



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

FOURTH SECTION

CASE OF KORPORATIVNA TARGOVSKA BANKA AD v. BULGARIA

(Applications nos. 46564/15 and 68140/16)

JUDGMENT

Art 6 § 1 (civil) • Access to court • Adversarial trial • No clear and practical possibility for bank, by proper representation, to seek and obtain proper judicial review of its banking licence withdrawal • Bank unable to properly state its case and protect its interests in insolvency and winding-up proceedings, given its representation by special administrators and liquidators dependent on the opposing party
Art 1 P1 • Peaceful enjoyment of possessions • No safeguards against arbitrariness surrounding decision to withdraw a bank's licence
Art 46 • Execution of judgment • Indication of individual and general measures • Reopening of judicial review proceedings required, but not necessarily leading to reversal of reviewed decision's effects, rather than award of damages • Need for general legislative and/or jurisprudential measures

STRASBOURG

30 August 2022

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

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In the case of Korporativna Targovska Banka AD v. Bulgaria,

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

Gabriele Kucsko-Stadlmayer, *President*,

Tim Eicke,

Faris Vehabović,

Iulia Antoanella Motoc,

Yonko Grozev,

Armen Harutyunyan,

Ana Maria Guerra Martins, *judges*,

and Ilse Freiwirth, *Deputy Section Registrar*,

Having regard to:

the two applications (nos. 46564/15 and 68140/16) 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 Mr I. Zafirov, Mr O. Rusev, Mr G. Hristov and Mr A. Pantaleev, the four former executive directors of Korporativna Targovska Banka AD (“KTB”) on behalf of the bank, on 17 September 2015 and 18 November 2016 respectively;

the decision to give the Bulgarian Government (“the Government”) notice of the complaints that (a) KTB could not obtain judicial review of the withdrawal of its banking licence; (b) in the ensuing proceedings in which the courts decided that KTB was to be declared insolvent and wound up, it was represented exclusively by persons dependent on its opponent, the Bulgarian National Bank (“the BNB”); (c) the withdrawal of KTB’s licence and the ensuing decision to wind it up were an unlawful and unjustified interference with its possessions; and (d) KTB had no effective remedies in that regard, and to declare the remainder of the two applications, including all complaints raised by KTB’s largest shareholder, the limited liability company Bromak EOOD (“Bromak”), inadmissible;

the parties’ observations;

Having deliberated in private on 5 July 2022,

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

INTRODUCTION

1. The case mainly concerns the question whether a bank whose licence was withdrawn – which then almost automatically led to a judicial declaration of insolvency and an order that it be wound up – had a clear and practical possibility of seeking and obtaining judicial review of that withdrawal, and more generally a possibility of contesting it. These aspects of the case raise issues under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

2. The case also concerns the fact that in the proceedings in which the bank was declared insolvent and ordered to be wound up, it was represented

by persons alleged to be dependent on the opposing party. This second aspect of the case raises issues under Article 6 § 1 of the Convention.

THE FACTS

3. KTB, a limited company, was a bank which was formed and obtained its banking licence in 1994. Its registered office was in Sofia.

4. On 20 June 2014 the BNB placed KTB under special administration, removed all members of its management and supervisory boards from office, and appointed special administrators to run the bank (see paragraph 12 (b) below). On 6 November 2014 the BNB withdrew KTB's licence and extended the special administrators' mandate pending the appointment of liquidators by the competent court (see paragraphs 20-21 below). On 25 March 2015 the Sofia City Court appointed provisional liquidators for KTB (see paragraph 56 below), and on 22 April 2015 declared it insolvent and made an order for it to be wound up (see paragraph 60 below). On 23 April 2015 the Deposit Insurance Fund appointed the provisional liquidators as permanent ones (see paragraph 62 below). The winding-up proceedings are still pending.

5. Both applications were lodged on KTB's behalf by its four former executive directors, Mr I. Zafirov, Mr O. Rusev, Mr G. Hristov and Mr A. Pantaleev, whom the BNB had earlier removed from office (see paragraph 12 (e) below). They in turn authorised Mr M. Menkov, a lawyer practising in Sofia, to represent KTB in the proceedings before the Court.

