Constitutional judgment 3-4-1-4-12

JUDGMENT
OF THE SUPREME COURT *EN BANC*

on behalf of the Republic of Estonia

No. of the case	3-4-1-4-12
Date of judgment	20 November 2012
Composition of court	Chairman Märt Rask, members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Lea Laarmaa, Jaak Luik, Priit Pikamäe, Ivo Pilving, Jüri Põld, Harri Salmann and Tambet Tampuu
Court Case	Appeal by AS Pärnu Kalur Holding, AS Saare Kalur, AS A.O. Imbi (bankrupt), Akke AS (in liquidation), AS Tartu Lihakombinaat (bankrupt), AS Volta, OÜ Kommunaar (in liquidation), OÜ Belesta, AS Baltic Computer Systems, Magnesium & Metals Limited, Kreenholmi Valduse AS (bankrupt) and AS Latvijas Kugnieciba for annulment of the decision of the*Riigikogu* of 15 February 2012 “Compensation of Claims Secured by Certificates of the National VEB Fund”
Hearing	Written proceeding
DECISION	**1. To dismiss the appeal.** **2. To order AS Pärnu Kalur Holding, AS Saare Kalur, AS A.O. Imbi (bankrupt), Akke AS (in liquidation), AS Tartu Lihakombinaat (bankrupt), AS Volta, OÜ Kommunaar (in liquidation), OÜ Belesta, AS Baltic Computer Systems, Magnesium & Metals Limited, Kreenholmi Valduse AS (bankrupt) and AS Latvijas Kugnieciba to jointly and severally bear the procedural expenses of AS SEB Pank in the amount of 2000 euros.**

FACTS AND COURSE OF PROCEDURE
1.

By a judgment of 22 October 2010 in administrative case no. 3-04-469, Tallinn Circuit Court (the court of appeal) ordered the Republic of Estonia to resolve the matter of claims secured by the certificates of the National VEB Fund (VEB Fund) within nine months.

2. On 15 February 2012, the *Riigikogu*, referring to the judgment of the court of appeal, made the decision titled "Compensation of Claims Secured by Certificates of the National VEB Fund." The decision provided for the compensation of the claims secured with the certificates issued by the VEB Fund at the expense of funds received from the sale of the assets of the VEB Foundation (in liquidation) in the course of liquidation proceedings (section 1). The decision repealed the decision of the *Riigikogu* of 20 January 1993 "Accounts of Estonian Banks Frozen in the USSR Bank for Development and Foreign Economic Affairs" (section 2).

3. AS Pärnu Kalur Holding, AS Saare Kalur, AS A.O. Imbi (bankrupt), Akke AS (in liquidation), AS Tartu Lihakombinaat (bankrupt), AS Volta, OÜ Kommunaar (in liquidation), OÜ Belesta, AS Baltic Computer Systems, Magnesium & Metals Limited, Kreenholmi Valduse AS (bankrupt) and AS Latvijas Kugnieciba lodged an appeal with the Supreme Court on 5 March 2012 for annulment of the decision of the*Riigikogu* of 15 February 2012. The appeal requests that the proceedings be restored and the failure to pass legislation of general application be declared unconstitutional. The appellants submit that the Republic of Estonia should have passed legislation compensating the claims secured by the certificates of the VEB Fund with a thing whose value corresponds to the nominal value of the certificate and request that fair compensation be awarded to them for the period when the disposal of the assets corresponding to the nominal value of the VEB Fund certificate was restricted due to the transfer of the claims to the VEB Fund.

4. By an order dated 22 March 2012, the Constitutional Review Chamber placed case no. 3-4-1-4-12 before the Supreme Court *en banc*.

5. Applying the analogy to subsection 1 of § 20 of the Code of Administrative Court Procedure (CACP), the Supreme Court *en banc*involved, by an order dated 5 April 2012, AS SEB Pank and SA VEB (in liquidation) in the proceedings of case no. 3-4-1-4-12 as third parties and, applying the analogy to clause 4 of subsection 1 of § 24 of the CACP, involved the Government of the Republic and Eesti Pank in the proceedings of the case so that they could give their opinion.

6. By an order dated 25 September 2012, the Court *en banc* included annexes to the applications submitted by the parties to the proceedings, the file of administrative case no. 3-04-469, the file of administrative case no. 3-83/2003, the file of civil case no. II-2/116/01 and the file of civil case no. 2/3/35-7034/96 in the materials of the case.

SUBMISSIONS OF PARTIES TO PROCEEDINGS

7–12. [Omitted from this text.]

OPINION OF COURT *EN BANC*

13. The appellants submit that the compensation for the certificates of the VEB Fund granted by section 1 of the decision of the *Riigikogu*dated 15 February 2012 is not in accordance with law. In order to assess whether the *Riigikogu* should have granted different compensation by its decision dated 15 February 2012, the Court *en banc* will first summarise the circumstances of establishment and operation of the VEB Fund that have not been contested by the parties to the proceedings (I) and analyse the legal meaning of the contested decision of the*Riigikogu* (II). Thereafter, the Court *en banc* will discuss the formal lawfulness of the decision of the *Riigikogu* (III) and its compliance with laws (IV). In part V, the Court *en banc* will analyse the decision of the *Riigikogu* in light of the fundamental rights of the appellants. Finally, the Court *en banc* will adjudicate the case and award procedural expenses (VI).

I

14. In the final years of the former USSR, foreign currency operations were conducted mainly via the Bank for Development and Foreign Economic Affairs of the USSR. A branch of that bank operated in Estonia. By

a decision of the Supreme Council of the Estonian SSR dated 15 December 1989, Eesti Pank was founded as of 1 January 1990. On 1 December 1990, the Foreign Operations Division of Eesti Pank was established and it took over the operations of the Tallinn branch of the Bank for Development and Foreign Economic Affairs of the USSR. On the basis of an agreement between the Bank for Development and Foreign Economic Affairs of the USSR and Eesti Pank on 30 October 1990, the clients of the Tallinn branch could transfer their accounts to other institutions of the Bank for Development and Foreign Economic Affairs of the USSR or close them and take them over to other banks. The Tallinn branch of the Bank for Development and Foreign Economic Affairs of the USSR was liquidated on 1 January 1991.

15. The Bank for Development and Foreign Economic Affairs of the USSR stopped its settlements with the correspondent accounts of the Foreign Operations Division of Eesti Pank and Balti Ühispank (UBB) in December 1991. Until that time, these banks made foreign currency settlements with foreign banks via these correspondent accounts. By regulation no. 2172/1 of the Presidium of the Supreme Council of the Russian Federation dated 13 January 1992 the accounts of UBB and the Foreign Operations Division of Eesti Pank were frozen in the Bank for Development and Foreign Economic Affairs of the USSR. On 29 April 1992, the Foreign Operations Division of Eesti Pank was reorganised into Põhja-Eesti Aktsiapank (PEAP).

