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

FIRST SECTION

CASE OF CAPITAL BANK AD v. BULGARIA

(Application no. 49429/99)

JUDGMENT

STRASBOURG

24 November 2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Capital Bank AD v. Bulgaria,

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

Mr C.L. ROZAKIS, *President*,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 3 November 2005,

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

PROCEDURE

1. The case originated in an application (no. 49429/99) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Capital Bank AD, a company in liquidation whose registered office was in Sofia, Bulgaria ("the applicant bank"), on 23 December 1998. The application was introduced on its behalf by Mr Anguel Ivanov Parvanov and Mr Mancho Markov Markov, respectively the chairman and vice-chairman of its board of directors. The application form was also signed by its three shareholders, First Financial AD, a company whose registered office is in Sofia, TOO Royal Flash, a company whose registered office is in Moscow, Russia, and OOO Rontadent Trade, a company whose registered office is in Tver, Russia.

2. The Bulgarian Government ("the Government") were represented by their Agents, Ms M. Pasheva, Ms M. Dimova and Ms M. Kotzeva, of the Ministry of Justice.

3. The applicant bank alleged that the courts which had heard the winding-up petition against it had not examined whether it was in fact insolvent, that the proceedings in which that issue had been decided were not adversarial, and that the decision of the Bulgarian National Bank ("the BNB") to revoke its licence had not been taken in accordance with the law.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 9 September 2004 the Court (First Section) rejected the Government's objection that the application had not been validly lodged on the applicant bank's behalf and declared the application admissible.

6. On 18 October 2004 the applicant bank requested the Court to indicate to the Government that the proceedings for the sale of its entire undertaking to another bank (see paragraph 36 below) should be stayed pending the outcome of the proceedings before the Court, pursuant to Rule 39. On 25 October 2004 the acting President of the Chamber to which the case was allocated decided not to grant that request.

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1).

8. The applicant bank and the Government each filed observations on the merits. The parties replied in writing to each other's observations (Rule 59 § 1).

9. In a letter of 14 June 2005 the Central Cooperative Bank AD, a bank whose registered office is in Sofia, which purchased the applicant bank's entire undertaking at the beginning of 2005 (see paragraph 36 below), requested that the application be struck out of the list under Article 37 § 1 (a), as, in its alleged capacity of successor to the applicant bank, it no longer intended to pursue the application. On 3 November 2005 the Court (First Section) declared that request inadmissible. Insofar as the Central Cooperative Bank AD's letter could be construed as a request for leave to intervene as a third party (Rule 44 § 2), such leave was also refused by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant bank was set up and acquired a banking licence in 1993. On 20 November 1997 its licence was revoked by the BNB and on 6 January 1998 it was put into compulsory liquidation (see paragraphs 20 and 27 below). On 20 April 2005 the bank was wound up and it was struck off the register of companies (see paragraph 37 below).

A. The applicant bank's financial situation, the action taken by the BNB as a result and the first petition to wind up the applicant bank

11. On 27 March 1997 the BNB ruled that the applicant bank was insolvent.

12. On 5 May 1997 the BNB lodged a petition with the Sofia City Court to wind up the applicant bank.

13. In a decision of 15 May 1997 the BNB found that the overall amount of the applicant bank's outstanding major loans was more than twenty times greater than the amount of its capital (including paid-up capital and reserves), when the regulatory maximum was eight times. Considering that that situation put at risk the bank's ability to operate and posed certain other problems with its financial standing, it decided to restrict the bank's operations. In particular, it prohibited it from taking deposits, granting loans or other credit facilities, purchasing bills of exchange or promissory notes, entering into foreign-currency or precious-metals transactions, entering into deposit transactions, acting as a surety or guarantor or providing security to third parties, effecting non-cash operations, clearing current accounts of third parties and conducting factoring transactions. The BNB also appointed a special administrator (see paragraph 49 below) to supervise the activities of the applicant bank and to verify whether it complied with the restrictions.

14. On 23 September 1997 the Sofia City Court, finding that the BNB had yet to revoke the applicant bank's licence, which was a precondition to making a winding-up order under the new Banks Act of 1997, discontinued the proceedings. Its decision was upheld by the Supreme Court of Cassation on 12 November 1997.

B. The attempt to improve the applicant bank's financial situation

15. In principle, it would have been possible to remedy the problems noted in the BNB's decisions of 27 March and of 15 May 1997 (see paragraphs 11 and 13 above) by increasing the applicant bank's capital.

16. This appears to have been the reason why on 23 March 1997 the applicant bank's general meeting of shareholders resolved to issue new shares up to an amount of 12,000,000,000 old Bulgarian levs (BGL)[1], to be subscribed by the shareholders. The resolution was registered by the Sofia City Court and took effect on 12 May 1997.

17. Two of the applicant bank's shareholders, TOO Royal Flash and OOO Rontadent Trade, subscribed the shares and, accordingly, became liable to pay for them. However, they sought to discharge this liability by

1. On 5 July 1999 the Bulgarian lev was revalorized. One new Bulgarian lev (BGN) equals 1,000 old Bulgarian levs (BGL).

other means. On 30 June and 7 and 29 August 1997 the two shareholders purchased, at a discount, debts due by the applicant bank to the BNB and several other banks and companies. By virtue of these debt assignments the applicant bank's shareholders also became its creditors. They advised the applicant bank that they wished to set off their obligations to pay for their newly subscribed shares against the debts that the applicant bank now owed them. Accordingly, the applicant bank made entries in its accounts to effect the required set-offs.

18. On 11 November 1997 the deputy-governor of the BNB responsible for banking supervision, in whom the Central Bank's powers under section 65 of the Banks Act of 1997 (see paragraph 48 below) were vested, directed the applicant bank to cancel the above-mentioned entries in its accounts. She reasoned that the set-offs represented non-cash consideration for the shares and that they had been effected in breach of sections 72 and 73 of the Trade Act of 1991 and of section 19(2)(5) of the Banks Act of 1997 (see paragraphs 70-72 below). The deputy-governor of the BNB also ordered the applicant bank to present to the BNB a rectified balance sheet showing the cancelling of the entries. The order was immediately enforceable and not subject to judicial review (see paragraph 56 below).

19. In a subsequent decision of 20 November 1997 (see paragraph 20 below) the BNB appears to have considered that the set-offs were in fact a conversion of assets which could not improve the applicant bank's financial situation.

C. The revocation of the applicant bank's licence

20. On 20 November 1997 the governor of the BNB, acting on a recommendation by the deputy-governor responsible for banking supervision, revoked the applicant bank's licence and appointed two special administrators to act in place of the applicant bank's board of directors. The reasons for his decision were as follows:

> "In its decision [of 27 March 1997] the BNB's board of governors found that the [applicant bank] was insolvent and petitioned the court to put it in compulsory liquidation.
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> With a view to allowing the [applicant bank's] managing bodies to improve its financial situation by increasing its capital and accumulating additional funds and thus allowing it to restore itself to a state of solvency, [the BNB's] banking supervision department decided not to recommend the revocation of the bank's licence on grounds of insolvency.
>
> The analysis of the [applicant bank's] financial situation as of 11 November 1997, carried out by [the BNB's] banking supervision department, indicates that the bank's capital has not been increased through the accumulation of additional funds, but mainly through the conversion of assets – a conversion which was, moreover, not

carried out in the proper manner – which has not led to a substantial improvement in the bank's financial situation.

The overall capital adequacy of the bank is negative – minus 16.74% –, and the valuation of the bank's assets and liabilities, carried out in accordance with the BNB's supervisory requirements and rules, indicates that the value of the bank's liabilities exceeds the value of its assets by BGL 1,072,977,000. Moreover, the bank has failed for more than seven working days to pay a due debt of 437,975.65 United States dollars (USD) to the Commercial and Savings Bank AD (in liquidation). Because of all these facts the BNB's deputy-governor in charge of the banking supervision department has recommended that the bank's licence be revoked by reason of insolvency."

21. The decision, a copy of which was sent to the applicant bank by fax on 20 November 1997 and later by a letter of 1 December 1997, which was received by the bank on 2 December 1997, stated that it was immediately enforceable and not subject to judicial review (see also paragraph 56 below). On 25 November 1997 it was published in the State Gazette.

22. The applicant bank contended that the debt to which the BNB had referred in its decision had in fact been settled. In support of that assertion it presented a decision of 12 April 2001 of an enforcement judge at the Sofia District Court, which indicated that by 5 September 1997 the applicant bank had paid in full a debt to the Commercial and Savings Bank AD under a writ of execution. The applicant bank further claimed that the BNB had been informed of the payment of the debt through a report made by the applicant bank's special administrator on 8 September 1997. The Government disputed the applicant bank's contentions and said that the debt in fact remained unpaid, as the Sofia City Court had found in its judgment approving the list of agreed creditors' claims in the liquidation proceedings (see paragraph 35 below). The parties also produced a number of other documents in corroboration of their assertions.

23. The applicant bank further contended that its assets exceeded its liabilities, contrary to what the BNB had found in its decision. In particular, it had money in two accounts in banks in the United States of America. The Government disputed that statement. Both parties presented various documents in corroboration of their assertions.

D. The BNB's second winding-up petition against the applicant bank and the ensuing proceedings

24. On 24 November 1997 the BNB filed with the Sofia City Court a petition to wind up the applicant bank. In the petition it repeated almost verbatim the findings it had made in its decision of 20 November 1997 (see paragraph 20 above).

25. A hearing was held on 17 December 1997, at which the applicant bank was represented by the special administrators previously appointed by

the BNB (see paragraph 20 above). A prosecutor from the Sofia City Prosecutor's Office also took part in the proceedings, as mandated by former section 81 of the Banks Act of 1997 (see paragraph 61 below).

26. Counsel instructed by the special administrators argued that there was no indication that the applicant bank's liabilities exceeded its assets or that it had defaulted on a debt which had fallen due. This position was supported by the prosecutor, who also submitted that it was necessary to gather evidence on the applicant bank's real financial situation.

