companies, which was the only measure available at the time, would have inundated the courts for an estimated 30 years and would have had significant financial implications for the State (see paragraph 85 above). The FOCA thus introduced the possibility for companies to be struck off from the court register, on the court's initiative, without first being wound up. In addition, in order to protect the creditors of such companies, section 27(4) of the FOCA, as amended by the Constitutional Court in 2002, provided that the former members of companies struck off under the FOCA who had been able to influence the operation of the companies would be liable for the companies' debts (see also *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 877, 25 July 2013). Bearing in mind the particularly broad margin of appreciation enjoyed by the domestic authorities in matters of general social and economic policy (see *Jahn and Others*, cited above, § 91; *Vistiņš and Perepjolkins v. Latvia*, cited above, § 98; and *Béláné Nagy v. Hungary* [GC], no. 53080/13, §§ 113-14, 13 December 2016), the Court finds no reason to doubt that the impugned measure was in the public interest. In situations such as the deterioration of the commercial market due to a high number of dormant and insolvent companies, there may be a paramount need for the State to act so as to avoid irreparable harm to the economy and to enhance the legal security and confidence of participants in the market.

5. Whether the interference struck a "fair balance"

(a) General principles

107. The Court reiterates that the Convention does not provide for the institution of an *actio popularis*. Under the Court's well-established case-law, in proceedings originating in an individual application under Article 34 of the Convention, its task is not to review domestic law *in abstracto.* Instead, it must determine whether the manner in which it was applied to, or affected, the applicant gave rise to a violation of the Convention (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 101, ECHR 2014; *Perinçek v. Switzerland* [GC], no. 27510/08, § 136, ECHR 2015; and *Roman Zakharov v. Russia* [GC], no. 47143/06, § 164, ECHR 2015, with further references).

108. The Court further draws attention to its fundamentally subsidiary role in the Convention protection system. The Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the Court. Through their democratic legitimation, the national authorities are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions (see, *inter alia*, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII; *Vistiņš and Perepjolkins*, cited above, § 98; and *Garib v. the Netherlands* [GC], no. 43494/09, § 137, 6 November 2017).

109. Where the legislature enjoys a margin of appreciation, the latter in principle extends both to its decision to intervene in a given subject area and, once having intervened, to the detailed rules it lays down in order to ensure that the legislation is Convention compliant and achieves a balance between any competing public and private interests. However, the Court has repeatedly held that the choices made by the legislature are not beyond its scrutiny and has assessed the quality of the parliamentary and judicial review of the necessity of a particular measure. It has considered it relevant to take into account the risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the State to assess. A general measure has also been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty, of litigation, expense and delay as well as of discrimination and arbitrariness (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013, with further references). It falls to the Court to examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to determine whether a fair balance has been struck between the competing interests of the State or the public generally and those directly affected by the legislative choices (compare *Correia de Matos v. Portugal* [GC], no. 56402/12, § 129, 4 April 2018).

110. The search for this balance is also reflected in the structure of Article 1 of Protocol No. 1. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measures applied by the State. In each case involving the alleged violation of that Article the Court must, therefore, ascertain whether by reason of the State's action or inaction the person concerned had to bear a disproportionate and excessive burden (see, for example, *Broniowski*, cited above, § 150, and *Sargsyan v. Azerbaijan* [GC], no. 40167/06, § 227, ECHR 2015).

111. Lastly, in *Agrotexim and Others*, to which the applicant referred in his submissions, the Court held that only exceptional circumstances could justify the lifting of the corporate veil. This was not specifically in relation to a question, as that raised in the present case, of whether an interference with the right to peaceful enjoyment of possessions was justified under Article 1 of Protocol No. 1, but the question whether a shareholder may in any circumstances claim to be a victim under Article 34 of the Convention as a result of actions aimed at the property of a company. Apparently, the rationale for the Court's reasoning was that since companies had a distinct legal personality from shareholders, it was the former and not the latter who could lodge complaints of violations of Article 1 of Protocol No. 1 with the Court, unless, due to exceptional circumstances, the company was not in a position to do so. The Court observed (ibid., § 66) that the Supreme Courts of certain members States of the Council of Europe had taken the same line and that the principle had also been confirmed with regard to the diplomatic protection of companies by the International Court of Justice ("ICJ") in *Barcelona Traction, Light and Power Company Limited* (judgment of 5 February 1970, *ICJ Reports* 1970, pp. 39-40, §§ 55-58). Addressing both sides of the principle, the ICJ stated the following in the relevant part of that judgment:

> "55. The Court will now examine other grounds on which it is conceivable that the submission by the Belgian Government of a claim on behalf of shareholders in Barcelona Traction may be justified.
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> 56. For the same reasons as before, the Court must here refer to municipal law. Forms of incorporation and their legal personality have sometimes not been employed for the sole purposes they were originally intended to serve; sometimes the corporate entity has been unable to protect the rights of those who entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of 'lifting the corporate veil' or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.
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> 57. Hence the lifting of the veil is more frequently employed from without, in the interest of those dealing with the corporate entity. However, it has also been operated from within, in the interest of – among others – the shareholders, but only in exceptional circumstances.
>
> 58. In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It

follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders."