16. In November 1992, the largest banks in Estonia, i.e. UBB, PEAP and Tartu Kommertspank, ran into difficulties. As of 18 November 1992, a moratorium was imposed on these banks.

17. On 20 January 1993, the *Riigikogu* passed the decision "Accounts of Estonian Banks Frozen in the USSR Bank for Development and Foreign Economic Affairs." The decision established the VEB Fund in Eesti Pank (section 1) and gathered the claims of PEAP and UBB regarding accounts frozen in the Bank for Development and Foreign Economic Affairs of the USSR (section 2) there. VEB Fund was permitted to issue freely circulated certificates (section 3). These compensated the claims of the clients of PEAP and UBB against the banks regarding the frozen accounts as well as the right of claim of the banks themselves (section 4). The main function of the VEB Fund was to find solutions to settle the claims of the Estonian banks and other legal persons and natural persons against the accounts frozen in VEB (section 5). Eesti Pank was appointed the manager of the VEB Fund on behalf of the Republic of Estonia (section 6).

18. Eesti Pank approved the articles of association of the VEB Fund by directive no. 11 of 21 January 1993. According to the articles of association, the VEB Fund was a state organisation established on the basis of the decision of the *Riigikogu* of 20 January 1993 for the purpose of gathering claims filed against Vnesheconombank of the Russian Federation in order to have them settled (section 1). The founder of the fund was Eesti Pank and the owner of the assets of the fund was the Republic of Estonia. The fund was supposed to be managed by Eesti Pank in the name of the Republic of Estonia (sections 2-4). Thereby the fund was a legal person (section 5). In order to perform its main function, the fund was, among other things, supposed to gather claims relating to the funds frozen in the Bank for Development and Foreign Economic Affairs, compensate them with certificates, realise the claims filed against the Bank for Development and Foreign Economic Affairs and settle the claims certified by the certificates at the expense of the funds obtained (section 9).

19. Eesti Pank approved the rules of the VEB Fund certificate by directive no. 15 of 25 January 1993. According to the directive, the VEB Fund certificate was a registered security that certified the right of its holder to a portion of the assets of the VEB Fund in proportion to the nominal value of the certificate with regard to the total nominal value of all of the certificates issued (section 1). The certificate was freely negotiable on the market (section 3). The right of claim represented by the certificates was to take place at once or gradually, according to the realisation of the assets of the Fund, and proportionately between all certificate holders (section 7). At the request of the certificate holder, the certificate could be exchanged for the authorisation of the VEB Fund to file a claim against the Bank for Development and Foreign Economic Affairs to the extent of the nominal value of the certificate (section 8).

20. On 22 January 1993, the Government of the Republic passed regulation no. 23 "On the Purchase of Põhja-Eesti Aktsiapank", by which the Government of the Republic bought Põhja-Eesti Aktsiapank from

Eesti Pank. By Government of the Republic regulation no. 25 of 22 January 1993 “On the Conditions of Purchase of the Shares of Balti Ühispank” the Government of the Republic decided to buy the shares of UBB. By Government of the Republic regulation no. 30 of 29 January 1993 “On the Partial Amendment of the Government of the Republic Regulation No. 25 of 22 January 1993” it was decided to buy all of the assets of UBB. By Government of the Republic regulation no. 45 of 12 February 1993 “On the Share Capital of Põhja-Eesti Pank” the size of the share capital of Põhja-Eesti Pank was decided. This way a national commercial bank was established on the basis of PEAP and UBB. The total assets of UBB were handed over to PEAP. By directive no. 13 of PEAP of 1 February 1993 it was decided to start servicing UBB’s clients under the name PEAP. On 12 February 1993, the new articles of association of PEAP were approved and the bank was renamed Põhja-Eesti Pank. The purchase of the total assets of PEAP and UBB was paid for with the certificates of the VEB Fund. The Government, in turn, purchased certificates from PEAP, paying for them with the fixed-term debt obligations of the Government of the Republic. The legal successor of Põhja-Eesti Pank was AS Eesti Ühispank and that of the latter is currently AS SEB Pank.

21. In the beginning, VEB Fund certificates were issued in the amount of 853 411 523 Estonian kroons and 64 cents (54 542 937 euros and 36 cents). The VEB Fund has failed to realise its assets (the claim against VEB). However, the volume of the certificates has decreased considerably. As of 31 December 2011, the balance was 15 085 395 euros and 72 cents (236 035 152 Estonian kroons and 67 cents). In this regard it should be noted that section 8 of the rules of the VEB Fund certificate also enabled people to seek settlement of the claims secured by the certificate on their own. Thus, the possibility of a decrease of the assets of the fund without making payments to certificate holders was stipulated in the terms and conditions of the certificate.

22. SA VEB was registered on 22 March 1998 as the legal successor of the VEB Fund. According to the articles of association, the beneficiaries with regard to the foundation include banks, other legal persons and natural persons who have the right of claims against the accounts frozen in the Bank for Development and Foreign Economic Affairs (articles 1.3 and 3.1). Any payment to the beneficiaries must be made in accordance with the principle of proportionality (article 3.2). The foundation is obligated to make a payment to the beneficiaries once funds have accrued to its account or it has acquired assets at the expense of which it will be possible to make payments to the beneficiaries after bearing the expenses relating to the operations of the foundation and such payments have been approved by the supervisory board of the foundation (article 3.3).

23. The appellants in this constitutional review case obtained the certificates of the VEB Fund under various circumstances. Some of them had claims against PEAP or UBB as of 20 January 1993 in connection with the accounts frozen in the Bank for Development and Foreign Economic Affairs within the meaning of section 4 of the decision of the *Riigikogu* dated 20 January 1993. However, for instance, AS A.O. Imbi (bankrupt) was not a client of PEAP or UBB in 1993, but acquired its certificate in 1995 from Erkers, a Latvian company. On 23 March 2001, Tallinn Circuit Court dismissed the appeal of AS A.O. Imbi (bankrupt) against Eesti Ühispank in civil case no. II-2/116/01. The court considered it proven that the claim of the Latvian company Erkers was transferred to the VEB Fund and held that Eesti Ühispank did not have any obligations under the settlement agreement entered into between UBB and Erkers. On 28 November 2003, Tallinn Circuit Court dismissed the claims of AS A.O. Imbi (bankrupt) in administrative case no. 2-3/612/2003. In that case the claimant requested that Eesti Pank compensate the damage caused by the unlawful actions of Eesti Pank, because Eesti Pank transferred the claimant’s financial claims against UBB to a foundation that did not have any assets. Alternatively, the claimant requested that the Ministry of Finance compensate the damage caused by the expropriation of the claim. The court dismissed the claims, because the claimant was never the legal successor of Erkers in the legal relationships between the latter and UBB, but took Erkers’s place in its relationship with the VEB Fund.

24. By the judgment of 22 October 2010 in administrative case no. 3-04-469, Tallinn Circuit Court ordered that “the Republic of Estonia […] decide the matter of compensation of claims secured by the certificates of the National VEB Fund within nine months” on the basis of a claim filed by Akke AS (in liquidation), AS Tartu Lihakombinaat (bankrupt), AS A.O. Imbi (bankrupt), AS Saare Kalur and AS Pärnu Kalur Holding.