27. In a judgment of 6 January 1998 the Sofia City Court granted the BNB's petition, declared the applicant bank insolvent, made an order for it to be wound up, divested its decision-making bodies of their powers and the bank of the right to administer its property, ordered the sale of its assets, and appointed liquidators. It found that the conditions for making a winding-up order – namely, that an order revoking the bank's licence had been made and a copy of that order produced to the court – were satisfied. The Banks Act of 1997 gave the court limited jurisdiction in proceedings to wind up an insolvent bank. The only fact the court had to verify in such proceedings was whether the above two conditions were met. The judgment continued:

> "...in view of the new procedure introduced by the Banks Act [of 1997], ... the objection ... that the BNB's averment of [the applicant bank's] insolvency is not supported by evidence is unfounded. Unlike the repealed Banks and Credit Business Act [of 1992], which provided that the BNB had to ... prove ... the bank's insolvency, the new Banks Act [of 1997] does not contain such a requirement. Moreover, in section 79(1) and (3) of the Act the legislature has exhaustively specified the conditions for making a winding-up order [in respect of a bank] and the requirements that the BNB's petition has to conform to. These boil down solely to indicating the grounds on which the bank's licence has been revoked under section 21(2) of the Act.
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> The logical and comparative-law construction of the above provisions ... leads to the categorical conclusion that the changes in the statutory regime of bank insolvency are aimed, on the one hand, at a significant reduction in the court's jurisdiction, [and even] at taking away its power to determine whether the bank is insolvent, and, on the other hand, at empowering [the BNB] to determine that issue without being required to substantiate or prove its finding before the court...
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> An argument in favour of the above conclusion is section 21(5) of the Act, which expressly provides that the decision of [the BNB] to revoke a banking licence is not subject to judicial review. ... Gathering evidence relating to the ... insolvency of a bank would run counter to the above-cited prohibition against judicial review.
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> In view of all this the court finds that all [the applicant bank's] requests and objections ... contesting the BNB's averments about its insolvency are inadmissible and cannot be examined. The same goes for the evidence presented by [the applicant bank]: even if it is admissible, it should not be taken into account, as it is absolutely irrelevant to the dispute at hand. The two above-cited prerequisites – the order ... revoking the banking licence of [the applicant bank] and the production of a copy of that order to the court... – are sufficient for the resolution of this dispute."

28. As the judgment was immediately enforceable (see paragraph 64 below), it was considered that from that moment onwards the persons entitled in law to act on the applicant bank's behalf were the court-appointed liquidators. Accordingly, the liquidators represented the applicant bank in the ensuing stages of the proceedings.

29. The liquidators did not appeal against the judgment, but the Sofia City Prosecutor's Office did. It argued that the Sofia City Court had erred in not examining whether the applicant bank was in fact insolvent. It had thus turned the proceedings into a mere rubber-stamping of the BNB's petition for an order winding up the applicant bank. Had the court taken the trouble to look at the actual circumstances, it would have found that the applicant bank had more than USD 3,000,000 in cash, as evidenced by a report drawn up by the BNB-appointed special administrators. That fact raised the question whether the BNB's finding that the value of the applicant bank's liabilities exceeded the value of its assets was indeed true. Also, the BNB had not specified the amount or the date of maturity of the overdue debt the applicant bank was alleged to have failed to pay for more than seven working days. It was thus impossible to carry out an independent assessment of the veracity of its allegation. The Prosecutor's Office presented an expert report according to which the applicant bank's assets adequately covered its liabilities.

30. In reply the BNB and the applicant bank's liquidators argued that the appeal was unfounded.

31. On 10 March 1998 a three-member panel of the Supreme Court of Cassation upheld the Sofia City Court's judgment. Although it held that it could independently establish the facts, without deferring to the BNB's findings, it was of the view that the applicant bank was indeed insolvent. An analysis of the evidence showed that, according to the BNB's deputy-governor, the value of the applicant bank's assets was BGL 8,391,953,000, and the value of its liabilities BGL 9,464,930,000. The difference between those figures was exactly the amount mentioned in the BNB's decision and its ensuing winding-up petition. Turning to the other factual evidence of insolvency – the non-payment of a due debt for more than seven working days – the court held that the applicant bank did in fact owe another bank more than USD 2,500,000 under a debt rescheduling agreement of 18 September 1997. No payments had been made in satisfaction of that debt. The applicant bank's objection that it had not been able to make any payments because of the prohibition on non-cash operations imposed on it by the BNB's decision of 15 May 1997 (see paragraph 13 above) was unfounded. In any event, the reasons for non-payment were irrelevant, since inability, however caused, to pay a debt for more than seven working days was of itself sufficient for the court to find insolvency.

32. The Chief Prosecutor's Office filed a petition for review of the judgment of the three-member panel.

33. On 30 June 1998 a five-member panel of the Supreme Court of Cassation dismissed that petition in the following terms:

> "The first-instance court's construction of the law – the Banking Act [of 1997] – is correct. The regime of bank insolvency is a *lex specialis* in relation to general commercial insolvency law ... In this context it has to be considered that the ... prerequisites for ... an order winding up a bank are governed not by the general rules of the Trade Act [of 1991], but by the special rules of the Banks Act [of 1997]... This is necessary because of the specific character of the banking business ... [Banks operate] predominantly with other people's money, which necessitates compliance with strict requirements for capital adequacy, formation of provisions and ... liquidity. [The BNB monitors compliance with these requirements] as part of its function of banking supervision, with a view to preserving the stability of the banking system and achieving effective and enhanced protection of depositors. Because of this specificity proceedings to wind up banks are expedited, with a view to protecting the interests of the creditors of the insolvent bank.
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> ...
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> The Sofia City Court correctly held that the soundness and the expediency of the BNB's decision to revoke [the applicant bank's] licence could not be reviewed by the court, because [the BNB has special powers] in discharging its banking supervisory duties. By virtue of section 82 of the Banking Act [of 1997] the court is bound by [the BNB's] winding-up petition, if it meets the requirements of section 79(3) in conjunction with section 21(2). [T]he court does not carry out an additional examination of circumstances evidencing the insolvency of a bank. ... The BNB alone ... has the competence to determine extra-judicially whether the two grounds for [declaring a bank insolvent] exist. [This determination] is not subject to review by the court, which has no latitude in such proceedings. Once the BNB has established the insolvency of a bank before the winding-up procedure begins, the court may not reconsider the issue. It must only carry out a formal, *ex facie* verification of [the BNB]'s winding-up petition, without venturing into the substantive issues..., because it is the revocation of the licence itself that constitutes the ground for making a winding-up order. The court may only verify whether [the BNB]'s decision is void, but may not examine whether [the BNB's] finding of insolvency is borne out by the facts..."

34. Thereafter winding-up proceedings unfolded in respect of the applicant bank.

35. In the course of those proceedings the applicant bank's creditors, which included its three shareholders, submitted their proofs of debt to the bank's liquidators. The liquidators examined the proofs and drew up a list of agreed claims. Two of the bank's shareholders, TOO Royal Flash and OOO Rontadent Trade, and two other creditors made objections to the list, which the liquidators examined. The liquidators then transmitted the list to the Sofia City Court for approval. No objections to the list were made to the court, which approved it in a final judgment of 9 February 1999. On 7 December 2000 the liquidators tried to obtain a ruling that a debt to the Commercial and Savings Bank AD did not exist and that the underlying

claim should accordingly be disallowed, but the Sofia City Court declared their request inadmissible in a decision of 23 January 2001, holding that no objections had been made to that claim at the appropriate time, and that the existence of the debt had therefore been conclusively established in its judgment of 9 February 1999, which was binding on the bank, its creditors and liquidators.

36. On 10 October 2003 the applicant bank's liquidators applied to the Bank Deposits Guarantee Fund (see paragraph 67 below) for permission to start negotiations with potential buyers for the purchase of the applicant bank's entire undertaking. Permission was granted on 14 October 2003 and on 31 January 2005 the liquidators entered into a contract for the sale of the undertaking to the Central Cooperative Bank AD, with the latter agreeing to pay a purchase price of BGN 1 and the applicant bank's creditors BGN 3,254,000 in satisfaction of their claims. The contract was approved by the Sofia City Court in a final judgment of 8 April 2005.

37. In a final judgment of 20 April 2005 the same court, on an application by the applicant bank's liquidators, brought the winding up to an end and ordered that the applicant bank be struck off the register of companies.

E. The attempt to have the BNB's decision revoking the applicant bank's licence declared null and void by the Supreme Administrative Court

38. On an unspecified date in 2002 one of the applicant bank's shareholders, First Financial AD, lodged with the Supreme Administrative Court an application for judicial review of the BNB's decision to revoke the bank's licence. It argued that the decision was null and void. Later the chairman and vice-chairman of the applicant bank's board of directors, purporting to act on the bank's behalf, requested leave to intervene in the proceedings.

39. In a decision of 5 March 2002 a three-member panel of the Supreme Administrative Court held that the applicant bank's request to be allowed to intervene in the proceedings was inadmissible because it had been lodged by persons who no longer represented it. Following the winding-up order and by virtue of section 84(3) of the Banks Act of 1997, read in conjunction with section 658(1) of the Trade Act of 1991, the only persons with power to act on its behalf were the liquidators. The court went on to hold that First Financial AD's application for judicial review of the BNB's decision was inadmissible. Section 21(5) of the Banks Act of 1997 excluded decisions by the BNB to revoke a bank's licence from the scope of judicial review. That provision was to be construed according to its plain meaning and was applicable regardless of whether the request was to annul the decision or to declare it null and void. Furthermore, First Financial AD had no standing to

lodge an application for judicial review, because the BNB's decision was addressed to the applicant bank, not to its shareholders.

40. The chairman and the vice-chairman of the applicant bank's board of directors and First Financial AD appealed.

41. In a decision of 10 April 2002 a five-member panel of the Supreme Administrative Court declared the appeal by the chairman and vice-chairman of the applicant bank's board of directors inadmissible and First Financial AD's appeal ill-founded. It held that no appeal lay against the refusal to allow the applicant bank to intervene in the proceedings. It also held that the decision not to examine First Financial AD's application for judicial review on the merits was correct. The prohibition of section 21(5) of the Banks Act of 1997 applied regardless of whether the request was to annul the BNB's decision or to declare it null and void.

F. The criminal proceedings against the BNB's deputy-governor

42. In late 1997 the chairman and the vice-chairman of the applicant bank's board of directors complained to the prosecution authorities about the actions of the BNB's deputy-governor in charge of banking supervision who had made the order of 11 November 1997 and the recommendation to the governor of the Central Bank to revoke the applicant bank's licence (see paragraphs 18 and 20 above). They argued that she had acted in excess of her powers with a view to causing damage to the applicant bank. On 8 June 1998 the Chief Prosecutor's Office ordered a criminal investigation into the deputy-governor's actions. On 6 November 1998 she was charged with abuse of office. In the course of the investigation the prosecution authorities ordered expert reports on, *inter alia*, the issue of whether the applicant bank had been insolvent as of 20 November 1997. One of the experts answered that question in the affirmative, another answered it in the negative.