6. The Government were represented by their Agents, Ms B. Simeonova and Ms R. Nikolova of the Ministry of Justice.

7. The facts of the case may be summarised as follows.

I. KTB'S MAJOR SHAREHOLDERS AND MANAGEMENT

8. At the time of the events which gave rise to the applications, Bromak, a single-member limited liability company, held 50.66% of KTB's shares. Bromak was in turn wholly owned by Mr Tsvetan Vasilev. Another limited liability company, Bulgarian Acquisition Company II Sarl, which has its registered office in Luxembourg, held 30.35% of KTB's shares.

9. At the time of the events which gave rise to the applications, KTB had a management board and a supervisory board, each consisting of four members. The management board's members were the four executive directors (see paragraph 5 above). Mr Vasilev was a member of the supervisory board.

II. KTB'S PLACEMENT UNDER SPECIAL ADMINISTRATION

10. In mid-June 2014, following the opening of criminal investigations relating to KTB and a number of negative media publications about it, depositors in the bank began mass withdrawals of funds. On 16 June 2014 KTB asked the BNB to take steps to prevent the dissemination of false information about it and its destabilisation.

11. The run on KTB continued, and at 10.51 a.m. on 20 June 2014 KTB advised the BNB that it was experiencing liquidity problems and would soon become unable to honour all withdrawal requests. It requested the BNB to take measures in that regard, including placing it under special administration. At 12.06 p.m. KTB informed the BNB that at 11.45 a.m. it had stopped making payments or any other banking transactions.

12. Shortly after 12.30 p.m. the same day, 20 June 2014, the BNB decided to:

- (a) place KTB under special administration for three months;
- (b) appoint two special administrators to run KTB;
- (c) suspend the payment of all debts owed by KTB for three months;
- (d) bar KTB from carrying out any further banking transactions;
- (e) remove all members of KTB's management and supervisory boards from office; and
- (f) deprive all shareholders in KTB holding more than 10% of its shares – Bromak and Bulgarian Acquisition Company II Sarl (see paragraph 8 above) – of the right to vote for three months.

13. The decision was immediately enforceable and was amenable to review by the Supreme Administrative Court. No such claim was made within the applicable time-limit, but later, in January 2015, KTB's (then former) executive directors brought one on its behalf (see paragraphs 82-87 below).

14. On 22 June 2014 the BNB made minor technical corrections to its decision.

15. On 25 July 2014 the BNB replaced the two special administrators with new ones. It also commissioned an audit of KTB's assets by three auditing companies.

16. On 16 September 2014 the BNB extended KTB's special administration and all related measures (see paragraph 12 above) until 20 November 2014. It also instructed the special administrators to report on KTB's assets. Their report was submitted on 20 October 2014.

17. Meanwhile, between July and mid-October 2014, the BNB itself audited KTB. The audit report likewise became available on 20 October 2014.

18. On 21 October 2014 the BNB, having reviewed the reports drawn up by the auditing companies (see paragraph 15 above), instructed the special administrators to reflect the findings of those reports about KTB's assets in the bank's accounts and then report on KTB's financial situation.

19. On 4 November 2014 the special administrators submitted reports to the BNB about KTB's financial situation on 30 September 2014.

III. THE BNB'S DECISION TO WITHDRAW KTB'S LICENCE

20. On 6 November 2014 the BNB decided to withdraw KTB's licence and apply to the competent court to have it declared insolvent and wound up. The BNB set out the steps that it had taken with respect to KTB and the audits carried out on it since June 2014, finding that according to the reports about KTB's situation, on 30 September 2014 its own funds, assessed in the manner laid down by Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms ("the Capital Requirements Regulation" – see paragraph 90 below), were minus 3,745,313,000 Bulgarian levs (BGN – equivalent to 1,914,948,129 euros (EUR)), and that it did not meet the capital requirements laid down in that Regulation. According to the special administrators' report, the developments since 30 September 2014 – in particular a series of assignments and set-offs carried out by some of KTB's clients – had not materially improved that situation. Even if all those operations were to be reflected in KTB's accounting records, they would reduce that sum by only BGN 161,468,000 (equivalent to EUR 82,557,277) and its own funds would remain a negative value. Under section 36(2)(2) of the Credit Institutions Act 2006 (see paragraph 90 below), the BNB had to withdraw a bank's licence if it found that the bank's own funds were a negative value. KTB's Common Equity Tier 1 capital ratio was minus 188.03%, its Tier 1 capital ratio was likewise minus 188.03% and its total capital ratio was minus 180.10%. All those values were below the minimum levels required under Article 92 § 1 of the Capital Requirements Regulation. The BNB also noted that its own audit of KTB, carried out between July and October 2014, had revealed that its management had engaged in "vicious banking and business practices" and submitted misleading reports about the bank.