25. On 24 March 2011, the supervisory board of SA VEB decided to liquidate the foundation, because the assets of the foundation are insufficient to achieve the purpose and the acquisition of assets in the near future is unlikely.

26. In the decision of the *Riigikogu* of 15 February 2012 contested in the present case, it was decided to compensate the claims secured by the certificates of the VEB Fund to the holders of the certificates at the expense of funds received from the sale of the assets of SA VEB (in liquidation) in liquidation proceedings conducted on the basis of the Foundations Act (section 1). The decision of the *Riigikogu* of 20 January 1993 was repealed (section 2).

II

27. In order to assess the legal meaning and, thereafter, the lawfulness of the decision of the *Riigikogu* dated 15 February 2012, it is necessary to identify the object that was compensated to the appellants by the decision and the value of the object. As appears from section 1 of the contested decision, the *Riigikogu* decided to compensate the claims secured by the certificates of the VEB Fund.

28. In order to identify the substance of these claims, it is first necessary to look at how the decision of the *Riigikogu* dated 20 January 1993 affected the legal relationships between PEAP and UBB.

29. Section 2 of the decision of the *Riigikogu* dated 20 January 1993 gathered the claims of PEAP and UBB against the Bank for Development and Foreign Economic Affairs in the VEB Fund, i.e. turned them into the fund's assets. The claims of the clients of PEAP and UBB against these banks, the Bank for Development and Foreign Economic Affairs or any third party were not gathered in the fund; the decision does not contemplate that these ought to have become assets in the balance sheet of the fund. Section 4 regulated clients' claims against the banks. The claims of the clients against PEAP and UBB relating to accounts frozen in the former USSR Bank for Development and Foreign Economic Affairs were compensated for by the certificates of the fund.

30. According to the Court *en banc*, the consequence of compensation was the cessation of the compensated claims. These were replaced by conditional claims against the VEB Fund secured by certificates, i.e. the settlement of the claims depended on the transfer of funds from the former USSR Bank for Development and Foreign Economic Affairs to the VEB Fund. As of this moment, the respective obligations of PEAP and UBB towards the clients ceased to exist. Tallinn Circuit Court also came to this conclusion in the judgment made in civil case no. II-2/116/01 on 26 March 2001.

31. The cessation of the banks' obligations is confirmed by the main purpose of the decision of the *Riigikogu* dated 20 January 1993 – the restoration of the solvency of the banks – and especially the information expressed in the drafting process. At the time, the freezing of the banks' funds in the Bank for Development and Foreign Economic Affairs and the resulting inability of the banks to perform their obligations towards their clients was considered the main reason for the banking crisis in 1993. If the banks had not been released of the obligations relating to the frozen funds towards their clients, the decision of the *Riigikogu* dated 20 January 1993 would not have mitigated the situation for the banks. Annexes A and B to the explanatory memorandum of the draft decision describe the balance sheets of the banks before and after the planned operation. This clearly indicates a decrease in the obligations corresponding to the clients' claims (e.g. counter-frozen accounts in commercial banks; procedural file of the *Riigikogu*, pp. 6 and 7).

32. The Court *en banc* disagrees with Eesti Pank in that the claims against commercial banks were replaced with the certificates of the VEB Fund based on the free will of the clients of the banks. Section 4 of the decision of the *Riigikogu* dated 20 January 1993 stipulated the compensation of all the claims specified in the provision. Both the decision as well as the materials of drafting the decision contain no references to the right of choice of clients. In addition, the right of choice would have been in conflict with the purpose of releasing the banks from obligations.

33. This does not refute the fact that the lawfulness of termination of the clients' claims by the decision of the *Riigikogu* dated 20 January 1993 is doubtful. A decision of the *Riigikogu* remains in force regardless of its lawfulness until it is repealed. At the time of making the decision the effective legislation included the Banking Act of the Republic of Estonia, which entered into force on 7 January 1990, and the Bankruptcy Act of the Republic of Estonia, which entered into force on 1 September 1992. These acts did not provide for the transfer of the obligations of companies that had run into difficulties to a third party by a decision of the *Riigikogu*, etc. According to the first sentence of § 16 of the Banking Act, commercial banks were liable for their liabilities with all of their assets. However, by its decision dated 20 January 1993, the *Riigikogu* precluded the banks' liability for some of their liabilities. Under § 9 of the Banking Act, the creditors should have been able to file a bankruptcy petition against the insolvent debtor. The decision of the *Riigikogu* precluded this possibility as well, because the claims of the creditors against banks were terminated. It is possible that the circumstances at the time called for special regulation (compare with the reasons for Regulation no. 18 of the Government of the Republic of 22 January 1993). However, a special regulation should have been established by an act. Decisions of the *Riigikogu* must be in accordance with acts.

34. As of 15 February 2012, the certificates of the VEB Fund were securities for the purposes of § 917 of the Law of Obligations Act. Below, the Court *en banc* will explain the rights arising from them.

35. The VEB Fund comprised PEAP and UBB claims against the USSR Bank for Development and Foreign Economic Affairs. These former claims of the banks made up the assets of the VEB Fund. To the extent of the gathered claims, the fund was permitted to issue freely negotiable certificates. The certificates were meant for banks and clients as compensation for the claims frozen in the Bank for Development and Foreign Economic Affairs or claims terminated by the *Riigikogu* (sections 1-4 of the decision of the *Riigikogu* of 20 January 1993). Therefore, it must be presumed that as of the issuing of the certificates the acquirer obtained material rights. Regardless of whether the owners obtained the certificates as compensation on the basis of a decision of the *Riigikogu* or obtained them on the market later, the right secured by the certificates was the same.

36. The certificates merely provided for the right of claim against the VEB Fund (and later against its legal successor SA VEB). This emerges from the rules of the certificate approved by directive no. 15 of Eesti Pank dated 25 February 1993. More specifically, the certificate as the security certified the right of its holder to a portion of the assets of the VEB Fund (section 1 of the rules). According to section 7 of the rules, all certificate holders were entitled to a proportional portion of sums accrued to the fund from the realisation of its assets (the claim against the Bank for Development and Foreign Economic Affairs). According to section 8.3 of the rules, this did not preclude a situation where a certificate holder could seek the settlement of the fund's claim against VEB instead of the fund to the extent of the nominal value of their certificate. For this purpose one could exchange the certificate for the fund's authorisation.

37. According to the Court *en banc*, no right of claim against anyone else arose from the certificate. Possible claims arising from law, for instance against the state or Eesti Pank due to the establishment of the VEB Fund (e.g. compensation of damage, unjust enrichment or expropriation compensation claims) cannot be considered claims secured by the certificates for the purposes of subsection 1 of the decision of the *Riigikogu* dated 15 February 2012. In point 9 of the order made in administrative case no. 3-3-1-82-06 of 12 December 2006, the Administrative Chamber of the Supreme Court took the following view: "The certificates of the VEB Fund do not give rise to the right to demand that the claims specified in section 4 of the decision of the *Riigikogu* dated 20 January 1993 be compensated for in another way because, according to the decision, these certificates constituted compensation for the claims relating to the accounts frozen in the USSR Bank for Development and Foreign Economic Affairs." The Court *en banc* agrees with such a position.