43. One of the expert reports, drawn up on 7 April 1999, noted that a confidential agreement concluded in May 1997 between the International Monetary Fund ("the IMF") and Bulgaria for the establishment of a currency board in the country stipulated that the right to appeal against the BNB's decisions should be preserved, but should not hamper it in the performance of its banking supervisory functions. According to an opinion expressed by the IMF's mission in Bulgaria, any successful appeal should only lead to an award of compensation, not to the invalidation of the BNB's decision to close the bank. It appears to have been the view of the IMF's mission in Bulgaria that the protracted process of judicial review of the BNB's decisions and their possible invalidation would not be consistent with the effective process of banking supervision.

44. On 23 April 1999 a prosecutor from the Supreme Cassation Prosecutor's Office discontinued the proceedings, considering that the BNB's deputy-governor had acted lawfully and had not acted in abuse of

office. On 11 March 2005 another prosecutor from the Supreme Cassation Prosecutor's Office, acting on a complaint by the applicant bank's shareholders, decided to reopen the investigation, which the Court understands is still pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The reform of the banking legislation in 1997

45. In 1996-97 a serious financial crisis unfolded in Bulgaria, leading to economic instability, considerable inflation and the failure of a number of State-owned and private banks. As a response to that and after negotiations with the IMF, the country adopted a currency board, whereby its national currency became pegged to the German mark, and also established a completely new legislative framework regulating the activity of banks, mainly consisting of the new Bulgarian National Bank Act of 1997 („Закон за Българската народна банка"), which entered into force on 10 June and 1 July 1997, and the Banks Act of 1997 („Закон за банките"), which entered into force on 1 July 1997 and superseded the Banks and Credit Business Act of 1992 („Закон за банките и кредитното дело").

B. The BNB

46. The BNB, established in 1879, is the Central Bank of Bulgaria. At present its mission, structure, mandate and powers are principally set out in the Bulgarian National Bank Act of 1997. Its duties comprise, *inter alia*, regulating and supervising the other banks in the country with a view to securing the stability of the banking system and protecting the interests of depositors (section 2(6) of the Act). It is accountable to the National Assembly (section 1(2) of the Act), which elects its governor (section 12(1) of the Act) and deputy-governors (section 12(2) of the Act). The three remaining members of its board are appointed by the President of the Republic (section 12(3) of the Act). Section 44 of the Act, as worded at the material time, provided that the BNB was independent of the instructions of the Council of Ministers or any other government agency in the exercise of its powers.

C. The BNB's supervisory and enforcement powers in respect of commercial banks

1. Power to restrict a bank's activities

47. Under the Banks and Credit Business Act of 1992 the BNB could, under certain conditions, restrict the activities of a bank and the types of transactions it could enter into (section 56(1)(5) of the Banks and Credit Business Act of 1992; see also section 65(2)(6) of the Banks Act of 1997).

2. Power to order remedial action

48. Section 65(1)(1) and (2)(3) of the Banks Act of 1997 allows in broad terms the BNB to direct a bank in writing to remedy breaches of the Act or of the BNB's regulations or other Acts or directives.

3. Power to appoint special administrators

49. Under section 58(2) in conjunction with section 56(1)(5) of the Banks and Credit Business Act of 1992, the BNB could appoint special administrators („квестори") with the power to, *inter alia*, control the activities of the bank, verify whether it had complied with restrictions, gain access to its premises and check all its operations (see also section 58(1)(1) and (2) of that Act).

50. Sections 68 and 69 of the Banks Act of 1997 also allow the BNB to appoint special administrators to a bank. These special administrators act in lieu of the bank's board of directors (section 71(1)), that is to say on behalf of the bank. They are appointed and dismissed by the BNB (section 69(1)), which may give them instructions (section 71(3)), and are accountable only to it (section 71(5)). All transactions made by a bank without the prior approval of the special administrators are null and void (section 71(6)).

4. Power to revoke a bank's licence

51. The BNB is required to revoke a bank's licence on the ground of insolvency if (a) the bank fails for more than seven working days to repay a debt which has fallen due or (b) the total of the bank's liabilities exceeds the total of its assets (section 21(2) of the Banks Act of 1997). The value of the bank's assets and liabilities is determined by the BNB in accordance with supervisory requirements and its own rules (section 21(3)).

52. When it revokes a bank's licence, the BNB must appoint special administrators (see paragraphs 49 and 50 above) if none have yet been appointed (section 21(4) of the Banks Act of 1997). The administrators represent the bank until the court appoints liquidators (section 69(3) of the Banks Act of 1997). A decision by the BNB to revoke a bank's licence is immediately enforceable (section 21(5) of the Banks Act of 1997).

53. As an exception to the general rules of administrative procedure (sections 7(2) and 11(1) of the Administrative Procedure Act of 1979 („Закон за административното производство")), the BNB does not inform the bank of the commencement of the procedure for revoking its licence and does not have to examine or take into account the bank's representations and objections, if any (section 21(5) of the Banks Act of 1997). Under previous legislation (section 56(4) of the now repealed Banks and Credit Business Act of 1992), when revoking a bank's licence the only circumstance in which the BNB could dispense with informing the bank of the commencement of the procedure and with examining its representations and objections was if the case was exigent and urgent.

54. After revoking a bank's licence on the ground of insolvency, the BNB is required to file with the competent insolvency court a petition for an order winding-up the bank (former section 79(1) of the Banks Act of 1997; see also sections 8 and 9 of the Bank Insolvency Act of 2002 („Закон за банковата несъстоятелност"), which in December 2002 superseded the provisions of the Banks Act of 1997 relating to the winding up of insolvent banks).

D. Judicial review of the BNB's decisions

1. Relevant constitutional provisions

55. Article 120 of the Constitution of 1991 provides:

> "1. The courts shall review the lawfulness of the administration's acts and decisions.
>
> 2. Natural and juristic persons shall have the right to seek judicial review of any administrative act or decision which affects them, save as expressly specified by statute."

2. Relevant provisions of the Banks Act of 1997

56. Whereas the BNB's decisions under the Banks and Credit Business Act of 1992 were, without limitation, subject to review by the Supreme Administrative Court (section 88(2) and (3) of the Banks and Credit Business Act of 1992), the Banks Act of 1997 prohibits judicial review of a number of the BNB's decisions. Thus, supervisory and enforcement measures ordered by the BNB under section 65 of the Act are not subject to judicial review (section 65(4) of the Banks Act of 1997); neither are its decisions to revoke a bank's licence (section 21(5) of the Banks Act of 1997), or to appoint or replace special administrators at a bank (sections 65(4) and 69(4) of the Banks Act of 1997).

3. Relevant provisions of the Administrative Procedure Act of 1979

57. The Administrative Procedure Act of 1979 governs the procedure for issuing administrative decisions and for judicial review of such decisions. An application for judicial review must be lodged within a specified time-limit, which varies depending on whether the administrative decision was express or implied and on whether there has been an appeal to a higher administrative authority (section 37(1), read in conjunction with sections 22, 29 and 31 of the Act). The only circumstance in which no time-limit will apply is if it is alleged that the administrative decision is null and void (section 37(2) of the Act).

4. Judgment no. 18 of 1997 of the Constitutional Court

58. On 14 November 1997 the Constitutional Court delivered judgment (реш. № 18 от 14 ноември 1997 г. по конституционно дело № 12 от 1997 г., обн., ДВ брой 110 от 25 ноември 1997 г.) in proceedings that had been brought by fifty-one members of Parliament who considered, *inter alia*, that sections 21(5) and 65(4) of the Banks Act of 1997 should be declared contrary to Article 120 § 2 of the Constitution.

59. The Constitutional Court dismissed the complaint in the following terms:

> "[This] court has already clearly and categorically expressed the view that 'judicial review of administrative decisions is a constitutive element of the rule of law'...
>
> The court is of the view that the question of the judicial review of administrative decisions may be resolved only in accordance with the express wording of Article 120 § 2 of the Constitution. According to that provision, judicial review of administrative decisions may be limited only by statute. In the case at hand this means the Banks Act [of 1997].
>
> In view of the wording of Article 120 § 2 *in fine* of the Constitution, the court may not come up with an interpretation providing exceptions to the exception. Only the legislature has the power, by statute, to exclude certain administrative decisions from judicial review. [Article 120 § 2] does not lay down any criteria limiting the legislature's powers in this respect. This is a question falling within the legislature's competence...
>
> At the same time the court deems it necessary to point out that the legislature's right to exclude certain categories of administrative decisions from judicial review is not absolute. In exercising that right the National Assembly must have regard to the main constitutional principles relating to the rule of law and the protection of the fundamental human rights. The power granted to the National Assembly by Article 120 § 2 *in fine* is an exception and has to be construed and applied restrictively. The character of this exception requires the National Assembly to use its powers in this respect only when it has good and compelling reasons to do so. To hold otherwise would render the principle of judicial review meaningless. For this reason [this court] has jurisdiction to assess in each specific case whether the legislature's discretion has been exercised within the limits laid down in the Constitution...

> An analysis of the decisions excluded from judicial review by the Banks Act [of 1997] indicates that the legislature has remained within the bounds of its constitutional discretion in protecting the public interest and the interests of depositors. These are mainly acts of banking supervision, an area in which the competence of the supervisory body cannot be supplanted by judicial decision. ... In all cases where the administrative decisions that are not subject to review affect the rights and legal interests of individual citizens, there are no obstacles to their seeking redress in a civil action and claiming compensation for the alleged damage.
>
> In addition, the Court considers it necessary to emphasise that the rule set out in Article 120 § 2 *in fine* of the Constitution does not preclude the courts from ruling incidentally on the nullity of administrative decisions. To hold otherwise would mean that vitiated administrative decisions, such as decisions issued *ultra vires*, would be less easy to challenge than a statute, whose unconstitutionality can be established in proceedings before the Constitutional Court. In this sense the restriction on reviewing administrative decisions is not absolute."

E. Bank insolvency

60. Before 1 July 1997 bank insolvency was regulated by the Banks and Credit Business Act of 1992. From that date onward the newly adopted Banks Act of 1997 became applicable to such proceedings (until December 2002, when its provisions relating to bank insolvency were superseded by the Bank Insolvency Act of 2002 – see paragraph 54 above).