The Court has then applied the *Agrotexim* test on a number of occasions, when dealing with shareholders' claims to be identified with companies for the purposes of "victim" status – that is, "from within" in the parlance of the ICJ (see *Centro Europa 7 S.r.1. and Di Stefano*, cited above, §§ 90-95, and the authorities cited therein). The *Agrotexim* line of case-law cannot thus be transposed directly to assist the Court in resolving a case, such as the present one, which concerns lifting of the corporate veil of a limited liability company in the interest of its creditors – or "from without" in the parlance of the ICJ. In this connection, the Court has acknowledged that where a limited liability company was used merely as a façade for fraudulent actions by its owners or managers, lifting of the corporate veil may be an appropriate solution for defending the rights of its creditors (see *Khodorkovskiy and Lebedev*, cited above, § 877). Moreover, in a number of cases introduced by creditors of State-owned limited liability companies or banks, the Court has found a breach of, *inter alia*, Article 1 of Protocol No. 1 because of the refusal of the respondent State to pay a debt of the impugned company or bank, hiding thereby behind the corporate veil (see *Ališić and Others*, cited above, §§ 114-15, with further references). The Court relied in this regard on, *inter alia*, the following factors: whether the State siphoned the corporate funds to the detriment of the company and its stakeholders, failed to keep an arm's-length relationship with the company or otherwise acted in abuse of the corporate form (ibid.). This is also in line with the approach taken by a number of Contracting States (see the comparative law information provided by the parties and one of the third parties in the present case in paragraph 56 above).

112. The Court will now proceed to examine whether in the present case a fair balance was struck between the interests involved (that is, the interest of the applicant not to be held liable for the debts of L.E., the interest of L.E.'s creditor in having its claim fully settled and the public interest of stable economic relations). In assessing whether the person has had to bear an individual and excessive burden within the meaning of Article 1 of Protocol No. 1, the Court will, as appropriate, take into account the principle, explained above, that holding a member of a limited liability company liable for debts of the company, and thus lifting the corporate veil, should be made necessary by exceptional circumstances and counterbalanced by specific safeguards.

(b) Application of the general principles to the present case

113. At the outset, the Court observes that prior to the entry into force of the FOCA, the lifting of the corporate veil in order to hold a company member personally liable for company debts, under the Slovenian law, was limited to the grounds set out in section 6 of the Companies Act 1993 as

described in paragraph 34 above, including abuse of the company and misuse of the company's assets. Similar provisions have been introduced in the domestic law of a number of other Contracting States (see paragraph 56 above).

114. However, as can be seen from the preparatory work in respect of the FOCA, section 6 of the Companies Act 1993 was no longer deemed adapted to deal with the situation that had arisen in Slovenia by the end of the 1990s, when thousands of companies, which had been created under the legislation of the former Socialist Federal Republic of Yugoslavia, existed only on paper and, moreover, had large debts, but no assets. The national legislature decided to put in place new means of dealing with such companies.

115. To begin with, the Court notes that there can be no doubt that the FOCA entailed extensive consequences for many individuals including the applicant, who, as a result, became personally liable for their respective companies' debts. However, the exceptional character of the circumstances that may warrant the lifting of the corporate veil essentially comes down to the nature of the issues to be decided by the competent national court, not to the frequency of such situations. It does not mean that this kind of measure may be justified only in rare cases (see, *mutatis mutandis*, *Miller v. Sweden*, no. 55853/00, § 29, 8 February 2005, in relation to an issue under Article 6).

116. It is further apparent from the FOCA preparatory work (see paragraph 41 above), that the FOCA was introduced in response to a serious and widespread problem in post-socialist Slovenia extending to no less than 6,500 companies and undermining some of the basic conditions which the companies had to satisfy in a free-market economy. The introduction of new rules on the lifting of the corporate veil so as to make members of dormant companies liable for the companies' debts, on the basis of a presumption that they intended to have the companies dissolved and that they assumed joint and several liability for those debts, would also seem to have been motivated by a certain urgency. Moreover, by virtue of the Constitutional Court's decision, such liability was confined to company members who were in fact able to influence the operation of a company (see paragraph 51 above). The Constitutional Court pointed out, *inter alia*, that the need for an additional protection of creditors was even stronger under the FOCA, which did not envisage any procedures to ensure repayment to creditors in the event of the dissolution of these companies, and in case of potential over-indebtedness of a company also no procedures to at least ensure the regular responsibility of limited liability companies (decision U-I-135/00 of 9 October 2002, § 49, cited in paragraph 50 above).