38. The VEB Fund was a legal person with individual legal capacity, more precisely, a state organisation under subsection 1 of § 26 of the Civil Code of the Estonian SSR (ESSRCC) (article 1 of the articles of association approved by directive no. 11 of Eesti Pank of 21 January 1993). According to the civil law in force at the time, the state was considered the owner of the assets of the VEB Fund (article 3 of the articles

of association), but the assets had been allocated to it in accordance with § 25 of the ESSRCC. Neither the state (the owner of the assets of the VEB Fund) nor Eesti Pank (the founder and manager of the VEB Fund) was responsible for the liabilities of the VEB Fund as a state organisation (subsection 1 of § 35 of the ESSRCC).

39. By its decision of 15 February 2012, the *Riigikogu* did not start resolving the issues resolved by the decision of 20 January 1993 again. The repealing of the decision of 20 January 1993 by section 2 of the decision of 15 February 2012 does not allow for any other conclusion. Clearly, the *Riigikogu* repealed the decision of 1993 prospectively. The will of the parliament to eliminate any legal impact of the decision of 1993 retroactively and to reverse all relationships established with the creation of the VEB Fund cannot be derived from anywhere. Thus, the decision of the *Riigikogu* of 20 January 1993 is still the basis for assessing the legal relationships established by it.

40. The decision of the *Riigikogu* of 15 February 2012 was made for the purpose of complying with the judgment of Tallinn Circuit Court (the court of appeal) made on 22 October 2010 in administrative case no. 3-04-469. The decision of the *Riigikogu* is in accordance with the judgment of the court of appeal.

41. The court of appeal did not order the state to pay compensation for the damage caused by the establishment of the VEB Fund or for expropriation. It appears from the judgment of the court of appeal that the granting of compensation for the certificates was under discussion in the administrative case. In the claims filed in this administrative case, the claimants requested that the Republic of Estonia be ordered to compensate the certificates either by granting government bonds, paying money or granting other fair compensation. The claimants did not request compensation for the possible damage or expropriation suffered in 1993. These claims were based on the state's subsequent alleged failure to act, not on the establishment of the VEB Fund or the alleged expropriation of the clients' claims (see, for instance, administrative case no. 3-04-469, Volume I, case file p. 14; and order of the Supreme Court in administrative case no. 3-3-1-82-06, point 12). Following the judgment of the court of appeal, the *Riigikogu* decided the issue of compensation of the claims secured by the certificates.

42. As for the claims secured by the certificates, the court of appeal and, thus, also the *Riigikogu* bore in mind the conditional proprietary claim arising from the certificate as a security. Thus, by the decision of the *Riigikogu* dated 15 February 2012, compensation was granted for the right to obtain a portion of the assets of SA VEB (in liquidation). Compensation was not granted for the lawful or unlawful actions of the state, Eesti Pank or any other third party or for possible expropriation or unjust enrichment due to the establishment and organisation of the activities of the VEB Fund.

43. The value of the claims secured by the certificates thus corresponds to the value of the money received from the sale of SA VEB (in liquidation).

III

44. In order to verify whether the contested decision of the *Riigikogu* is formally lawful, the Court *en banc* will examine whether the*Riigikogu* was allowed to resolve the issue of compensation of the certificates in the form of a decision specified in clause 1 of § 65 of the Constitution and whether the *Riigikogu* was competent to resolve the issue.

45. According to the Court *en banc*, the decision of the *Riigikogu* dated 15 February 2012 is, at least to the relevant extent, legislation of specific application for substantive purposes. The addressees of the decision can be individualised: they are holders of the VEB Fund certificates. The regulated legal relationships, i.e. the relationships between the certificate holders and SA VEB (in liquidation), have been determined specifically. The decision regulates a specific case: the liquidation of an individual foundation and the consequences thereof. Legislation of specific application does not necessarily need to specify all of the addressees or affected persons (cf. the judgment of the Constitutional Review Chamber of the Supreme Court of 22 November 2010 in case no. 3-4-1-6-10, point 47). Thus, the legal form chosen by the *Riigikogu*

corresponds to the substance of the decision. Clause 1 of § 65 of the Constitution has not been violated in this instance.

46. According to the Court *en banc*, the competence of the *Riigikogu* to make the decision dated 15 February 2012 arose from point 16 of § 65 of the Constitution. Since the *Riigikogu* had intervened in issues relating to the VEB Fund by its decision in 1993, the steps taken in 2012 remained state affairs. There was strong public interest in the issue also in 2012.

47. Therefore, the decision of the *Riigikogu* is formally lawful.

IV

48. Next, the Court *en banc* will examine whether the law entitles the appellants to claim higher compensation than that granted to them by the decision of the *Riigikogu* dated 15 February 2012.

49. In the judgment of 22 October 2010, the court of appeal held that there is no legal basis on which compensation for the claims compensated by the certificates could be granted. The Court *en banc* agrees with the position of the court of appeal in the administrative case.

50. Since the decision of the *Riigikogu* did not resolve the claims of the appellants relating to causing possible damage, expropriation or unjust enrichment, the *Riigikogu* did not, upon granting the compensation in the decision dated 15 February 2012, have to follow the provisions of law that may regulate the claims (ESSRCC, State Liability Act and Law of Obligations Act). The granting of the compensation for the certificates of the VEB Fund does not, in itself, mean that the certificate holders cannot bring claims, for instance, in 1993 or later for damages, expropriation or unjust enrichment. Thus, the decision of the *Riigikogu* cannot be in conflict with these provisions of law.

51. In addition to the aforementioned, the contested decision of the *Riigikogu* is not in conflict with the provisions of law regulating unjust enrichment either because the changes in the legal relationships made on the basis of the decision of the *Riigikogu* dated 20 January 1993 cannot be considered unfounded, as even in the event of possible unlawfulness, the decision was in force (see point 33 above).

52. On the basis of the Law of Obligations Act, damages or the performance of an obligation can be claimed from the state in private law relationships. The decision of the *Riigikogu* of 20 January 1993, being an act of public authority, is governed by public law. Therefore the Law of Obligations Act does not regulate the compensation of possible damage caused by this decision.

53. The state's obligation towards the appellants might arise from the Foundations Act via the fact that the VEB Fund, being the legal predecessor of SA VEB (in liquidation), was established on the basis of the decision of the *Riigikogu*. Sections 13, 23 and 32 of the Foundations Act provide for the liability of the members of the founders, management board and supervisory board members for damage caused to the foundation by a breach of their duties and obligations. However, these provisions of the Foundations Act are irrelevant, because the *Riigikogu* did not resolve the claim of compensation for damage regulated therein.