61. The regime of bank insolvency set forth in the Banks Act of 1997 (and largely followed by the Bank Insolvency Act of 2002) contained a number of special features. Only the BNB, not creditors or the bank itself, could petition for a winding-up order against a bank (former section 79(2) of the Banks Act of 1997). The BNB had a statutory obligation to lodge such a petition after revoking a bank's licence on the ground of insolvency (former section 79(1) of the Banks Act of 1997). The petition needed only specify the grounds on which the bank's licence had been revoked under section 21(2) of the Banks Act of 1997 (former section 79(3) of the Banks Act of 1997). A certified copy of the BNB's decision to revoke the licence had to be enclosed with the petition (ibid.). The petition was examined by the competent court at a hearing in the presence of a prosecutor from which the public was excluded (former section 81 of the Banks Act of 1997). The court had no power to make an order for the restructuring of the bank (former section 91 of the Banks Act of 1997). The bank was divested of the right to administer and dispose of its assets (former section 82(6) of the Banks Act of 1997), and, when granting the petition, the court was also required to immediately order the sale of the bank's assets and the distribution of the proceeds to its creditors (former section 82(7) of the Banks Act of 1997). The court divested the bank's decision-making bodies (such as the general meeting of shareholders and the board of directors) of their powers (former section 82(4) of the Banks Act of 1997) and appointed

liquidators („синдици“ – former section 82(8) of the Banks Act of 1997) in whom most of these powers, including the right to represent the bank in court, were vested (former section 84(3) of the Banks Act of 1997, in conjunction with section 658(1) of the Trade Act of 1991 („Търговски закон“)).

62. The decision-making bodies of a company in liquidation continue, however, to exist and may act on its behalf in certain limited circumstances; for instance, when there is a conflict of interest between the company and the liquidators. Thus, in a decision of 19 July 1999 (опред. № 234 от 19 юли 1999 г. по гр.д. № 52/1999 г. на ВКС, петчленен състав) the Supreme Court of Cassation held that the insolvent company, not the liquidator, had standing to appeal against the winding-up order. The rationale adopted by the court was that the liquidator might have a conflict of interest with the company. However, section 16(1) of the Bank Insolvency Act of 2002 now provides that it is the BNB-appointed special administrators (see paragraph 50 above) who may appeal against a court order putting a bank into compulsory liquidation.

63. The court could appoint liquidators only from a panel of qualified persons named on a list drawn up by the BNB (former section 84(1) of the Banks Act of 1997). If a liquidator was subsequently struck off that list by the BNB, the court was bound to discharge him or her (former section 84(2) of the Banks Act of 1997). In a decision of 29 October 1997 the Supreme Court of Cassation held that the insolvency court could not review a decision by the BNB to remove a person from that list, because the court had no discretion in this respect (опред. № 1712 от 29 октомври 1997 г. по гр.д. № 1631/1997 г., на ВКС, V г.о.).

64. The Trade Act of 1991 was applicable *mutatis mutandis* and insofar as the Banks Act of 1997 did not contain special rules (former section 97 of the Banks Act of 1997). Section 634 of the Trade Act of 1991, which thus appears to have been applicable, provides that a court order declaring a debtor insolvent and requiring it to be wound up is immediately enforceable (see also section 13(2) of the Bank Insolvency Act of 2002).

65. A winding-up order has the effect of automatically staying all pending enforcement proceedings against property forming part of the insolvent entity’s estate (section 638(1) of the Trade Act of 1991, as applicable until superseded in December 2002 in respect of banks by section 21(1) of the Bank (Insolvency) Act of 2002, which provides for such proceedings to be stayed even earlier, namely when the BNB’s decision revoking the bank’s licence is published in the State Gazette).

66. Creditors of the bank were required to submit their proofs of debt to the liquidators within one month after the publication of the winding-up order (former section 86(1) of the Banks Act of 1997). The liquidators then examined the claims, drew up a list of agreed claims, and informed the creditors thereof by a notice published in, *inter alia*, the State Gazette

(former section 87(1) of the Banks Act of 1997). The creditors and shareholders of the bank owning at least 25% of the voting shares were entitled to lodge objections to the list with the liquidators (former section 87(2) of the Banks Act of 1997). The liquidators were required to examine the objections within fourteen days in the presence of the debtor, the creditor whose claim was challenged, and the person who had made the objection (section 690(2) of the Trade Act of 1991, as in force at the material time). The liquidators then submitted the original or the amended list, as appropriate, to the insolvency court for approval. Any of the above persons could then repeat its objection before the court, which had a duty to examine it at a public hearing (section 692(1), (2) and (3) of the Trade Act of 1991, as in force at the material time). An appeal lay against the court's judgment to the Supreme Court of Cassation (former section 90(1) of the Banks Act of 1997, as in force at the material time). If no objections were made before the court, it examined the list in private and approved it in a final judgment (section 692(5) of the Trade Act of 1991, as in force at the material time). The court's judgment was binding on the insolvent bank, the liquidator, and all the creditors (former section 90(6) of the Banks Act of 1997, as in force at the material time).

67. The insolvent bank's assets may be sold off individually at auction and the proceeds then distributed among the creditors whose claims have been allowed (former sections 92, 94a and 95 of the Banks Act of 1997, in conjunction with sections 716-32 of the Trade Act of 1991, superseded in December 2002 by sections 72-90 and 93-104 of the Bank Insolvency Act of 2002). Alternatively, the liquidators may try to sell the bank's entire undertaking to another licensed bank, with the permission of the body responsible for overseeing the winding up of banks, the Bank Deposits Guarantee Fund (sections 91 and 92 of the Bank Insolvency Act of 2002; see also former sections 93 and 94 of the Banks Act of 1997).

F. Capital and capital adequacy of a bank

68. A bank's paid-up capital on incorporation must not be less than BGL 10,000,000,000 (BGN 10,000,000 after the currency revalorization of 5 July 1999) (section 23(2) of the Banks Act of 1997). All payments made by the shareholders for subscribed shares must be in cash, until this minimum capital is attained (section 23(3) of the Banks Act of 1997). The bank's capital must at all times surpass this amount (section 2(2) of the BNB's Regulation no. 8 of 5 August 1997 on the capital adequacy of banks, superseded on 1 July 2005 by section 2(2) of the BNB's Regulation no. 8 of 23 December 2004 on the capital adequacy of banks).

69. Also, a bank's capital adequacy: the ratio between its capital base – defined as its primary, or tier-one, capital (including paid-up shares plus premiums and statutory and other reserves minus intangible assets, losses,

and treasury shares – section 9 of Regulation no. 8 of 5 August 1997), plus supplementary capital elements, or tier-two, capital (including retained earnings, special reserves, hybrid capital instruments, subordinated debt – section 10 of Regulation no. 8 of 5 August 1997) – and its risk-weighted assets and off-balance-sheet items may not be less than 12% (section 23(3) of Regulation no. 8 of 5 August 1997; see also section 8(6) of the BNB's Regulation no. 8 of 23 December 2004 on the capital adequacy of banks).

G. Capital maintenance: payment for subscribed shares

70. Under Bulgarian law banks are joint-stock companies („акционерно дружество" – section 1(1) of the Banks Act of 1997). The capital of joint-stock companies may be increased by, *inter alia*, issuing new shares (section 192(1) of the Trade Act of 1991). Once these shares have been subscribed, the subscriber is under an obligation to pay cash or to provide non-cash consideration for the shares (section 188(1) of the Trade Act of 1991). The manner and conditions for providing non-cash consideration are laid down in sections 72 and 73 of the Trade Act of 1991 (see also new sections 73b and 73c of the Trade Act of 1991).

71. If a bank decides to increase its capital by issuing shares for non-cash consideration, it has to obtain the prior written approval of the BNB (section 19(2)(5), now section 19(4)(5), of the Banks Act of 1997). Any increase made without such approval is null and void (section 19(6), now section 19(9), of the Banks Act of 1997).

72. At the relevant time section 120(2) of the Trade Act of 1991 prohibited any set-off between the obligation of a member of a limited liability company („дружество с ограничена отговорност") to pay up his or her shares against debt due by that company to the member. At the time it was unclear whether this prohibition also applied to joint-stock companies in the absence of any express provision. Although expressed *obiter*, the Supreme Court of Cassation's view appears to have been that it did (опред. № 51 от 26 февруари 1999 г. по гр.д. № 41/1999 г. на ВКС, V г.о.). In 2000 the legislature clarified the issue by introducing a new section 73a of the Trade Act of 1991, whereby the proscription was explicitly expanded to both limited liability companies and joint-stock companies.

H. State responsibility for unlawful acts and omissions

73. Section 1(1) of the State Responsibility for Damage Act of 1988 („Закон за отговорността на държавата за вреди, причинени на граждани") provides that the State is liable for damage suffered by private persons as a result of unlawful decisions, actions or omissions by civil servants, committed in the course of or in connection with the performance of their duties. Section 1(2) provides that compensation for damage flowing

from unlawful decisions may be claimed after the decisions concerned have annulled in prior proceedings. The court examining the claim for compensation cannot inquire into the validity of a voidable decision; it may merely examine whether a decision is null and void. Only natural persons, not juristic persons, may claim compensation under the Act (реш. № 1307 от 21 октомври 2003 г. по гр.д. № 2136/2002 г., на ВКС, V г.о.). Persons seeking redress for damage occasioned in circumstances falling within the scope of the Act have no claim under the general law of tort, as the Act is a *lex specialis* and excludes the application of the general regime (section 8(1); реш. № 1370/1992 г. от 16 декември 1992 г. по гр.д. № 1181/1992 г. на ВС, IV г.о.; реш. от 29 юли 2002 г. по гр.д. № 169/2002 г. на СГС, ГК, IVб отд.).

THE LAW

I. THE GOVERNMENT'S REQUEST FOR THE CASE TO BE STRUCK OUT OF THE LIST

74. In their observations submitted on 17 June 2005 the Government requested the Court to strike the application out of its list pursuant to Article 37 § 1 of the Convention, on the ground that the applicant bank no longer existed as a legal person, as it had been struck off the register of companies after being liquidated (see paragraph 37 above).