117. It is true that those rules became the subject of at least two rounds of legislative changes and judicial appeals to the Constitutional Court. Thus, the FOCA was first amended in 2007 to relieve company members of their personal liability, but the Constitutional Court annulled that amendment the

same year in order to protect creditors (see paragraph 52 above). When the legislature made a further attempt to relieve company members in 2011 (see paragraph 54 above), the Constitutional Court allowed exoneration but only for companies struck off after the entry into force of the Act.

118. From a perusal of the relevant considerations in the preparatory work and the reasoning of the Constitutional Court, it appears that at the time under consideration, notably from the Constitutional Court's ruling of 2002, genuine efforts were made to achieve a fair balance between the interests of the creditors of struck-off companies and those of the members of such companies. The quality of the parliamentary and judicial review of the necessity of that legislation and of the measures adopted was such as to warrant a wide margin of appreciation as regards the legislative and judicial choices made (see *Animal Defenders International*, cited above, § 109). The divergence of views expressed in the legislature, on the one hand, and the Constitutional Court, on the other, is one that must be considered to fall within that margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with a European supervision by the Court, whose task it is to give a final ruling on whether the impugned interference in the instant case is reconcilable with the applicant's rights under Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 58, ECHR 1999-III).

119. In the instant case, the domestic courts examined the applicant's personal liability for a debt of L.E. in enforcement proceedings pursued by the Slovenian Railways against him. In its judgment of 12 March 2005, the Ljubljana Local Court found that the onus of proving his status as passive member was on the applicant and that he had failed to demonstrate that he had not been an active member of L.E. The court established that with his 11.11% share in the company, the applicant had enjoyed the rights of a minority member, and moreover, had been employed by the company and actively involved in its management since 1993. In his capacity as acting director and later managing director, he had been authorised to act on behalf of the company. Furthermore, even after he had resigned as managing director, he had still been active in the operations of the company and had also signed the winding-up petition. Lastly, the court considered that, as a minority member, the applicant could have and should have proposed the appointment of a new director at a general meeting of the company because pursuant to domestic law all limited liability companies had to have at least one director.

120. On 9 February 2006 the Ljubljana Higher Court rejected the applicant's appeal on essentially the same grounds as the first-instance court. It noted, *inter alia*, that the Constitutional Court had found the measure of lifting the corporate veil under the FOCA to be in line with the principle of the separation of a company's assets from those of its members and thus to be consistent with the Constitution. The court considered it

irrelevant whether the applicant had become a member of L.E. before or after the creditor's claim had arisen. Having joined the company, he had assumed its assets as well as its liabilities. It further held that it was not decisive that the applicant had not remained a director of L.E. until the dissolution of that company. What was crucial was that the applicant had been actively involved in its management and that he had had the rights of a minority member pursuant to section 445 of the Companies Act 1993 (see paragraph 37 above). The court noted that, in contrast to section 6 of the Companies Act 1993, which required the creditors of a company to prove that a member of the company had abused the corporate form (see paragraph 34 above), the FOCA had introduced a "non-rebuttable" presumption that the members of a struck-off company were deemed to have undertaken joint and several liability for any outstanding debts of the company. In accordance with the Constitutional Court's ruling of 2002, they could be exonerated from their liability only if they demonstrated that they were "passive members" of the company (see paragraphs 46 and 51 above). Lastly, the court took note of the fact that the applicant had indeed made a winding-up petition on behalf of L.E., but it considered this irrelevant because L.E. had at the time failed to make the required advance payment and the petition had therefore been rejected (see paragraphs 15 and 18 above).

121. Subsequently, on 9 July 2007, the Constitutional Court considered that the lower courts had correctly applied its criteria for differentiating between active and passive members to the applicant's individual situation. It thus rejected the applicant's complaint as manifestly ill-founded.

122. The Court sees no cause to disagree, in substance, with the above reasoning of the national courts. It is not persuaded by the applicant's argument that the domestic courts should have attached more weight to other factors that he had adduced and absolved him from his personal liability. In principle it is not the Court's task to reassess their factual findings. Moreover, as the Court has recognised in its case-law, presumptions of fact or of law operate in every legal system. The Convention clearly does not prohibit such presumptions as a matter of principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law (see *Salabiaku v. France*, 7 October 1988, § 28, Series A no. 141-A). In the Court's view, presumptions can *a fortiori* be accepted in the area of company law, where the right to respect for possessions may be at stake. Moreover, there is nothing to indicate that the manner of the application of the relevant burden of proof in the applicant's case overstepped those limits (see paragraph 100 above).

123. Regarding the specific situation of the company in issue, the Court further observes that L.E. was converted from a public limited company into a limited liability company in November 1995 (see paragraph 13 above). As

explained by the Constitutional Court of Slovenia in its decision U-I-135/00, § 44 (cited in paragraph 51 above), limited liability companies, also known as private limited companies, were very different from public limited companies, notably when it came to the responsibility of their members. The applicant acknowledged that L.E. had already been insolvent at the time when it was converted. Consequently, it can only be concluded that, as a limited liability company, L.E. was not adequately capitalised from the start and acted in breach of the applicable rules of company law. Moreover, despite the fact that the company had been unable to re-establish liquidity and solvency since 1995, it did not apply for winding-up until two years later, when it was evidently lacking any assets whatsoever. L.E. failed to make the required advance payment for the costs of the proceedings in the amount of EUR 626, and instead decided to wait until such proceedings were instituted of the court's own motion. However, the relevant legislation changed and removed that possibility; the FOCA introduced stricter provisions on the operation of companies.