54. The first sentence of subsection 1 of § 56 of the Foundations Act states, regarding the winding-up of a foundation, that in such an event the assets remaining after all of the claims of creditors have been settled or after all of the claims of creditors have been secured and the money has been deposited will be distributed between all of the parties entitled thereto in the articles of association. The decision of the*Riigikogu* dated 15 February 2012 is in accordance with this: according to section 1 of the decision, the claims of the certificate holders secured by law must be compensated from the funds obtained from the sale of the assets of SA VEB (in liquidation) in liquidation proceedings.

55. The Court *en banc* also notes that no act required the *Riigikogu* to resolve the appellants' claims relating to possible damages or expropriation due to the establishment of the VEB Fund and organisation of its operations. The resolution of such claims falls within the competence of courts (the first sentence of § 146 of

the Constitution; see also point 73 below). The judgment of the court of appeal made in the administrative case did not order the *Riigikogu* to resolve the issue of compensation for damage, but merely to decide on what will become of the claims secured by the certificates of the VEB Fund.

56. Thus, no act obligated the *Riigikogu* to grant higher compensation than granted in the decision of the *Riigikogu* dated 15 February 2012.

V

57. The appellants request that the failure to adopt such legislation of general application by which the VEB Fund compensates the claims secured by the certificates of the VEB Fund with a thing whose value corresponds to the nominal value of the certificate, along with interest, be declared unconstitutional. Thus, the Court *en banc* must resolve the issue of whether the Constitution provides for the appellants' right to obtain higher compensation than that granted by the decision of the *Riigikogu*.

58. In the request for constitutional review, the appellants submitted that the right provided for in § 14 of the Constitution has been infringed. In the administrative court proceedings, the appellants also referred to §§ 1, 10 and 12 of the Constitution. However, the Court *en banc* will also verify whether the decision of the *Riigikogu* dated 15 February 2012 affects the fundamental rights provided for in §§ 25 and 32 of the Constitution.

59. It follows, above all, from §§ 1 and 10 of the Constitution that Estonia is a sovereign state with democratic rule of law. In the administrative court proceedings, the appellants referred in general to the fact that these provisions establish in Estonia the general principles and main values characteristic of the European legal space. The appellants did not specify the general principles or main values of law according to which the state should have granted them compensation. According to the Court *en banc*, these provisions do not provide for the appellants' right to receive compensation for the VEB Fund certificates that is higher than the compensation granted to them by the decision of the *Riigikogu* dated 15 February 2012.

60. Subsection 1 of § 12 of the Constitution stipulates the fundamental right of equality. According to the provision, equal persons must be treated equally and unequal persons must be treated unequally. By the decision of the *Riigikogu* dated 15 February 2012, the appellants are not treated unequally among themselves or in comparison with any other comparable group. No higher compensation has been granted to anyone else by the decision. Also, there are no special circumstances that would call for treating the appellants more favourably than other certificate holders for the purpose of ensuring equal treatment. Therefore, the Court *en banc* finds that, under subsection 1 of § 12 of the Constitution, the *Riigikogu* was not under the obligation to grant higher compensation than the compensation granted by the decision of the*Riigikogu* dated 15 February 2012.

61. The Court *en banc* also explains that in the present case it is not under discussion whether in 1993 the clients related to VEB were treated less favourably than other clients of UBB and PEAP. Also, in the present case there is no question whether the state or Eesti Pank has treated a certificate holder more favourably, as a result of which in the 1990s some certificate holders were able to regain a portion of the assets from VEB. Even possible unequal treatment by the decision of the *Riigikogu* dated 20 January 1993 or by the state or Eesti Pank in the meantime did not obligate the *Riigikogu* to treat the appellants more favourably upon deciding the compensation of the certificates. The obligation to compensate for prior unlawful inequality could arise upon resolution of a claim for damages, but the *Riigikogu* did not (and did not have to) attend to this (see sections 55, 66 and 73 of the decision).

62. Section 14 of the Constitution provides for the right of organisation and procedure, The protection zone of this provision includes the fundamental right of good governance whose addressee is the Executive and the fundamental right of procedure and organisation whose addressee is the Legislature. Both fundamental rights are procedural rights that do not provide for any substantive law grounds to demand payment of money. The right to higher compensation should arise from another provision. Only in such a situation could

a question as to whether there is due procedure for enforcing the right arise. Thus, the Court *en banc* finds that § 14 of the Constitution did not grant the appellants the right to demand payment of higher compensation.

63. It should be noted that in the administrative case preceding the decision of the *Riigikogu* dated 15 February 2012 the court appeal held that the state infringed § 14 of the Constitution. Based on the fundamental right, the court of appeal ordered that the state decide the matter of compensation of the certificates. Even though it does not affect the compulsory nature of the final decision of the court of appeal, the Court *en banc* would like to emphasise that the identification of an unconstitutional omission by the Legislature must be followed by the initiation of constitutional review proceedings in the Supreme Court. If a court does not initiate constitutional review proceedings, the court cannot refuse to apply an unconstitutional act; likewise, under § 9 of the Judicial Constitutional Review Proceedings Act (JCRPA), the court cannot start filling an unconstitutional gap without addressing the Supreme Court.

64. Section 25 of the Constitution grants everyone the right to claim compensation for moral and material damages unlawfully caused to them by anyone.

65. The Court *en banc* maintains that the decision of the *Riigikogu* dated 15 February 2012 did not cause damage to the appellants. The appellants would have suffered material damage if, as a result of the decision, their material situation had been worse than in a situation where the decision of the *Riigikogu* of 15 February 2012 had not been made. Before the decision of the *Riigikogu* was made, it was decided to liquidate SA VEB (see section 25 of the decision). By the decision of the *Riigikogu*, the same consequence as the one provided by law was provided for the certificate holders upon liquidation of SA VEB (see section 54 of the decision). Thus, the appellants' material situation did not worsen as a result of the decision of the *Riigikogu*.

66. Damage would have been, for instance, a situation where the appellants could, without the decision of the *Riigikogu* dated 20 January 1993, have realised their claims against UBB or PEAP on more favourable conditions. It should be noted that, as of 20 January 1993, a moratorium was imposed on UBB and PEAP. It is likely that without the decision of the *Riigikogu* dated 20 January 1993 the banks would have been liquidated. The materials of the case do not enable a conclusion to be drawn as to the extent to which the claims of the clients would have been settled in bankruptcy proceedings. Based on the balance sheets of the banks annexed to the explanatory memorandum of the decision of the *Riigikogu* dated 20 January 1993, it can be concluded that merely approx. 33% of the banks' liabilities were covered by assets. It is possible that the assets of the banks would have been sold at a different price during the moratorium or in later bankruptcy proceedings. It must also be taken into account that, according to § 86 of the Bankruptcy Act, the claims of the clients would have been settled in the very last round.