75. Article 37 § 1 provides:

> "The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> (a) the applicant does not intend to pursue his application; or
>
> (b) the matter has been resolved; or
>
> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
>
> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

76. The Court notes at the outset that the application was lodged on behalf of the applicant bank by the chairman and the vice-chairman of its board of directors and its shareholders (see paragraph 1 above) – when at the time it was in liquidation and should normally have been represented by the liquidators. In its admissibility decision in the present case the Court accepted that in the particular circumstances and in consideration of the

need to interpret Article 34 of the Convention as guaranteeing rights which are practical and effective as opposed to theoretical and illusory, this was permissible (see *Capital Bank AD v. Bulgaria* (dec.), no. 49429/99, 9 September 2004).

77. The Court does not find it necessary to examine whether the conditions for striking the application out of its list under Article 37 § 1 (a) to (c) are fulfilled, as respect for human rights as defined in the Convention and the Protocols requires the examination of the application (see Article 37 § 1 *in fine*).

78. While under Article 34 of the Convention the existence of a "victim of a violation" is indispensable for putting the protection mechanism of the Convention into motion, this criterion cannot be applied in a rigid, mechanical and inflexible way throughout the whole proceedings. As a rule, and in particular in cases which, as the one at hand, primarily involve pecuniary, and, for this reason, transferable claims, the existence of other persons to whom that claim is transferred is an important criterion, but cannot be the only one. Human rights cases before the Court generally also have a moral dimension, which it must take into account when considering whether to continue with the examination of an application after the applicant has ceased to exist. All the more so if the issues raised by the case transcend the person and the interests of the applicant (see, *mutatis mutandis*, *Karner v. Austria*, no. 40016/98, § 25, ECHR 2003-IX, with further references).

79. The Court has repeatedly stated that its judgments in fact serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties. Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States (ibid., § 26).

80. The Court notes that the various alleged breaches of Articles 6 § 1 and 13 of the Convention and Article 1 of Protocol No. 1 in the present case concern the procedure whereby the applicant bank's licence was revoked and the bank was wound up, which ultimately led to its ceasing to exist as a legal person. Striking the application out of the list under such circumstances would undermine the very essence of the right of individual applications by legal persons, as it would encourage governments to deprive such entities of the possibility to pursue an application lodged at a time when they enjoyed legal personality (see, *mutatis mutandis*, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, Commission decision of 29 June 1998, unreported, with further

references). It would also render nugatory the Court's reasoning in its admissibility decision in the present case (see paragraph 76 above). This issue in itself transcends the interests of the applicant bank and therefore the Court rejects the Government's request for the application to be struck out of its list.

II. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

81. The applicant bank complained under Article 6 § 1 of the Convention that in the proceedings commenced by the BNB's second winding-up petition the courts had not examined in substance whether it was in fact insolvent but had chosen instead to defer to the BNB's findings, as they considered that they only had jurisdiction to verify the formal validity of the Central Bank's decision to revoke its licence on the ground of insolvency.

82. The applicant bank further complained under the same provision that in the same proceedings it had been represented before the Sofia City Court by the special administrators appointed by and answerable to the BNB, and before the Supreme Court of Cassation by the liquidators who were also accountable to the BNB.

83. The relevant part of Article 6 § 1 reads:

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

A. Applicability of Article 6 § 1

1. The parties' submissions

84. The applicant bank submitted that proceedings relating to the withdrawal of a licence required for operating a business were determinative of civil rights and obligations. The fact that the parties to the dispute were the BNB – a government body – and the applicant bank was immaterial. Since banking was a private-law activity, there was no doubt that the right to engage in such a business was civil within the meaning of Article 6 § 1. Moreover, the conditions for withdrawing the licence were laid down by statute.

85. The Government submitted that the right to engage in banking was not a civil right within the meaning of Article 6 § 1. That right, which was reserved to joint-stock companies, was dependent on the fulfilment of a number of strict legal requirements, which had been laid down with a view to preserving the stability of the banking system and the interests of depositors. Compliance with those requirements was closely monitored by

the banking supervisory authorities, which were the only persons suitably qualified to perform that task. In this sense the right to engage in banking was not a fundamental civil right. Unlike other civil rights, such as the right to property, banking did not enjoy such full protection, because important public interests were at stake. Moreover, the decision to wind up the bank did not deprive it of its property, but merely affected the rights of its former management to administer it.

2. The Court's assessment

86. The Court reiterates at the outset that the applicability of Article 6 § 1 to bankruptcy proceedings is beyond doubt (see *S.p.r.l. ANCA and Others v. Belgium*, no. 10259/83, Commission decision of 10 December 1984, Decisions and Reports 40, p. 170; *Interfina and Christian della Faille d'Huysse v. Belgium*, no. 11101/84, Commission decision of 4 May 1987, unreported; *Ceteroni v. Italy*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V; and *Bassani v. Italy*, no. 47778/99, §§ 13 and 14, 11 December 2003).

87. In the instant case, subject to the possibility of its being revoked, the licence conferred a "right" on the applicant bank in the form of an authorisation to enter into certain categories of banking transactions in accordance with the conditions set out in the licence and the relevant provisions of domestic law. On the other hand, under the applicable law, the BNB was required to revoke the licence in the event of insolvency, which then results in a winding-up order. It has no discretion in this respect (see paragraphs 51 and 54 above). Bearing these circumstances in mind, the Court considers that the applicant bank could maintain, on arguable grounds, that it was allowed to continue to operate as a going concern unless it was indeed insolvent. Its principal contention was that it was solvent, so that there was a genuine and serious dispute over the existence of that right (see, *mutatis mutandis*, *Pudas v. Sweden*, judgment of 27 October 1987, Series A no. 125-A, pp. 14-15, §§ 31-34; and *Tre Traktörer AB v. Sweden*, judgment of 7 July 1989, Series A no. 159, pp. 17-18, §§ 37-40).

88. Concerning the civil character of the right, the Court notes that the withdrawing of the licence and the ensuing winding-up order had a clear and decisive impact on the applicant bank's ability to continue operating as a going concern and its right to manage its own financial affairs and to administer its property (see paragraph 27 above). These measures eventually resulted in its being struck off the register of companies and its ceasing to exist as a legal person (see paragraph 37 above). They were thus decisive as far as its civil rights were concerned. The fact that banks are legal entities and that the banking industry is tightly regulated in view of the important interests at stake, such as those of depositors and of the public at large, is not a sufficient reason for concluding that proceedings in respect of a bank fall outside the scope of Article 6 § 1. To hold otherwise would create an

important lacuna in the system of human-rights protection in that area. In a recent judgment, *Credit and Industrial Bank v. the Czech Republic*, the Court had no doubts that Article 6 § 1 was applicable to various sets of proceedings concerning the compulsory administration of a bank. The Court further found that the decision to place the bank in compulsory administration affected the rights of the bank itself, not only those of its existing management (see *Credit and Industrial Bank v. the Czech Republic*, no. 29010/95, §§ 56-67, 21 October 2003). The situation in the instant case is substantially the same.

89. It follows that Article 6 § 1 is applicable.

B. Compliance with Article 6 § 1

1. The parties' submissions

(a) The applicant bank

90. The applicant bank submitted that because of the prohibition in section 21(5) of the Banks Act of 1997 the lawfulness of the revocation of its licence had in reality never been tried by a court. The Supreme Administrative Court had declared the application for judicial review of the BNB's decision inadmissible and the courts examining the winding-up petition had considered themselves bound by the BNB's findings, thus effectively rubber-stamping its decision. Had the courts taken the trouble to verify the facts on which the BNB's decision was based, they would have found them to be untrue. The Government's assertion that indirect judicial review was possible was based on an erroneous interpretation of the applicable law. Nor was it possible to obtain compensation. Furthermore, the Government's reliance on the alleged demands by the IMF to limit the courts' involvement in the closing of ailing banks was misplaced, because Bulgaria could not avoid its obligations under the Convention under the guise of complying with the recommendations of an international organisation. Such an all-out ban was disproportionate, as the desired effects could have been achieved through other means.

91. Concerning the second limb of its complaint, the applicant bank alleged that, in practice, the BNB controlled the liquidators, as it had the power to remove them from its list, thereby triggering their discharge by the insolvency court. Therefore, as the applicant bank had been represented by the liquidators, it had been unable to participate properly in the proceedings before the domestic courts.

(b) The Government

92. The Government submitted that domestic law did not go so far as to exclude any form of judicial scrutiny of the BNB's findings. For instance, the applicant bank's shareholders could commence an action in tort against the BNB and claim compensation for any alleged damage they had suffered as a result of the BNB's decision to revoke its licence. In such proceedings the courts would be able to review the legality of the Central Bank's decision. This was apparent from the Constitutional Court's reasoning in its judgment of 14 November 1997 (see paragraph 59 above), which was binding on the courts and all other State bodies. The shareholders of another bank whose licence had been revoked by the BNB had instituted an action in tort against it in 2002 and on 4 November 2004 the proceedings were pending at first instance before the Sofia City Court.

93. The applicant bank's shareholders could also assert their rights by making objections to the list of agreed claims drawn up by the bank's liquidators. Such objections would be examined jointly by the liquidators, the debtor (the applicant bank), the creditor whose claim was challenged, and the person who had made the objection. If the liquidators rejected their objections, the shareholders could later repeat them before the insolvency court, which would examine them at a public hearing (see paragraph 66 above). In such proceedings the courts could scrutinize the facts disputed by the applicant bank, including the question of the existence of the debt to the Commercial and Savings Bank AD and its repayment. The applicant bank's shareholders had not availed themselves of that possibility.

94. The restriction on the banks' access to a court in respect of the supervisory acts of the BNB had been dictated by the need to protect the public interest during a serious banking crisis, which had even compelled Parliament to bring in legislation establishing a depositors' protection scheme for insolvent banks. As the two grounds on which the BNB was required to revoke a bank's licence were clearly set out in the relevant statute, there was no risk of arbitrary action.

95. According to the Government, the prohibition of judicial review of the BNB's decisions to revoke a bank's licence had been introduced on the insistence of the IMF. This had been one of the requirements of the Fund for the conclusion of the agreement establishing a currency board in Bulgaria after the financial crisis in 1996-97. This was apparent from one of the expert reports drawn up during the investigation into the actions of the BNB's deputy-governor (see paragraph 43 above).

96. The Government argued that the applicant bank's complaint about its inability to seek judicial review of the BNB's decision to withdraw its licence was abusive, because it implied that the authorities should disregard the interests of depositors and take only the bank's interest into account. This was made worse by the fact that the applicant bank owed large

amounts of money to other banks, whose depositors had also suffered as a result of its troubled financial standing.