124. It is worth noting in this regard that the impugned provisions of the FOCA only became applicable one year after the Act had entered into force. The one-year *vacatio legis* provided L.E. and its members with ample time to institute appropriate proceedings in order to have the company dissolved and to avoid the application of the FOCA (contrast with *Vékony v. Hungary*, no. 65681/13, § 34, 13 January 2015, where the Court held that the applicant had not been granted enough time to adjust to the new situation). It is true that the members would have been required to cover the costs of winding-up proceedings instituted by them, but would have avoided the strike off and personal liability for the debts of the company. In sum, although the company was not able to pay its debts or to perform the activities for which it had been established, it perpetuated its existence. In this connection, the Court sees no grounds for calling into doubt the position of the Constitutional Court relied on by the Government that such companies posed a threat to the proper functioning of the market.

125. Furthermore, the effect of reducing the capital below the statutory limit and eventually exhausting it completely, coupled with prolonged failure to institute winding-up proceedings, had considerable adverse effects on the position of the company's creditor (namely, the Slovenian Railways). The latter was subjected to prolonged uncertainty as to whether its debt would be repaid. Such a lengthy course of proceedings could have been avoided if L.E. had applied for winding-up in due time after recognising that it was unable to re-establish sufficient basic funds to continue its operations.

126. Referring to the judgment of the CJEU of 21 October 2010 in *Idryma Typou AE v. Ypourgos Typou kai Meson Mazikis Enimerosis* (C-81/09, EU:C:2010:622), the applicant argued that the impugned measure was contrary to the fundamental principles of company law in the European

Union. However, his claim does not seem to properly reflect the content of the said ruling. The judgment in question clearly states in § 42:

> ".. while it is apparent from an examination of the law of the Member States ... that in the majority of cases shareholders of the companies listed in Article 1 of the First Directive are not required to be personally answerable for the debts of a company limited by shares or otherwise having limited liability, it cannot be concluded therefrom that this is a general principle of company law applicable in all circumstances and without exception."

The CJEU found a breach of the freedom of establishment and the free movement of capital in that case because the measure in question allowed shareholders of a public limited company in the television sector to be held liable for fines imposed on that company in order that they should see to it that the company observed Greek legislation and rules of good conduct, whereas the powers accorded to those shareholders did not actually give them a possibility of so doing (see § 57 of that judgment). In contrast, pursuant to the FOCA, as amended by the Constitutional Court in 2002, only those who were in a position to actively influence the operation of a company were liable for debts of the company. The CJEU further held that the deterrent effect of the measure in question was greater for investors from other member States than for Greek investors. That point was not argued in the present case.

127. It should further be emphasised that the amount of the debt paid by the applicant (see paragraph 31 above) was relatively modest. In addition, the Slovenian Railways did not focus their attention on the applicant alone, but also pursued their claim against other members of L.E. (see paragraph 24 above). In any event, the applicant has not argued, let alone substantiated, that he suffered any serious consequences in this connection (contrast *Vaskrsić*, cited above, § 83). Therefore, in this particular case, the Court has no factual grounds to establish that the impugned measure, which was based on the statutory rule of unlimited liability of the applicant for the outstanding debts of L.E., was disproportionate.

128. In this connection, the Court has also taken note of the guarantee mechanism which, as explained by the Government in paragraph 87 above and as was undisputed by the applicant, was included in the FOCA regime: besides their debts, the members of struck-off companies also inherited any and all assets of those companies and the creditors of struck-off companies had a limited time of one year to seek enforcement of their claims from the members. Moreover, if the applicant considered that he had paid more than other active members of L.E., he could have lodged a civil action against them seeking to be reimbursed.

129. In the light of the above considerations, in particular the applicant's involvement in the running of the company, the amount of the debt paid by him (see paragraph 127 above) and the national context at the relevant time (see paragraph 106 above), the Court finds that there was a reasonable

relationship of proportionality between the aim pursued and the means applied. The impugned measure did not, in the specific circumstances, entail the imposition of an individual and excessive burden on the applicant, thereby overstepping the State's wide margin of appreciation in this field (see paragraphs 105 and 118 above).

6. Conclusion

130. There has therefore been no breach of Article 1 of Protocol No. 1.

FOR THESE REASONS, THE COURT

1. Dismisses, unanimously, the Government's preliminary objections;

2. Holds, by fifteen votes to two, that there has been no violation of Article 1 of Protocol No. 1 to the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 11 December 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Prebensen	Guido Raimondi
Deputy to the Registrar	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) Joint concurring opinion of Judges Raimondi, Nußberger, Lemmens, Ravarani, Paczolay and Zalar;

(b) joint dissenting opinion of Judges Turković and Mourou-Vikström.

