



The norms on establishing the status of public official for the administrators of insolvency proceedings are incompatible with the Satversme

On 21 December 2015 the Constitutional Court passed the judgement in Case No. 2015-03-01 “On Compliance of Section 2 of the law “Amendments to the Insolvency Law” of 25 September 2014 and the law “Amendments to the Law On Prevention of Conflict of Interest in the Activities of Public Officials” of 30 October 2014 with Article 1 and the first sentence of Article 106 of the Satversme of the Republic of Latvia.”

The contested norms, insofar they do not ensure to administrators, who are at the same time advocates, guarantees in professional activities for retaining the chosen employment, are incompatible with the principle of proportionality

The Contested Norms

Section 2 of the law “Amendments to the Insolvency Law” added a second sentence to Section 9(1) of the Insolvency Law, worded as follows: “The administrators of insolvency proceedings in performing their activities of office shall be equalled to public officials.” The norm entered into force on 1 March of the current year.

Whereas the law “ Amendments to the Law On Prevention of Conflict of Interest in Activities of Public Officials” of 30 October 2014 envisages supplementing to the enumeration of public officials set out in Section 4(1) of the law On Prevention of Conflict of Interest in Activities of Public Officials with a new paragraph, Para 26 “administrator or insolvency proceedings”. The law sets out that these amendments will enter into force on 1 January 2016.

The Norms of Higher Legal Force

Article 1 of the Satversme: “Latvia is an independent democratic republic.”

The first sentence of Article 106 of the Satversme: “Everyone has the right to freely choose their employment and workplace according to their abilities and qualifications.”

The Facts

A number of advocates turned to the Constitutional Court with regard to the contested norm; the applicants combine their activities as advocates with performing the duties of an administrator of insolvency proceedings. The applicants hold that the status of a public official that the contested norms establish for them as the administrators of insolvency proceedings prohibits them from being at the same time advocates. This, allegedly, restricts the applicant's right to freely choose their employment and workplace, established in the first sentence of Article 106 of the Satversme and is said to be incompatible with the principle of legal certainty.

The Court's Findings and Ruling

On the scope of review with regard to the contested norms

First of all the Constitutional Court reviewed compliance of the contested norms with Article 106 of the Satversme. [13]

The Constitutional Court examined the contested norms as a unified regulation, which provides that administrators of insolvency proceedings in the performance of their duties of office are equalled to public officials, and therefore Law On Prevention of Conflict of Interest in the Activities of Public Officials is applicable to them. [15]

The Constitutional Court recognised that in reviewing compatibility of the contested norms with Article 106 of the Satversme, the particular situation of the applicants should be taken into account. Therefore the Constitutional Court reviewed compatibility of the contested norms with the Satversme, insofar they applied to administrators of insolvency proceedings, who were at the same time also advocates. [17]

On the content of the first sentence in Article 106 of the Satversme

The Constitutional Court noted that the right to retain employment is an essential element in the right to freely choose employment and comprises the right to continue this employment in the future. Likewise, the right to choose a number of employments and perform them at the same time also falls with the scope of the right to freely choose employment. [14.2]

The Constitutional Court recognised that restrictions could be placed upon the right to freely choose employment, including the right to retain the current employment; however, the

restriction should comply with one of the legitimate aims defined in Article 116 of the Satversme and should be proportional. [14.2]

On the restriction upon the applicants' fundamental rights

In assessing, whether the contested norms restricted the applicants' fundamental rights, the Constitutional Court verified, what new restrictions, prohibitions and obligations for the applicants were created by the status of a public official and whether these could be incompatible with the principles of advocates' independence and confidentiality. [21, 21.1, 21.2, 21.2.1, 21.2.2, 21.3]

The Constitutional Court found that the applicants as public officials would have to comply with such obligations and prohibitions in their professional activities that would jeopardize the rights that they have acquired to act both as administrators of insolvency proceedings and advocates. [21.4] For example, situations could arise, where the principle of confidentiality, which is binding upon an advocate, prohibits requesting information not only about the content of legal assistance provided by the advocate, but also to whom concretely it has been provided [21.2.2] The established obligation to include in the declaration of a public official information on concluded agreements and the parties to these agreements, as well as income and the sources of income would be incompatible with the principle of confidentiality in advocate's activities, because this would mean disclosing information about the particular person, to who an advocate had provided assistance. [21.2.2]