97. Concerning the allegation that the proceedings were unfair because the applicant bank was represented by the special administrators and later by the liquidators, the Government argued that, although the BNB had played a role in their appointment, it had no power to interfere with their daily work or their operative decisions. This was especially true in the case of the liquidators, who were appointed by the court, which could select any person it saw fit and was not bound by the BNB's decision in that respect. The list of prospective liquidators compiled by the Central Bank was only the starting point in the selection process. Nor was the court fully bound to dismiss a liquidator once he or she had been struck off that list by the BNB, as it could verify the reasons for the BNB's decision. On the other hand, both the special administrators and the liquidators were under an obligation to act in good faith and with due care.

2. The Court's assessment

98. As regards the first limb of the applicant bank's complaint, the Court reiterates that for the determination of civil rights and obligations by a tribunal to satisfy Article 6 § 1, the tribunal in question must have jurisdiction to examine all questions of fact and law relevant to the dispute before it (see *Terra Woningen B.V. v. the Netherlands*, judgment of 17 December 1996, *Reports* 1996-VI, pp. 2122-23, § 52; *Chevrol v. France* [GC], no. 49636/99, § 77, ECHR 2003-III; and *I.D. v. Bulgaria*, no. 43578/98, § 45, 28 April 2005).

99. The Court notes that, when examining the BNB's winding-up petition, the Sofia City Court and the five-member panel of the Supreme Court of Cassation, whose judgment was final, held, as is apparent from their reasoning, that they were precluded from conducting their own examination of whether the applicant bank was in fact insolvent after it had been found to be insolvent by the BNB (see paragraphs 27 and 33 above). As a result, the Sofia City Court expressly held that the evidence adduced by the applicant bank and by the prosecutor's office with a view to challenging the BNB's findings should not be taken into account, as it was irrelevant to the dispute before it. It further held that the applicant bank's requests and objections on this point were inadmissible and would not be examined (see paragraph 27 above). These holdings were endorsed by the five-member panel of the Supreme Court of Cassation (see paragraph 33 above). The outcome of the case was thus in the end determined solely on the basis of the BNB's finding that the applicant bank was insolvent.

100. Such decisions by a domestic court have already been considered by the Court in the cases of *Obermeier v. Austria*, *Terra Woningen B.V. v. the Netherlands* and *I.D. v. Bulgaria*. In all three cases the Court found violations of Article 6 § 1 because the domestic courts had considered

themselves bound by the prior findings of administrative bodies which were decisive for the outcome of the cases before them, without examining the relevant issues independently (see *Obermeier v. Austria*, judgment of 28 June 1990, Series A no. 179, pp. 22-23, §§ 69-70; *Terra Woningen B.V.*, cited above, pp. 2122-23, §§ 52-55; and *I.D.*, cited above, §§ 46 and 50-55).

101. The present case is very similar. As noted above, the domestic courts that examined the winding-up petition declined to examine an issue which was crucial to the determination of the case, choosing instead to defer to the findings of the BNB. They did not, therefore, exercise jurisdiction to examine all the questions of fact and law relevant to the dispute before them, as they were required to do by Article 6 § 1.

102. It follows that the conditions laid down in Article 6 § 1 are met only if the decision of the BNB to revoke the licence, which was considered as binding by the courts, was delivered in conformity with the requirements of that provision (see *Obermeier*, p. 23, § 70; and *I.D.*, § 51, both cited above).

103. In this connection, the Court finds that the BNB, although independent of the executive (see paragraph 46 above), is nevertheless an administrative body (see *Credit and Industrial Bank and Antonín Moravec v. the Czech Republic*, cited above, Commission's report of 25 October 1999, unpublished, § 78) and, in the circumstances of the case, cannot be deemed a tribunal conforming to the requirements of Article 6 § 1.

104. The Court must therefore examine whether the BNB's finding of insolvency was subject to direct review by a court having full jurisdiction, because, if that was the case, no issue would arise under Article 6 § 1 (see *Obermeier*, cited above, p. 23, § 70; *British-American Tobacco Company Ltd v. the Netherlands*, judgment of 20 November 1995, Series A no. 331, p. 28, §§ 84-87; and *I.D.*, cited above, § 53).

105. In this connection, the Court notes that section 21(5) of the Banks Act of 1997 explicitly excludes from the scope of judicial review a decision by the BNB to revoke a bank's licence on the ground of insolvency (see paragraph 56 above). According to the Supreme Administrative Court, that prohibition applies regardless of whether the allegation is that it is null and void or merely voidable. Indeed, it was for this reason that the Supreme Administrative Court rejected the application for judicial review of the BNB's decision to revoke the applicant bank's licence (see paragraphs 38-41 above).

106. As to the allegation that it was open to the bank's shareholders to commence an action in tort against the BNB, in the course of which the courts would be able to verify, as a preliminary issue, whether the BNB's decision was defective and, if so, award compensation (see paragraph 92 above), the Court notes that the Government have not produced a final judgment confirming that such an avenue of redress was indeed available. They merely referred to a set of proceedings pending at first instance whose

outcome is far from certain, especially if account is taken of the relevant provisions of the State Responsibility for Damage Act of 1988. Section 1(2) of that Act provides that the court hearing an action for compensation against a State body may only examine whether the impugned administrative decision from which the damage flows is null and void. If the alleged defect in the decision leads to it being merely voidable, it must first be invalidated in prior judicial-review proceedings (see paragraph 73 above). This proved impossible in the case of the applicant bank because of the prohibition in section 21(5) of the Banks Act of 1997 (see paragraphs 38-41 above). Moreover, as is apparent from the Supreme Court of Cassation's reasoning in its final judgment of 30 June 1998, any alleged erroneous finding by the BNB on the issue of the applicant bank's insolvency would not constitute sufficient grounds for declaring the BNB's decision null and void (see paragraph 33 *in fine* above). In addition, as the shareholders of the applicant bank are all juristic persons, they have no claim under the Act (see paragraph 73 above). Finally, the action referred to by the Government is one under the general law of tort, whereas section 8(1) of the State Responsibility for Damage Act of 1988, which appears to have been strictly adhered to by the Bulgarian courts, provides that no claim lies under the general law of tort for damage occasioned in circumstances falling within the ambit of that Act (ibid.). The existence of an alleged judicial remedy must be sufficiently certain, failing which it will lack the accessibility and effectiveness required for the purposes of Article 6 § 1 (see *I.D.*, cited above, § 54). That is not the case here (see, as an example to the contrary, *British-American Tobacco Company Ltd*, cited above, pp. 25-28, §§ 78-86). That being so, the Court does not consider it necessary to rule on the issue whether an action for compensation brought by a bank's shareholders could be a sufficient avenue of redress for its inability to seek judicial review of administrative decisions affecting the bank itself.

107. As regards the Government's contention that judicial review was available in the form of an objection before the insolvency court against the list of agreed creditors' claims drawn up by the liquidators (see paragraph 93 above), the Court notes that the legal issue to be decided in such proceedings – whether the creditor's claim is valid and should hence be allowed – is entirely different from the issue to be decided on a winding-up petition, where the court has to ascertain whether the bank is insolvent and whether a winding-up order is thus warranted (see paragraph 66 above).

108. The Court thus finds that the BNB's determination in the case at hand was not subject to judicial scrutiny of the scope required by Article 6 § 1.

109. The final question which needs to be resolved is whether the inability to challenge the BNB's decision before the courts was not

warranted in terms of the inherent limitations on the right of access to a court implicit in Article 6 § 1.

110. Concerning the Government's contention that the prohibition of judicial review of the BNB's decision to revoke a bank's licence was permissible because it was introduced at the demand of the IMF (see paragraph 95 above), the Court notes that the Government have not produced before the Court any specific agreement or other documentary evidence to show that the Fund expressly imposed such a requirement. They relied only on vague statements in an expert report that had been prepared in the context of the criminal investigation into the conduct of the BNB's deputy-governor, which appears to have drawn on opinions expressed by the Fund's mission in Bulgaria (see paragraph 43 above). In these circumstances and in the absence of further explanations from the Government, the Court is not satisfied that the limitation on the applicant bank's access to a court was indeed imposed pursuant to any binding international obligations undertaken by Bulgaria.

111. However, even assuming that it was, that fact cannot necessarily justify the limitation. The Contracting States' responsibility continues even after they assume international obligations subsequent to the entry into force of the Convention or its Protocols. It would be incompatible with the object and purpose of the Convention if the Contracting States, by assuming such obligations, were automatically absolved from their responsibility under the Convention (see, *mutatis mutandis*, *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, §§ 47 and 48, ECHR 2001-VIII; and *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, §§ 153 and 154, ECHR 2005-...). The Court, while attentive of the need to interpret the Convention in such a manner as to allow the States Parties to comply with their international obligations, must nevertheless in each case be satisfied that the measures in issue are compatible with the Convention or its Protocols (see *Prince Hans-Adam II of Liechtenstein* and *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi*, both cited above; and also *Matthews v. the United Kingdom* [GC], no. 24833/94, ECHR 1999-I; *Waite and Kennedy v. Germany* [GC], no. 26083/94, ECHR 1999-I; *Beer and Regan v. Germany* [GC], no. 28934/95, 18 February 1999; and *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI).

112. In this connection, the Court notes that, in order to justify the self-imposed limitation on its jurisdiction, the five-member panel of the Supreme Court of Cassation explained that the need to defer to the BNB's finding that the bank was insolvent existed because of the "specific character of the banking business" and the fact that "[banks operate] predominantly with other people's money, which necessitates compliance with strict requirements for capital adequacy, formation of provisions and ... liquidity. [The BNB monitors compliance with these requirements] as part

of its function of banking supervision, with a view to preserving the stability of the banking system and of achieving effective and enhanced protection of depositors" (see paragraph 33 above). The Court also notes that the Constitutional Court held that a decision by the BNB to revoke a licence was excluded from judicial review because it was an act of "banking supervision, an area in which the competence of the supervisory body [could not] be supplanted by judicial decision" (see paragraph 59 above).