G.R.
S.C.P.

JOINT CONCURRING OPINION OF JUDGES RAIMONDI, NUSSBERGER, LEMMENS, RAVARANI, PACZOLAY AND ZALAR

1. We voted with the majority in finding no violation of Article 1 of Protocol No. 1 to the Convention.

We respectfully disagree, however, with the statement in the judgment that "holding a member of a limited liability company liable for debts of the company, and thus lifting the corporate veil, should be made necessary by exceptional circumstances and counterbalanced by specific safeguards" (see paragraph 112 of the judgment). In our opinion, the reference to "exceptional circumstances" is inappropriate or misleading in a case like the present one.

A. The "exceptional circumstances" requirement should not have been introduced in the context of the "fair balance" test

2. It is for domestic law to determine under which conditions legal personality can be given to a corporate entity created by one or more individuals, and to determine to what extent the legal personality of the corporation is separate from that of its members. Where domestic law provides that a corporation of a given type has a separate legal personality, the courts, including international courts, must take the characteristics of that legal personality into account. Accordingly, in principle, only the corporation can act in defence of its rights and only the corporation can be held liable for its obligations.

3. That principle is not without exception. As was explained by the International Court of Justice in the *Barcelona Traction* case, quoted in paragraph 111 of the present judgment, the lifting of the corporate veil is admitted by the domestic law of many, if not all States, "in the interests of those within the corporate entity as well as of those outside who have dealings with it" (*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, judgment of 5 February 1970, *ICJ Reports* 1970, p. 40, § 56). The International Court of Justice pointed to a difference in frequency between the two situations: while "the lifting of the veil is more frequently employed from without, in the interests of those dealing with the corporate entity, ... it has also been operated from within, in the interests of – among others – the shareholders, but only in exceptional circumstances" (ibid., p. 40, § 57). Based on its analysis of domestic laws, the International Court of Justice concluded that the process of lifting the veil, "being an exceptional one admitted by municipal law in respect of an institution of its own making", was "equally admissible to play a similar role in international law"; it admitted, more specifically, that there could be "special

circumstances which justif[ied] the lifting of the veil in the interest of shareholders" (ibid., p. 40, § 58).

Barcelona Traction concerned a claim by a State acting on behalf of shareholders who were its nationals. The European Court of Human Rights relied on that judgment when it had to decide whether individual shareholders (themselves legal persons) could bring an application before it, complaining about a violation of their company's rights. It held as follows (see *Agrotexim and Others v. Greece*, 24 October 1995, § 66, Series A no. 330-A):

> "... the piercing of the 'corporate veil' or the disregarding of a company's legal personality will be justified only in exceptional circumstances in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or – in the event of liquidation – through its liquidators."

We would like to emphasise that in situations such as those covered by *Barcelona Traction* and *Agrotexim*, the lifting of the corporate veil occurs according to a *general principle of (corporate) law* that operates in favour of the shareholders. In that specific context the requirement of exceptional circumstances is perfectly understandable and clearly applicable: lifting the corporate veil appears as a *derogation* from the general rule of separation of the legal personalities of the company and its shareholders *as determined by the legislature*.

4. The present case is of a different nature. The majority acknowledge the existence of such a difference, and even admit that "the *Agrotexim* line of case-law cannot ... be transposed directly to assist the Court in resolving a case, such as the present one, which concerns lifting of the corporate veil of a limited liability company in the interest of its creditors" (see paragraph 111 of the judgment). They nevertheless hold, as indicated above, that lifting the corporate veil in a case such as the present one can only be admissible under the Convention where this is "made necessary by exceptional circumstances" (see paragraph 112 of the judgment). Notwithstanding the wording to the contrary, this seems to be a rather direct transposition of the *Agrotexim* criterion to the present case...

The difference between the two types of cases is not only about who benefits from the lifting of the corporate veil: the shareholders (as in *Barcelona Traction* and *Agrotexim*) or the corporation's creditors (as in the present case). The difference is also, and more fundamentally, about the legal basis for lifting the corporate veil: in the former situation, as explained above, the legal basis is a general principle of law allowing for a derogation from the general rule established by the legislature; in the latter situation it is the legislature itself which allows for a derogation, under certain

conditions, from the general rule that individual shareholders are not liable for the corporation's debts[1].

We do not believe that it is for the Court to limit the discretion of domestic legislatures to shape the legal personality of corporate entities as they see fit. More specifically, there is in our opinion, in principle[2], nothing that should prevent a legislature from deciding that an individual shareholder may be held liable for the corporation's debts, or from determining the circumstances in which that can and should happen. To hold that the legislature can do so *only* "in exceptional circumstances" (a vague notion, and therefore in fact left to the appreciation of the Court) constitutes, in our opinion, an unjustified restriction of the discretion enjoyed by the domestic legislature.