67. Even if the decision of the *Riigikogu* dated 20 January 1993 was unlawful and the bank clients suffered damage as a result thereof, the decision of the *Riigikogu* dated 15 February 2012 does not infringe the appellants' right to claim damages, which is provided for in § 25 of the Constitution. Nor would the right to claim damages be affected by the decision if it became evident that the appellants' right to receive money from the VEB Fund had decreased as a result of the unlawful acts or omissions of the state, Eesti Pank or a third party. As repeatedly noted above, the issue of damages has not been resolved by the decision of the *Riigikogu* dated 15 February 2012. If the appellants had the right to claims damages under § 25 of the Constitution before 15 February 2012, such a right exists unaltered after the entry into force of the decision dated 15 February 2012.

68. The Court *en banc* emphasises that the legislation regulating damage caused by the state has existed in Estonia at least since the entry into force of the Constitution.

69. At the time of establishment of the VEB Fund, subsection 1 of § 450 of the ESSRCC read as follows: "Damage caused to a citizen by the unlawful acts of a state or public organisation or an official upon performance of their official duties in the field of administration will be compensated for on general grounds (§§ 448-449), unless otherwise provided by law." This provision had to be applied jointly with § 25 of the

Constitution, which grants everyone the right to claim damages from anyone who caused the damage unlawfully. Thus, at the time there were substantive law grounds for compensation of damage caused by the *Riigikogu*.

70. The State Liability Act (SLA) entered into force on 1 January 2002. Under subsection 1 of § 7 of the SLA, a person whose rights have been violated by the unlawful acts of a public authority in a public law relationship may claim compensation for damage caused to the person if the damage could not be prevented and cannot be eliminated by a claim for the annulment of an administrative decision or termination of an administrative step or making an administrative decision or taking an administrative step. Among others, the *Riigikogu* is considered a public authority and subsection 1 of § 7 of the SLA also applies to its decisions.

71. Until 1 January 2000, the claims for compensation for damage caused by the state were adjudicated by county and city courts pursuant to the civil procedure, and later by administrative courts (§ 5 of the Code of Administrative Court Procedure Implementation Act – RT I 2000, 51, 321). As of 1 August 2002, clause 2 of subsection 3 of § 6 of the wording of the Code of Administrative Court Procedure in force at the time provided for the administrative courts' clear authorisation to award compensation for any damage caused in a public law relationship.

72. It should be noted that AS A.O. Imbi (bankrupt) has already filed a claim for damages allegedly caused by the creation of the VEB Fund which was rejected by a final judgment (the judgment of Tallinn Circuit Court of 28 November 2003 in administrative case no. 2-3/612/2003).

73. Thus, the appellants right to demand that the *Riigikogu* grant them higher compensation than actually granted by the decision for the purpose of compensating possible earlier injustice did not arise alone from § 25 of the Constitution or in combination with § 14 of the Constitution. Also, at the time the contested decision of the *Riigikogu* was made, the Legislature did not have the obligation to additionally regulate the grounds of and procedure for compensation for damage in the context of the VEB Fund by legislation of general application.

74. Section 32 of the Constitution provides for the protection of the right of ownership. The protection zone of the fundamental right of ownership also includes material rights. Currently, the right of ownership has not been affected, because the decision of the *Riigikogu* dated 15 February 2012 did not worsen the material situation of the appellants (see points 54 and 65 above).

75. According to the second sentence of subsection 1 of § 32 of the Constitution, ownership may be transferred without the owner's consent only in the events and pursuant to the procedure provided by law, in public interests and for fair and immediate compensation. The Court *en banc* does not need to assess whether the VEB Fund certificates constituted immediate and fair compensation for the possible expropriation related to the decision of the *Riigikogu* dated 20 January 1993, because this matter merely focuses on the lawfulness of the compensation granted for the certificates.

76. According to the second sentence of subsection 1 of § 32 of the Constitution, the possible expropriation in 1993 did not obligate the*Riigikogu* to grant higher compensation or regulate the payment of higher compensation by law as of 15 February 2012. If the expropriation provided by the decision of the *Riigikogu* is not based on law and the procedure provided by law or if it does not result in the payment of immediate and fair compensation provided for in the second sentence of subsection 1 of § 32 of the Constitution, the expropriation is unlawful and the related damage can be compensated for as unlawfully caused damage. As noted earlier, a procedure for compensation of such damage existed and still exists (see points 68-73 of the judgment). Since §§ 25 and 32 of the Constitution are not relevant in this dispute, the Court *en banc* will not discuss the issue of whether the appellants had fundamental rights at the time of making the decision of the *Riigikogu* dated 20 January 1993.

77. Proceeding from the aforementioned, the Court *en banc* finds that, following the Constitution, the *Riigikogu* did not have to grant the appellants higher compensation for the certificates of the VEB Fund by

its decision of 15 February 2012.

VI

78. In summary, the contested decision of the *Riigikogu* does not violate the appellants' rights. Therefore, the Supreme Court dismisses the appeal (clause 2 of subsection 1 of § 24 of the JCRPA).

79. AS SEB Pank, a third party involved in the proceedings, requests that the appellants be ordered to bear the procedural expenses (amounting to 8849 euros and 28 cents) which AS SEB Pank paid to its legal counsel. No other party to the proceedings requested that the procedural expenses be awarded. Based on an analogy with subsections 1 and 8 of § 108 and subsection 6 of § 109 of the CACP, the court orders the person against whom the court decides to pay the necessary and reasoned procedural expenses.

80. The appellants submit that, under subsections 8 and 11 of § 108 of the CACP, they should not be ordered to bear the procedural expenses of the third party, because AS SEB Pank was involved in the proceedings on the side of the appellants and the awarding of the procedural expenses would be unreasonable due to the unforeseeable involvement of the third party. Furthermore, the appellants submit that the duty to compensate the procedural expenses cannot be imposed on them based on analogy in a public law procedural relationship.

81. The Court *en banc* disagrees with the appellants' arguments. It has been identified by the judgment that the appellants' claims against the predecessors of AS SEB Pank have ceased to exist. The appellants' request is rejected. Thus, the judgment is made in favour of AS SEB Pank, not the appellants, and therefore they are located on opposing sides of the case. The Court *en banc* also disagrees with the submission that the provisions of compensation of procedural expenses cannot apply in constitutional review proceedings by way of analogy. It is a general principle of procedural law that if a party files an appeal without reason, that party will bear the procedural expenses of the other parties to the proceedings. The appellants could not have presumed that the need to involve third parties would not arise in resolving the appeal.

82. The bearing of the legal expenses of AS SEB Pank has been proven. Given the volume of the case and the fact that AS SEB Pank attended to the issues relating to the certificates of the VEB Fund earlier, the Court *en banc* finds that it is justified to award legal expenses to the extent of 2000 euros. Since the appellants filed the appeal with the Supreme Court jointly, the Court *en banc* orders them to bear the legal expenses jointly and severally.