113. The Court, for its part, is prepared to accept that the BNB's opinion on this issue carries significant weight because of its special expertise in this area. However, it is not persuaded that the domestic courts, if need be with the assistance of expert opinion, could not themselves ascertain whether the applicant bank was insolvent or not. The difficulties encountered in this respect could also be overcome through the provision of a right of appeal against the BNB's decision to an adjudicatory body other than a traditional court integrated within the standard judicial machinery of the country, but which otherwise fully complies with all the requirements of Article 6 § 1, or whose decision is subject to review by a judicial body with full jurisdiction which itself provides the safeguards required by that provision. Indeed, as is apparent from the Court's case-law, similar systems exist in many States Parties in domains in which special expertise is needed (see, by way of example, *Langborger v. Sweden*, judgment of 22 June 1989, Series A no. 155; *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A no. 307-B; *British-American Tobacco Company Ltd*, cited above; *Bryan v. the United Kingdom*, judgment of 22 November 1995, Series A no. 335-A; and *AB Kurt Kellermann v. Sweden*, no. 41579/98, 26 October 2004). It is true that any such proceedings would inevitably have consumed a certain amount of time, but that difficulty could have been addressed through strict time-limits for processing such cases or rules giving them priority. With regard to this concern and to the other potential risks to the stability of the banking system stemming from any delay, the Court refers, *mutatis mutandis*, to its reasoning in respect of Article 1 of Protocol No. 1 (see paragraphs 135-38 below).

114. The Court is mindful of the fact that the prohibition of judicial review of a decision by the BNB to revoke a bank's licence, which resulted in the courts' surrendering their jurisdiction to examine the BNB's related findings of fact, was imposed at a time of a serious banking and financial crisis which called for a prompt regulatory response from the authorities, consisting, *inter alia*, of the introduction of swift and seamless procedures for closing ailing banks. However, it has not been shown to the Court's satisfaction that other, less radical, solutions would have failed to achieve the desired results. It is also noteworthy that the provision laying down this prohibition, section 21(5) of the Banks Act of 1997, remains in force to this day.

115. In conclusion, having regard to the prominent place held in a democratic society by the right to a fair trial, the Court finds that, in the circumstances, the courts' decision to abide by the BNB's determination without subjecting it to any criticism or discussion, coupled with the absence of any means of scrutinizing that determination in direct review proceedings, was not justified.

116. There has therefore been a violation of Article 6 § 1 on that account.

117. Concerning the second limb of the complaint, the Court notes that in the proceedings on the BNB's petition the applicant bank was represented by persons who were dependent, to varying degrees, on the other party to those proceedings – the Central Bank. Before the Sofia City Court the applicant bank was represented by the BNB-appointed special administrators (see paragraph 25 above). Since the Sofia City Court's judgment was immediately enforceable (see paragraphs 28 and 64 above), in the ensuing stages of the proceedings the applicant bank was represented by the liquidators appointed by the insolvency court from a panel of qualified persons selected by the BNB (see paragraph 63 above). The liquidators could be struck off the list kept by the BNB and that would automatically result in their discharge by the insolvency court (ibid.). In view of the resulting dependence of the liquidators on the BNB, it is not surprising that they did not lodge any appeal against the Sofia City Court's judgment or petition for review of the judgment of the Supreme Court of Cassation's three-member panel, and that they acted in concert with the BNB throughout the proceedings (see paragraphs 29 and 30 above). If the prosecutor's office had not acted in support of the applicant bank and had not lodged an appeal and a petition itself, the bank would have been deprived of access to an appellate jurisdiction (see, *mutatis mutandis*, *Credit and Industrial Bank*, cited above, § 72).

118. The rights of access to a court and of adversarial proceedings, enshrined by Article 6, imply, among other things, the possibility for the parties to a civil or criminal trial to be able to effectively participate in the proceedings (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 13, § 24; and *Stanford v. the United Kingdom*, judgment of 23 February 1994, Series A no. 282-A, pp. 10-11, § 26) and adduce evidence and arguments with a view to influencing the court's decision. The litigants' confidence in the workings of justice is based on, *inter alia*, the knowledge that they have had the opportunity to express their views (see *Pellegrini v. Italy*, no. 30882/96, § 45, ECHR 2001-VIII). As it was represented by persons dependent on the other party to the proceedings, the applicant bank was unable, especially when the case was being examined by the Supreme Court of Cassation, to properly state its case and protect its interests. It is true that the prosecutor's office came to its aid, but that cannot remedy the fact that it was denied the opportunity to present its case before

the courts (see, *mutatis mutandis*, *Philis v. Greece (no. 1)*, judgment of 27 August 1991, Series A no. 209, pp. 20-23, §§ 58-65). The Court notes in this connection that in July 1999 the Supreme Court of Cassation held that the debtor itself, not the liquidator, had standing to appeal against the winding-up order, for reasons similar to those set out above (see paragraph 62 above). However, that did not happen in the instant case.

119. There has therefore been a violation of Article 6 § 1 on that account also.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

120. In the view of the applicant bank, the facts underlying its complaints under Article 6 § 1 of the Convention also gave rise to a violation of Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

121. The Court does not consider it necessary to rule on this submission, because the requirements of Article 13 are less strict than, and are here absorbed by, those of Article 6 § 1 (see *British-American Tobacco Company Ltd*, cited above, p. 29, § 89; and, more recently, *Związek Nauczycielstwa Polskiego v. Poland*, no. 42049/98, § 43, ECHR 2004-IX).

IV. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

122. The applicant bank complained under Article 1 of Protocol No. 1 that the BNB's decision to revoke its licence on the ground of insolvency, which later resulted in it being put into compulsory liquidation, had not been made in accordance with the law, as the statutory conditions for making a winding-up order – defaulting on a due debt for more than seven days or excess of liabilities over assets – had not been satisfied.

123. Article 1 of Protocol No. 1 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."

A. The parties' submissions

1. The applicant bank

124. The applicant bank submitted that its licence was essential to the continuation of its activity and its withdrawal could accordingly be analysed as an interference with its possessions. Under Bulgarian law, revocation of the licence automatically triggered winding-up proceedings and the eventual disappearance of the bank as a legal person, without there being any possibility of a reversal of the course of events. Admittedly, the BNB had to be vested with supervisory and enforcement powers, but the inability to seek judicial review of its decision to revoke the licence at any time was disproportionate and did not serve any legitimate public interest. The aim of avoiding harm to the banking system could be achieved through depriving any appeal of suspensive effect and appointing special administrators with immediate effect. Such an arrangement would have the advantage of making it easier to correct mistakes by the BNB. It would also facilitate the relatively seamless resumption of the affected bank's activity.

125. The BNB's decision that the statutory conditions for withdrawing the applicant bank's licence were satisfied was arbitrary and erroneous, as evidenced by the materials in the case file and in particular, an expert report that had been prepared in the course of the investigation into the conduct of the BNB's deputy-governor. The BNB had been informed by one of the applicant bank's special administrators that its assets covered its liabilities. The debt to the Commercial and Savings Bank AD had also been settled, as evidenced by the decision of the enforcement judge of 12 April 2001 (see paragraph 22 above). However, the procedure followed in the instant case had deprived the applicant bank of the opportunity to challenge those findings, which later led to winding-up proceedings being brought against it, with all their attendant negative consequences.

2. The Government

126. The Government submitted that the revoking of the licence did not constitute deprivation of possessions, but was a control of the use of property. They further argued that that interference was lawful and sought to safeguard an important public interest: the stability of the banking system. The interference was also proportionate to the attainment of that aim. Both conditions for withdrawing the licence were satisfied.

127. The applicant bank had failed for more than seven days to pay a debt to the Commercial and Savings Bank AD, as indicated by a detailed analysis of the materials in the case file. It could not present any proof of payment simply because such proof did not exist. In particular, the decision of the enforcement judge of 12 April 2001 (see paragraph 22 above) did not constitute such proof, because it was invalid. By section 638 of the Trade

Act of 1991, all enforcement proceedings in respect of an insolvent debtor were stayed as a result of the winding-up order (see paragraph 65 above). The enforcement judge therefore had no jurisdiction to discontinue such proceedings. On the other hand, the existence of the debt and its non-payment had been conclusively established by the insolvency court in its judgment approving the list of agreed creditors' claims drawn up by the liquidators. The applicant bank was estopped *per rem judicatum* by that judgment from reopening that issue.

128. Likewise, the applicant bank's liabilities had also exceeded its assets. There was no proof that the amounts allegedly held by it in two accounts in the United States of America had actually existed or that it had been free to dispose of them. Nor could it be conclusively established that the account statements produced by the applicant bank to prove the existence of the accounts were genuine. It was true that if the debt to the Commercial and Savings Bank AD, which was considerable, did not exist, the applicant bank's liabilities would probably not exceed its assets. However, that debt existed, as the insolvency court had categorically established. The expert report referred to by the applicant bank was not reliable and had not been taken into account by the prosecution authorities.

129. Finally, the insolvency of the applicant bank was evident from the fact that the winding-up proceedings had lasted more than seven years owing to the lack of realisable assets in the estate.

B. The Court's assessment

1. Applicability of Article 1 of Protocol No. 1

130. The Court notes that, in contrast to their position in respect of Article 6 § 1 (see paragraph 85 above), the Government did not dispute the applicability of Article 1 of Protocol No. 1. The Court further notes that having a licence was one of the principal conditions on which the applicant bank depended for carrying on its business, and that its withdrawal had the effect of automatically putting it into compulsory liquidation (see paragraphs 54 and 61 above). Therefore, the revocation of the licence constituted an interference with the applicant bank's possessions and Article 1 of Protocol No. 1 is applicable (see, *mutatis mutandis*, *Tre Traktörer AB*, cited above, p. 21, § 53; *Fredin v. Sweden (no. 1)*, judgment of 18 February 1991, Series A no. 192, p. 14, § 40; and *Luordo v. Italy*, no. 32190/96, §§ 65-67, ECHR 2003-IX). The Court also refers, *mutatis mutandis*, to its reasoning on the applicability of Article 6 § 1 (see paragraphs 87 and 88 above).

131. As regards which provision of Article 1 of Protocol No. 1 applies in the instant case, the Court observes that the BNB's decision to revoke the licence was clearly taken as a measure to control the banking sector in the

country. It is true that it involved a deprivation of property, insofar as the licence itself could be considered as a possession, but in the circumstances the deprivation formed a constituent element of a scheme for controlling the banking industry. The Court therefore considers that it is the second paragraph of Article 1 of Protocol No. 1 which is applicable (see, *mutatis mutandis*, *AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, pp. 17-18, § 51; and *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi*, cited above, § 142).