We cannot see how such a restriction can be derived from Article 1 of Protocol No. 1. The majority are, in fact, turning a principle of (mere) company law (the principle of separation of the legal personalities of the corporation and its shareholders and the ensuing limited liability of shareholders, a principle from which the legislature can freely derogate) into a Convention principle (from which the legislature can derogate only "in exceptional circumstances").

Finally, we find that the majority's inclusion of the "exceptional circumstances" requirement among the general principles to be applied creates uncertainty. Indeed, when it comes to the application of the principles, the "exceptional circumstances" requirement is mentioned only in paragraph 115 of the judgment. The majority explain that "the exceptional character of the circumstances that may warrant the lifting of the corporate veil essentially comes down to the nature of the issues to be decided by the competent national court, not to the frequency of such situations", and thus "[i]t does not mean that this kind of measure may be justified only in rare cases". When it comes to the concrete fair-balance test (see paragraphs 116-29 of the judgment), however, the requirement of exceptional circumstances is not mentioned again.

B. The fair balance in the present case

5. Leaving aside the "exceptional circumstances" test altogether does not mean that the legislature's choices are beyond the scrutiny of the Court. As

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1. We do not express an opinion on the extent to which, *in the absence of an explicit statutory rule*, a general principle of law allows for the lifting of the corporate veil in the interest of third parties, such as the corporation's creditors. This question was briefly treated in *Barcelona Traction* (ibid., p. 40, § 56, *in fine*), but is as such not relevant for the present case.

2. We say "in principle" because the legislature is limited by the requirement to achieve a fair balance between the rights and interests involved (see paragraph 5, below).

indicated above, when the legislature interferes with the property rights of individuals, the Convention requires that a fair balance be struck between the rights of those directly affected by the legislative choices and the competing interests of the State or the public generally (see paragraph 109 of the judgment).

The assessment of whether a fair balance has been struck depends on all the circumstances of the case. Whether or not these circumstances are "exceptional", whatever the meaning to be given to that term, is in our opinion irrelevant. We take the system set up by the legislature as a fact.

What counts is whether the legislature had relevant and sufficient reasons to intervene, whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measures applied (see paragraph 110 of the judgment), and whether any individual and excessive burden was imposed on the applicant (see paragraphs 110 and 112 of the judgment).

6. We can be brief as to the assessment of whether there has been a fair balance in the present case.

As a starting point, we note that the interference with the applicant's rights resulted from a general measure adopted by the legislature. Indeed, the FOCA determined the situations in which shareholders could be held liable for the debts of their company. All that the courts had to do was to establish whether or not the applicant's situation corresponded to the statutory one (compare *Ždanoka v. Latvia* [GC], no. 58278/00, § 114, ECHR 2006-IV), apart of course from examining whether the interference with the applicant's right to the peaceful enjoyment of his possessions was compatible with the Convention standards.

In order to determine whether a general measure struck a fair balance between the competing interests at stake, the Court must primarily assess the legislative choices underlying it. The application of the general measure to the facts of the case remains, however, illustrative of its impact in practice and is thus material to its proportionality (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013, and *Correia de Matos v. Portugal* [GC], no. 56402/12, § 129, 4 April 2018).

7. In this respect, we agree with the general approach adopted by the majority in their application of the general principles to the present case: they examine first the legislative framework as such, in paragraphs 113-18 of the judgment, then the application of that framework to the applicant's case, in paragraphs 119-28.

In particular, we agree that the legislature set up a system that was able to strike a fair balance between the interests of the creditors of struck-off companies and those of the members of such companies (see paragraph 118 of the judgment), and in particular that the quality of the parliamentary and judicial review of the necessity of that legislation and of the measures

adopted was such as to warrant a wide margin of appreciation as regards the legislative and judicial choices made (ibid.)[3]. We finally agree that in the circumstances of the present case no individual and excessive burden was imposed on the applicant (see paragraph 129 of the judgment).

On the basis of these reasons, we concur in the conclusion that there has been no violation of Article 1 of Protocol No. 1.

3. We arrive at this conclusion despite the fact that the Constitutional Court decided that the contested measure of the FOCA did not constitute an interference with the rights of shareholders as guaranteed by Article 1 of Protocol No. 1 (see paragraph 38 of decision U-I-135/00 of the Constitutional Court of 9 October 2002, mentioned in paragraphs 48-52 of the present judgment).

JOINT DISSENTING OPINION OF JUDGES TURKOVIĆ AND MOUROU-VIKSTRÖM

(Partial translation)

1. With all due respect we are unable to join the majority in finding that there has been no violation of Article 1 of Protocol No. 1.

A. General background to the application and scope of the FOCA

2. In our opinion, the legislature can freely derogate from the principle of separation between the legal personalities of a company and its shareholders, but it is not entitled to do so retroactively, for debts that were incurred while the corporate veil doctrine was applicable. In such circumstances, shareholders should have a legitimate expectation that the corporate veil will not be lifted and that there will be no interference with their property rights unless or until this is in the public interest; and this interference has to be necessary in a democratic society. We also believe that only the exceptional nature of the circumstances could justify lifting the corporate veil. However, in the present case there were no exceptional circumstances; nor was the proper balancing test provided for by law or exercised by the domestic courts.