Märt Rask, Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Lea Laarmaa, Jaak Luik, Priit Pikamäe, Ivo Pilving, Jüri Põld, Harri Salmann, Tambet Tampuu

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Dissenting opinion of justices Jaak Luik and Tambet Tampuu on the judgment of the Supreme Court *en banc* of 20 November 2012 in case no. 3-4-1-4-12. Justice Jüri Ilves agrees with the first point of the dissenting opinion, justices Jüri Ilvest and Indrek Koolmeister agree with the second point of the opinion and justices Jüri Ilves, Henn Jõks and Eerik Kergandberg agree with the third point of the opinion.

1. We disagree with the operative part of the judgment of the Court *en banc* and the part on the reasons for the dismissal of the appeals.

The appellants contested both sections of the decision of the *Riigikogu* of 15 February 2012 "Compensation of Claims Secured by Certificates of the National VEB Fund" (the decision of the *Riigikogu* dated 15 February 2012). The majority of the Court *en banc* held that the decision of the *Riigikogu* dated 15 February 2012 does not infringe the appellants' rights, because it does not preclude possible claims for damages and other claims of the appellants against the state and other persons (see point 50 of the judgment of the Court *en banc*

). We can agree with this conclusion only in part. We are not convinced that the second section of the decision of the *Riigikogu* dated 15 February 2012, which repealed the decision of the *Riigikogu* dated 20 January 1993 "Accounts of Estonian Banks Frozen in the USSR Bank for Development and Foreign Economic Affairs" (the decision of the *Riigikogu* dated 20 January 1993) does not infringe the appellants' rights. The Court *en banc*did not pay attention to this issue nor took a stand on it. Therefore, we cannot agree with the operative part of the judgment of the Court *en banc*.

In judicial constitutional review proceedings involving an administrative decision, the court is not, given the inquisitorial principle, bound by the reasons of the appeal (see the judgment of the Constitutional Review Chamber of the Supreme Court of 26 November 2009 in case no. 3 4 1 29 09, point 10). The repealing of the decision of the *Riigikogu* dated 20 January 1993 by the second section of the decision of the *Riigikogu*dated 15 February 2012 probably also means the annulment of the certificates of the VEB Fund without all the holders of the certificates being able to realise them. The first section of the decision of the *Riigikogu* dated 15 February 2012 alone does not bring about such a consequence. We find that, following the inquisitorial principle, the Court *en banc* should have examined why the appellants find that the second section of the decision of the *Riigikogu* dated 15 February 2012 infringes their rights. After identifying this circumstance, the Court *en banc* could have assessed whether the appellants' submissions regarding the infringement of the rights are reasoned and whether the appeals should be granted regarding the second section of the decision of the *Riigikogu* dated 15 February 2012.

2. Also, we disagree with the categorical position of the Court *en banc* (see points 30-33 of the judgment of the Court *en banc*) in that the entire second and fourth section of the decision of the *Riigikogu* dated 20 January 1993 resulted in a situation where the owners of the claims gathered in the VEB Fund lost the claims against PEAP and UBB, i.e. that the liabilities of the banks gathered in the VEB Fund ceased to exist.

According to point 33 of the judgment of the Court *en banc*, the decision of the *Riigikogu* dated 20 January 1993 is probably unlawful, but it remains in force nevertheless until repealed. The Court *en banc* holds that the *Riigikogu* should have established legislation of special application for the transfer of liabilities of undertakings with solvency problems to third parties. On the basis thereof we conclude that the Court *en banc* considers the decision of the *Riigikogu* dated 20 January 1993 an administrative legal instrument of specific application. We also find that it is an administrative legal instrument of specific application, but we disagree with the view that the administrative decision remains in force until repealed.

We believe that, based on the reasons given in point 33 of the judgment of the Court *en banc*, it is obvious that, upon making the decision dated 20 January 1993, the *Riigikogu* exceeded its competence to the extent that it sought, with the second and fourth sections of the decision, to terminate the liabilities of PEAP and UBB towards the owners of the claims gathered in the VEB Fund. Without having legal grounds to do so, the state interfered in civil law relationships for the purpose of releasing PEAP and UBB from some of their liabilities towards their clients. Under subsection 1 of § 60 of the Administrative Procedure Act (APA) in force as of 1 January 2002, only an effective administrative decision can create legal consequences and must be adhered to. Under clause 3 of subsection 2 of § 63 of the APA, an administrative decision is null unless it has been made by a competent administrative authority. Under subsection 1 of § 63 of the APA, a null administrative decision is ineffective as of its making. No doubt the principles contained in the aforementioned provisions of the APA were applicable as rules not provided by law also before 1 January 2002. The Supreme Court has also assessed the application of clause 3 of subsection 2 of § 63 of the APA with regard to administrative decisions made before 1 January 2002 (see, for instance, the judgment of the Administrative Chamber of the Supreme Court of 30 November 2004 in administrative case no. 3-3-1-64-04, points 15 and 16).

Following the aforementioned, we find that the second and fourth sections of the decision of the *Riigikogu* dated 20 January 1993 did not bring about a consequence affecting the rights of the owners of the claims gathered in the VEB Fund, i.e. the cessation of the liabilities of PEAP and UBB towards these persons. In our opinion, this fact does not preclude possible claims for damages and other claims of the owners of the claims gathered in the VEB Fund and their legal successors against the state and other persons. Also, this

fact does not preclude the state's obligation to consider additional regulation of the compensation of the claims secured by the certificates of the VEB Fund.

3. We also disagree with the position of the Court *en banc* (see point 76 of the judgment of the Court *en banc*) in that the owners of the claims gathered in the VEB Fund cannot have compensation claims against the state on the basis of the second sentence of subsection 1 of § 32 of the Constitution.

The Court *en banc* admits that the decision of the *Riigikogu* dated 20 January 1993 may have resulted in expropriation for the purposes of subsection 1 of § 32 of the Constitution. The second sentence of point 76 of the judgment of the Court *en banc* reads as follows: "If the expropriation provided by the decision of the *Riigikogu* is not based on law and the procedure provided by law or if it does not result in the payment of immediate and fair compensation provided for in the second sentence of subsection 1 of § 32 of the Constitution, the expropriation is unlawful and the related damage can be compensated for as unlawfully caused damage." This sentence allows for the conclusion that due to possible expropriation the owners of the claims gathered in the VEB Fund and their legal successors can only have claims for unlawfully caused damage against the state, but not claims for fair compensation based on the second sentence of subsection 1 of § 32 of the Constitution.

The claims for unlawfully caused damage specified by the Court *en banc* have in all likelihood expired. However, we do not think that it can be precluded that the owners of the claims gathered in the VEB Fund and their legal successors do not wish to have the unlawfulness of the decision of the *Riigikogu* dated 20 January 1993 identified retroactively or the damage caused by the unlawful administrative decision compensated for, but merely want fair compensation for the effective and presumably lawful expropriation. However, there are no grounds for applying the provisions regulating the expiry of claims for unlawfully caused damage to the expiry of claims for compensation for the alleged expropriation. Therefore we find that the Court *en banc* precluded without reason the application of the second sentence of subsection 1 of § 32 of the Constitution as independent grounds for compensation. The Court *en banc* should have, among other things, discussed the expiry of the claim as well as the expiry of the claim for unlawfully caused damage.