2. Compliance with Article 1 of Protocol No. 1

132. The gist of the applicant bank's complaint was that the BNB's decision to withdraw its licence had been unlawful because the statutory conditions for doing so were not satisfied. It alleged that the BNB's findings that it had failed to pay a due debt and that its liabilities exceeded its assets, which were the two grounds for revoking a bank's licence under section 21(2) of the Banks Act of 1997 (see paragraph 51 above), were incorrect. The Court does not consider it necessary to determine this issue, which was the subject of debate between the parties (see paragraphs 22, 23, 125 and 127-29 above) and among various domestic authorities (see paragraphs 29, 30 and 42 above), because its power to review compliance with national law is limited and it is not its task to take the place of the domestic courts (see *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A no. 82, p. 36, § 79; and *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 95, ECHR 2002-VII). However, that does not dispense with the need for the Court to determine whether the interference in issue complied with the requirements of Article 1 of Protocol No. 1 (ibid.).

133. In this connection, 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 the 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 *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II).

134. The requirement of lawfulness, within the meaning of the Convention, presupposes, among other things, that domestic law must provide a measure of legal protection against arbitrary interferences by the public authorities with the rights safeguarded by the Convention (see *Malone*, p. 32, § 67, and *Fredin (no. 1)*, p. 16, § 50, both cited above; and, more recently, *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI). Furthermore, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental

human rights be, in certain cases, subject to some form of adversarial proceedings before an independent body competent to review the reasons for the measures and the relevant evidence (see, *mutatis mutandis*, *Al-Nashif v. Bulgaria*, no. 50963/99, § 123, 20 June 2002). It is true that Article 1 of Protocol No. 1 contains no explicit procedural requirements and the absence of judicial review does not amount, in itself, to a violation of that provision (see *Fredin (no. 1)*, cited above, pp. 16-17, § 50). Nevertheless, it implies that any interference with the peaceful enjoyment of possessions must be accompanied by procedural guarantees affording to the individual or entity concerned a reasonable opportunity of presenting their case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable judicial and administrative procedures (see *AGOSI*, cited above, p. 19, § 55; *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296-A, p. 21, § 49; and *Jokela v. Finland*, no. 28856/95, § 45, ECHR 2002-IV).

135. Turning to the specific facts of the case, the Court notes that by section 21(5) of the Banks Act of 1997 the BNB's decision to revoke a bank's licence is adopted, as a matter of course, without an obligation to inform the bank of the commencement of the procedure, that is to say that the BNB is envisaging regulatory action (see paragraph 53 above). Nor does the BNB have to take into account the bank's representations and objections, if any (ibid.). Thus, under the law as it stands at present, a bank is first officially notified of the withdrawal of its licence only after the BNB's decision has already been taken, as happened in the present case (see paragraphs 20 and 21 above). This, combined with the lack of any subsequent possibility for administrative or judicial review of the decision and the view of the courts that examined the winding-up petition that they were bound by the BNB's determination on the question of insolvency, made it impossible for the applicant bank at any stage to state its objections to the BNB's findings of fact and mount a reasoned challenge to the BNB's conclusion that it was insolvent. Furthermore, the BNB's decision had serious and far-reaching consequences for the bank, which automatically ceased to operate as a going concern and was placed in compulsory liquidation, with all the resulting negative effects such a measure had. An act entailing such grave consequences may only be legitimate if it is adopted after, or is subject to verification in, some sort of proceedings that afford a reasonable opportunity to the bank to present its case to the competent authorities with a view to effectively challenging the revocation of its licence. However, the relevant provisions of domestic law expressly preclude such a possibility and, as a result, such proceedings were not available in the case at hand.

136. It is true that in such a sensitive economic area as the stability of the banking system the Contracting States enjoy a wide margin of appreciation (see *Olczak v. Poland* (dec.), no. 30417/96, § 85, ECHR 2002-X (extracts)) and that in certain situations – especially in the context of a banking crisis such as the one facing Bulgaria in 1996-97 (see paragraph 45 above) – there may be a paramount need to act expeditiously and without advance notice in order to avoid irreparable harm to the bank, its depositors and other creditors, or the banking and financial system as a whole. However, section 21(5) of the Banks Act of 1997, which is still in force, precludes any sort of procedure in all cases, regardless of whether dispatch is important or not (see paragraph 53 above). By contrast, section 56(4) of the repealed Banks and Credit Business Act of 1992, provided that when revoking a bank's licence the BNB could dispense with apprising the bank of the commencement of the procedure and with examining its representations and objections only in exigent and urgent cases (ibid.). There is no indication that the situation in the present case was one where time was of the essence. Despite the fact that the revocation of the applicant bank's licence took place during a banking crisis, it does not appear that it was a matter of such urgency that any delay occasioned by some sort of formal procedure would have been unduly prejudicial. In particular, the Court notes that by the time its licence was withdrawn the applicant bank's operations had been restricted and a special administrator had been overseeing its activities for more than six months (see paragraph 13 above). Those measures must have significantly reduced the risk of a further dissipation of its assets pending the outcome of such a procedure.

137. As regards the potential concern of a run on the applicant bank as a result of the negative publicity which a revocation procedure might generate, the Court notes that by the time the BNB decided to withdraw the licence, the public must have already been amply aware that the bank was experiencing difficulties. Moreover, such a procedure could have been confidential and closed to the public. The procedure could also have been expedited, so as to avoid the damaging consequences of any undue delay. It could also be contemplated that, if the case was considered urgent, the BNB could have provisionally suspended the bank's licence pending the examination of the bank's objections and representations before taking its final decision. This could have also been achieved through, for instance, an internal administrative appeal.

138. There existed therefore a number of options – and the above list is not exhaustive – to attain the desired results of safeguarding the interests of the applicant bank's depositors and other creditors and protecting the stability of the banking system, by swiftly and seamlessly revoking its licence. However, the legislative framework opted for the most drastic solution – dispensing with any sort of proceedings in all cases – and there is no indication that other possibilities were considered.

139. In the light of the foregoing, the Court comes to the conclusion that the interference with the applicant bank's possessions was not surrounded by sufficient guarantees against arbitrariness and was thus not lawful within the meaning of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *H.L. v. the United Kingdom*, no. 45508/99, § 124, ECHR 2004-IX). This conclusion makes it unnecessary to ascertain whether the other requirements of that provision have been complied with (see *Iatridis*, cited above, § 62). The Court thus expresses no opinion on the expediency of the supervisory and enforcement actions of the BNB in respect of the applicant bank or on the issue of whether they struck a fair balance between the bank's rights and the demands of the general interest of the community.

140. There has therefore been a violation of Article 1 of Protocol No. 1.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

141. Article 41 of the Convention provides:

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

A. Damage

142. The applicant bank claimed BGN 10,000,000 and USD 14,006,197.95 as compensation for the pecuniary damage it had allegedly sustained as a result of the violations found in the present case. It provided a detailed account of the assets it allegedly held when its licence had been withdrawn. It also stated that the liquidators had mismanaged its property and caused it losses, and that because of the winding-up order it had been deprived of the possibility of administering its property and receiving interest on extended credit facilities. The measures in issue had also prevented it from continuing its operations. Providing a detailed analysis of the applicable law, the applicant bank argued that it could not obtain reparation for the violations found at domestic level.

143. The Government submitted that the amount claimed was exorbitant and groundless and that the finding of a violation would constitute sufficient just satisfaction. They further argued that the alleged damage suffered by the applicant bank had no causal connection with the violations of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 found in the present case.

144. The Court finds that no causal link has been established between the violations of Article 6 § 1 of the Convention and of Article 1 of Protocol No. 1 found in the present case and the revocation of the applicant bank's

licence, its liquidation, and the alleged resulting mismanagement of its property. While the withdrawal of its licence and the order for its winding-up might well have had adverse financial consequences for the bank, the Court cannot speculate as to what the eventual result might have been if it had been able to challenge the imposition of those measures in administrative or judicial proceedings (see, *mutatis mutandis*, *Tre Traktörer* AB, p. 25, § 66, *Fredin (no. 1)*, p. 20, § 65; and *Credit and Industrial Bank*, § 88, all cited above). No award can therefore be made under this head.

B. Costs and expenses

145. The applicant bank sought the reimbursement of the sum of BGN 37,842.22 it had incurred in legal fees for the proceedings before the Court and certain domestic authorities. It produced two agreements between it and its lawyer, stipulating, *inter alia*, that certain types of services to be performed by the lawyer would be paid at the rate of EUR 90 per hour. It also presented two accounts for the work performed by the lawyer pursuant that agreement. It further claimed BGN 205,844.57, representing the costs incurred by its liquidators in the course of the winding-up proceedings up to 30 October 2004, according to a statement provided by the liquidators.

146. The Government submitted that the applicant bank had failed to submit an itemised account of the lawyers' fees it had paid, which appeared to have been set arbitrarily and exaggerated. According to them, the hourly rate of EUR 90 was several times the usual rate applicable in Bulgaria. They also objected that the fees disbursed by the applicant bank in the various domestic proceedings did not relate to the case before the Court. Moreover, the applicant bank had not supplied proof that it had actually incurred those expenses.

147. The Court reiterates that, according to its settled case-law, to be awarded costs and expenses the injured party must have incurred them in order to seek to prevent or rectify a violation of the Convention, to have the same established by the Court and to obtain redress therefor. It must also be shown that the costs were actually and necessarily incurred and that they were reasonable as to quantum (see *Credit and Industrial Bank*, cited above, § 92).

148. In the present case, the Court finds no causal connection between the expenses incurred by the liquidators in the winding-up proceedings and the violations of the Convention (see paragraph 144 above). Concerning the lawyers' fees claimed for the Strasbourg proceedings and the proceedings before the various domestic authorities, and having regard to all relevant factors, the Court awards the applicant bank the amount of EUR 4,000, plus any tax that may be chargeable on that amount, to be paid jointly to the chairman and the vice-chairman of the bank's former board of directors, who contracted the lawyer's services on the bank's behalf.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Rejects* the Government's request that the application be struck out of the list of cases;

2. *Holds* that there have been violations of Article 6 § 1 of the Convention;

3. *Holds* that it is not necessary to rule on the allegation of a violation of Article 13 of the Convention;

4. *Holds* that there has been a violation of Article 1 of Protocol No. 1;

5. *Holds*
   (a) that the respondent State is to pay to the applicant bank, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,000 (four thousand euros) in respect of costs and expenses, to be converted into Bulgarian levs at the rate applicable at the date of settlement, plus any tax that may be chargeable, to be paid jointly to Mr Anguel Ivanov Parvanov and Mr Mancho Markov Markov, chairman and vice-chairman of the applicant bank's former board of directors;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant bank's claim for just satisfaction.

Done in English, and notified in writing on 24 November 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President