3. In enacting the FOCA (Financial Operations of Companies Act), which entered into force on 23 July 1999, the national authorities sought to deal with the problem of the thousands of so-called "dormant" or inactive companies which, having high levels of debt and in most cases (92%) no employees, allegedly represented a threat to the Slovenian economy.

4. However, that new legislation was intended to provide a simple and effective solution to a situation that the State had itself allowed to develop and for which it therefore bore a share of responsibility. The FOCA had been enacted in 1989, two years before Slovenia gained its independence in 1991. Once independent and free from the shackles of the socialist system, Slovenia decided to continue to apply that legislation even though it was not obliged to do so. It was therefore an economic policy decision taken by the newly independent State. In that context it is important to note that the problems created by the legislation appeared, to a significant extent, after independence and had not actually been inherited from the socialist era (majority took a different position, see paragraph 106 of the judgment). By a timely reaction, the Slovenian State could thus have prevented the situation, or at least its consequences could have been significantly curbed.

5. Was the legislature, in any event, implicitly entitled to take the view that the transition to a market economy and the existence (admittedly problematic) of a mass of "living dead" companies – a situation that was actually created by the State itself – could constitute, generally and

objectively, without any case-by-case analysis, exceptional circumstances which justified the piercing of the corporate veil?

6. The same situation was faced by other States which were once part of the former Yugoslavia, but they have not introduced such drastic measures at the expense of shareholders and have not suffered severe consequences as a result. Unlike the majority, we do not find the situation in Slovenia to constitute exceptional circumstances that would, if accompanied by specific safeguards, justify lifting the corporate veil (see paragraph 106 in connection with paragraphs 112 and 116 of the judgment). Moreover, the majority have not in any way defined the exceptional circumstances. We believe that the standard established in *Agrotexim and Others v. Greece* (24 October 1995, § 66, Series A no. 330-A), which was developed in the context of a shareholder's claims for the purposes of the "victim" requirement under Article 34 of the Convention, to ensure that shareholders could seek protection of their interests before the European Court of Human Rights, cannot be directly transposed to cases where the corporate veil has been lifted in order to impose liability on shareholders.

7. The mechanism introduced by the FOCA provided that "active members" (those having 10% or more of shares in the company) were required to apply for liquidation within one year after the entry into force of the legislation and that otherwise they would be personally liable for any debts. The new scheme was introduced to avoid winding-up proceedings which would be time-consuming and costly to the State (see paragraph 43 of the judgment). Such simplified proceedings for the purpose of striking off dormant companies could, however, have left creditors without any possibility of protecting their interests against the assets of the struck-off company (see paragraph 52 of the judgment). Thus the lifting of the corporate veil was introduced in order to serve the "general interest" of protection of creditors while it should also encompass the interests of shareholders (see paragraph 50 of the judgment). The State thereby gave preference to the protection of the interests of creditors over those of shareholders, and in fact entirely placed the costs of the simplified proceedings on the shoulders of the shareholders, who had done nothing but make corporate decisions within the limits of reasonable business risk, just like the creditors. Shareholders were made to pay for the inadequate policy decisions of the State, and the wrong business decisions of shareholders and creditors alike, or simply for a difficult economic environment that existed in Slovenia at that time. Thus we believe that shareholders were made to bear an excessive burden in the implementation of the simplified striking-off procedure in respect of dormant companies.

8. In our view this is indeed a manifestly unreasonable provision, imposing an excessive burden on certain members of a company solely because they have not triggered the liquidation procedure. Those who have taken the initiative of applying for liquidation are released from any

personal liability on their own assets (see paragraph 42 of the judgment). Their property is therefore safe and protected by law solely on account of the fact that they have carried out an administrative formality. This is a harsh and in fact limitless pecuniary punishment, whereas a mere fine and an order to pay for winding-up would have achieved the same aim. There was no need for such a drastic measure to be taken against shareholders who have not taken advantage of the corporate veil in any way (i.e. have not committed any offence, have not evaded a tax liability, have not established a sham company, have not made decisions contrary to public policy, have not used the corporate form to violate human rights, etc.).

9. At the same time, the lifting of the corporate veil was a measure of protection for creditors in the simplified striking-off proceedings. Such protection could have been potentially greater than that available in winding–up proceedings, since the shareholders concerned were liable for debts up to the value of their entire property, while dormant companies often had no assets. Thus the FOCA created an advantageous position for creditors at the expense of shareholders, in respect of debts incurred before the FOCA was enacted.

10. Moreover, once the company was struck off from the court registry the shareholders no longer had any means of evading personal liability. Their personal liability for company debts was automatic once it was established that they held at least a 10% share. There was no possibility of taking any personal circumstances into consideration and nor was there any limit placed on the amount that could be claimed from them. No balancing exercise was called for or made possible by law. The FOCA thus drastically departed from the principle that the burden of proof is on the creditors as regards the piercing of the corporate veil.