4. Points 40-43 of the judgment of the Court *en banc* leave the impression that, in the opinion of the Court *en banc*, the *Riigikogu* has, with the decision of 15 February 2012, duly executed the judgment of Tallinn Circuit Court of 22 October 2010 in administrative case no. 3-04-469 (the judgment of the court of appeal). We find that the state has not executed the judgment in terms of its substance.

In our opinion, the reasons of the judgment of the court of appeal clearly indicate the position that based on § 14 of the Constitution the state is required to provide the appellants with an opportunity for additional compensation (in addition to the fourth section of the decision of the*Riigikogu* dated 20 January 1993). By the decision dated 15 February 2012, the *Riigikogu* did not provide for an opportunity for additional compensation. On the contrary, the second section of the decision further reduced opportunities for compensating the claims against PEAP and UBB, because the entire decision of the *Riigikogu* dated 20 January 1993 was repealed, including its fourth section. Furthermore, the court of appeal bore in mind the establishment of legislation, not the adoption of an administrative legal instrument of special application, when it referred to the state's duty to act. Among other things, the court of appeal referred to the judgment made by the Supreme Court *en banc* on 28 October 2002 in constitutional review case no. 3-4-1-5-02, where the Supreme Court held that in the event of a legislative omission the state is obligated to establish new legislation directly based on § 14 of the Constitution (see point 19 of the judgment of the court of appeal).

The Supreme Court *en banc* did not quash the judgment of the court of appeal by this judgment. In point 63 of its judgment the Court *en banc*did criticise the court of appeal for not initiating constitutional review proceedings, but held that this does not affect the compulsory nature of the final judgment of the court of appeal. The state contested the judgment of the court of appeal, but by an order dated 2 February 2011 the Supreme Court decided not to accept the state's appeal in cassation. Thus, the position of the court of appeal, according to which the state's omission is in conflict with § 14 of the Constitution, is also formally in force.

The conclusion of the Court *en banc*, according to which the decision of the *Riigikogu* dated 15 February 2012 is in accordance with the judgment of the court of appeal (see point 40 of the judgment of the Court *en banc*), does not answer the question of whether the state has performed the obligation imposed on it by the judgment of the court of appeal in full. The Court *en banc* has not explained whether and in which proceedings the appellants could, following the publication of the judgment of the Court *en banc*, contest the failure to execute the judgment of the court of appeal. The question of whether, following the judgment of the Court *en banc*, the court of appeal has the right to fine the state once again for failing to execute the judgment of the court of appeal remains unanswered.

At the same time we find that there is no direct conflict between the judgment of the court of appeal and the first section of the decision of the*Riigikogu* dated 15 February 2012. We take the view that, in spite of the first section of the decision of the *Riigikogu* dated 15 February 2012, the state still has the obligation to comply with the judgment of the court of appeal. Therefore, we consider the first section of the decision of the *Riigikogu* dated 15 February 2012 to be lawful and in accordance with the Constitution. Among other things, we support our view with the fact that the first section of the decision of the *Riigikogu* dated 15 February 2012 did not bring about any changes regarding the appellants' rights, because the liquidation of the VEB Foundation had already been commenced in accordance with the procedure provided by law (point 25 of the judgment of the Court *en banc*), the *Riigikogu* probably had no competence to decide anything else regarding the liquidation of VEB and the assets of the VEB Foundation (in liquidation) would have been distributed in accordance with the law anyway.

5. The appellants requested, among other things, that the Supreme Court restore the proceedings and initiate a constitutional review under § 23 of the Judicial Constitutional Review Procedure Act (JCRPA) (see point 3 of the judgment of the Court *en banc*). Even though the Court*en banc* did not take a clear view on the request, the Court *en banc*, in our opinion, granted the request by default. The Court *en banc* assessed the constitutionality of the decision of the *Riigikogu* dated 15 February 2012 and the actions of the *Riigikogu* as the Legislature (see points 57-77 of the judgment of the Court *en banc*). Under subsection 1 of § 23 of the JCRPA, the Court *en banc* should have involved the Chancellor of Justice and the Minister of Justice in the proceedings under clauses 5 and 6 of subsection 1 of § 10 of the JCRPA.

6. Since the Court *en banc* held that the decision of the *Riigikogu* dated 20 January 1993 terminated the liabilities of PEAP and UBB regarding the claims gathered in the VEB Fund (see points 30-33 of the Court *en banc*) and that the second section of the decision of the*Riigikogu* dated 15 February 2012 repealed the decision of the *Riigikogu* dated 15 February 2012 not from the start, but as of the decision of the *Riigikogu* dated 15 February 2012 (see point 39 of the judgment of the Court *en banc*), the owners of the claims gathered in the VEB Fund who have not yet received any money for their certificates and their legal successors have no claims arising from the current accounts against any person. Therefore, the position of the Court *en banc*, according to which the decision of the *Riigikogu* dated 15 February 2012 does not affect the right of ownership of the appellants, is incomprehensible (see point 74 of the judgment of the Court *en banc*). In our opinion the fact that, as a result of the second section of the decision of the *Riigikogu* dated 15 February 2012, the appellants finally lost the claims that they or their legal predecessors had against PEAP and UBB cannot be disregarded (see point 1 of the dissenting opinion). The Court *en banc* should have taken this legal situation into account upon making its assessment of a possible infringement of § 12 of the Constitution (see points 60 and 61 of the judgment of the Court *en banc*), because some of the certificates of the VEB Fund have been realised and the assets of the VEB Foundation (in liquidation) have decreased accordingly.

7. We find that before assessing the lawfulness and constitutionality of the second section of the decision of the *Riigikogu* dated 15 February 2012 all of the legal circumstances and facts regarding the realisation of the certificates of the VEB Fund should have been identified. If necessary, the Court *en banc* could have postponed discussing the case and, in line with the inquisitorial principle, demanded that the parties to the proceedings and other persons submit relevant documents and gather other evidence on the realisation of the certificates of the VEB Fund, the assets that accrued or should have accrued to the VEB Fund and other

important circumstances.

The Court *en banc* could have, among other things, taken a clear view on the issue of whether the possible claims for damage of the owners of the certificates of the VEB Fund and their legal successors or claims based on the second sentence of subsection 1 of § 32 of the Constitution call for declaring the absence of legislation unconstitutional or the claims can be filed again on the basis of the existing provisions (in connection therewith see the judgment of the Supreme Court *en banc* of 22 March 2011 in case no. 3-3-1-85-09, point 119; judgment of 30 August 2011 in case no. 3-2-1-15-10, points 42-51; and judgment of 31 August 2011 in case no. 3-2-1-35-10, points 46 69).

Jüri Ilvest, Henn Jõks, Eerik Kergandberg, Indrek Koolmeister, Jaak Luik, Tambet Tampuu

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