Thus, the Constitutional Court concluded that the contested norms restricted the applicants right established in the first sentence of Article 106 of the Satversme to retain the existing employment [21.4]

The Constitutional Court recognised that the right to retain the existing employment included in the first sentence of Article 106 of the Satversme could be restricted; however, then it must be assessed, whether the restriction was justified, namely: 1) it has been established by law; 2) it has a legitimate aim; 3) it is proportional. [22]

On whether the restriction upon fundamental rights is justifiable

The Constitutional Court recognised that the restriction upon fundamental rights that the contested norms comprised had been established by law. [23.3.] The legitimate aim of the restriction is protection of other persons' rights and public welfare. I.e., the regulation that the

contested norms comprise is aimed at protecting the rights of creditors and debtors in insolvency proceedings. At the same time, effective and lawful course of insolvency proceedings is important for the national economy. [24.2]

In examining the proportionality of a restriction upon fundamental rights, the Constitutional Court verifies:

- 1) whether the measures chosen by the legislator are appropriate for reaching the legitimate aim;
- 2) whether the legitimate aim cannot be reached by other measures, less restrictive upon an individual's rights;
- 3) whether the benefit gained by society exceeds the damage inflicted upon an individual's rights. [25]

If in the course of reviewing a legal norm it is recognised that it is incompatible with even one of these criteria, it is incompatible with the principle of proportionality and is unlawful. [25]

The Constitutional Court recognised that the measures chosen by the legislator were appropriate for reaching the legitimate aim. [26]

In assessing compliance of the contested norms with the second criterion of proportionality, the Constitutional Court first of all noted that the restriction upon fundamental rights was necessary, if no other means existed that would be as effective and choice of which would place lesser restrictions upon persons' fundamental rights. The Constitutional Court noted that its competence included examination of whether possibilities of using alternative measures had been given due consideration in this particular case. [27]

Looking for optimum solutions is the legislator's task; however, the Constitutional Court may point to the existence of more lenient measures. [27.2]

The Constitutional Court noted that in amending the regulation on the supervision of activities of administrators of insolvency proceedings, the legislator should select such measures for reaching the legitimate aim that would ensure the protection of fundamental rights also to those administrators, who are advocates. The Constitutional Court noted that in the case under review such measures could be, for example, defining exemptions with regard to those prohibitions set for a public official, which were incompatible with the guarantees for an

advocate's professional activities. Likewise, the adverse consequences caused to the applicants could be decreased by envisaging a different regulation on submitting the declaration of a public official. [27.2]

The Constitutional Court concluded that the materials in the case did not prove that the legislator had duly considered the consequences that the application of the contested norms would cause to those administrators of insolvency proceedings who are also advocates, even though such measures that would be less restrictive upon the applicants' fundamental rights and by which the legitimate aim could be reached in the same quality existed. I.e., there are measures that could, simultaneously with equalling administrators to public officials, ensure to those persons, who are not only administrators of insolvency proceedings, but also advocates, guarantees in professional activities for retaining the chosen employment. [27.4]

Thus, the Constitutional Court recognised that the contested norms, insofar they did not provide guarantees in professional activities to those administrators, who at the same time are also advocates, for retaining the chosen employment, were incompatible with the principle of proportionality. [27.4]

The Constitutional Court **recognised the contested norms as being incompatible with the first sentence of Article 106 of the Satversme.**

The judgement by the Constitutional Court is final and not subject to appeal, it shall enter into force on the day it is officially published. The text of the judgement (in Latvian) is available from the home page of the Constitutional Court.

The press release was prepared with the aim to facilitate understanding of the cases that are adjudicated by the Constitutional Court. It shall not be regarded as part of the judgement and is not binding to the Constitutional Court. The judgements, decisions and other information regarding the Constitutional Court are available at the home page of the Constitutional Court www.satv.tiesa.gov.lv.

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