11. The Government did not succeed in establishing, in a satisfactory manner, the general interest said to justify the enactment of the legislation. In calling into question the protection of shareholders who believed they were sheltered by the very structure of a limited liability company, can this measure be regarded as serving the common interest? Can the unconditional protection of creditors be seen as an "overriding reason of general interest" (see paragraph 50 of the judgment)? This cannot be so, especially as any analysis of the proportionality of the measure was not a statutory requirement and was not carried out at the domestic level, where the case was considered only in terms of Article 6, without it being examined under Article 1 of Protocol No. 1. As we have already said, there were far less drastic measures at the State's disposal in order to "force" bona fide shareholders to wind up dormant companies or to punish them in a proportionate manner for not doing so.

12. We take the view, unlike the majority, that the FOCA failed to meet the requirements of proportionality. It led to an undermining of stakeholders in the economy, particularly small investors. The legislature set up a system

which created an imbalance in the protection of the interests of creditors and bona fide shareholders at the expense of the latter. This was recognised by the legislature itself. The FOCA was a short-lived Act, enforced over a limited time-frame. It was already repealed by 2011, since it was regarded as being unfair for the shareholders concerned and in the long run detrimental to the economy (see paragraph 54 of the judgment). As such it was not in fact in the public interest, or at least it did not strike a proper balance between the public interest and the interest of the shareholders.

13. Its consequences for the assets of the shareholders thus affected were clearly disproportionate.

B. Application of the law to the applicant

14. The conditions in which the applicant rose to a position of responsibility in the company L.E. are particularly revealing. Having acquired a modest share of 11.11% of the capital in 1992, he was employed in 1993 in the company's I.T. department. He only became acting director on 23 February 1993, and managing director on 23 February 1995, on account of a serious accident in which the two main directors had died and two other shareholders had been injured. Thus the applicant found himself occupying a managerial position, almost "against his will", through those dramatic circumstances.

15. In the light of the conditions in which the applicant had taken on responsibilities in the company L.E., and his personal profile, we do not believe, contrary to the majority's analysis, that the applicant may be regarded as a well-informed businessman, aware of the rules of a company's economic management and of commercial law procedure, even though it is true that he could have kept himself informed of the applicable rules and of his personal responsibilities by seeking advice from a lawyer. However, since the company was not making any money, it is questionable whether he had the resources to do so.

16. In 1993 the Slovenian Railways brought a civil action against the company L.E. for the payment of a debt that had been incurred well before the applicant's arrival in the company.

17. In 1996 the applicant took the decision to resign from his position as managing director, even though the company had been a limited liability company since 1995. He had thus clearly expressed his wish to leave the company, even though he could legitimately have believed that he was protected by the corporate veil. His intention was not to conceal any improper conduct or to commit any wrongdoing, but to remove himself from a management role. A clerical error in the company's registers led to his remaining as managing director.

18. In 1997 he initiated, on behalf of the company L.E., a liquidation procedure, as any minority shareholder was entitled to do under

sections 445 and 455 of the Companies Act 1993. However, the fee for publication in the Official Gazette remained unpaid, and this was because the other shareholders refused to pay up, according to the applicant. In view of that explanation, which has not been denied by the Government, is it reasonable to expect him to have borne those expenses on his own? Can he be considered personally at fault? We do not believe so, since the obligation to pay must lie on all the shareholders, even though, legally speaking the applicant could have paid himself. The collective responsibility of the various components of the limited liability company must be engaged, and not only that of a single shareholder, who had, moreover, been seeking to resign since 1995.

19. Moreover, the decision to strike off the company L.E. was not notified in person to the applicant, nor to any of the other shareholders, even though he should have been kept informed in view of the significant repercussions that this decision would have for his property. The serving of notice solely at the head office of the company L.E. cannot be regarded as placing the applicant in a position where he was informed and was able to challenge the measure.

20. The piercing of the veil to reach the personal assets of a shareholder in a limited liability company serves as a sanction against any abuse, fraudulent acts, or reprehensible conduct on the part of a shareholder who might hide behind the protection to conceal wrongdoing. However, it has not been shown, or even alleged, that the applicant in the present case acted unlawfully. The lifting of the veil was thus only intended as a means of trying to recover a debt which had nothing to do with him, because he had not held shares in the company at the time when the debt had been registered. He had not had any influence over the decision which had given rise to the debt owed to the Slovenian Railways, and found himself having to reimburse the sum of 32,795 euros, there being no maximum statutory limit to the amount that he could be asked to pay. If the debt had been 10 times or 100 times higher, he would have been required to reimburse the full amount, on the same basis, without his personal situation being taken into account.

21. The lifting of the corporate veil thus had disproportionate consequences for the applicant's property.

22. In the light of the foregoing, we take the view that there has been a violation of Article 1 of Protocol No. 1 to the Convention.