21. The BNB also extended the mandate of the two special administrators already running KTB (see paragraphs 12 (b) and 15-16 above) pending the appointment of liquidators by the competent court.

IV. ATTEMPT BY KTB'S SHAREHOLDERS TO SEEK JUDICIAL REVIEW OF THE WITHDRAWAL OF ITS LICENCE

A. Proceedings at first instance

22. Bromak sought judicial review of the BNB's decision to withdraw KTB's licence by the Supreme Administrative Court under section 151(3) of the Credit Institutions Act 2006 (see paragraph 94 below). In its statement of claim, it argued that it had standing to do so, as it was a majority shareholder

in KTB and the withdrawal of KTB's licence, which would inevitably trigger a winding-up, would directly affect its rights pertaining to its shares in KTB.

23. The three-member panel of the Supreme Administrative Court dealing with Bromak's claim joined it to similar judicial review claims brought by three other shareholders in KTB, one of which was Bulgarian Acquisition Company II Sarl (see paragraph 8 above).

24. On 13 December 2014 KTB's (then former) executive directors, whom the BNB had earlier removed from office (see paragraph 12 (e) above), sought permission to intervene in the proceedings. They pointed out that they had likewise applied for judicial review of the BNB's decision to withdraw KTB's licence (see paragraph 44 below), arguing that the two cases should be joined since they concerned legal challenges against the same decision.

25. The three-member panel heard the case in public on 15 December 2014. Bromak asked the court to join KTB itself to the proceedings. Noting that the BNB's decision had been addressed to KTB and affected its rights, the court allowed Bromak's request and joined KTB as an interested party.

26. Bromak informed the court that it had made a claim for the BNB's earlier decision to appoint special administrators to be declared null and void, requesting that the proceedings be stayed pending the determination of that claim.

27. The three-member panel refused the request by KTB's former executive directors for permission to intervene (see paragraph 24 above). It noted that they had appealed against the decision of another three-member panel to dismiss their own claim for review of the BNB's decision for lack of standing, and that that appeal was still pending (see paragraph 46 below).

28. Lastly, the three-member panel found that KTB, which it had joined to the proceedings as an interested party (see paragraph 25 above), had to be given an opportunity to comment on the issues in the case. The panel listed a further hearing for 9 February 2015.

29. On 19 December 2014 KTB's former executive directors filed written submissions on the bank's behalf. They argued that they were entitled to represent it in the proceedings. They pointed out that although they had been removed from office, their powers had not been terminated. Moreover, there was a conflict of interests between the special administrators and KTB. This was, *inter alia*, because (a) they had been appointed by and could be removed by – and were accountable to – the respondent in the proceedings, the BNB; (b) the BNB had withdrawn KTB's licence on the basis of their reports; and (c) instead of trying to fix KTB's financial situation after their appointment, they had acted in a manner leading to the withdrawal of its licence. The former executive directors also requested the court to appoint a special representative *ad litem* for KTB under Article 29 § 4 of the Code of Civil Procedure (see paragraph 105 below).

30. On 29 December 2014 KTB's special administrators also filed written submissions on behalf of the bank in which they argued that the shareholders

were not entitled to seek a review of the BNB's decision to withdraw KTB's licence as it did not directly and immediately affect them.

31. On 13 January 2015 the three-member panel of the Supreme Administrative Court refused to examine the claims brought by Bromak and the three other shareholders. It found that only KTB had been directly affected by the BNB's decision to withdraw its licence, and that the effects of that decision on its shareholders were only indirect. It followed that they had no standing to challenge that decision. It could be accepted that the shareholders only had standing to protect KTB's interests if it was being run by persons who could not be controlled by them. But this was not the case, since the special administrators had initially been appointed as a result of a request from KTB's own management that it be placed under special administration, and their appointment had not been challenged by the bank. The shareholders could protect their rights in the subsequent proceedings relating to the BNB's application for KTB to be declared insolvent and wound up, in which they could intervene under section 11(4) of the Bank Insolvency Act 2002 (see paragraph 96 *in fine* below). Shareholders were legally distinct from the bank, which had been the sole addressee of the BNB's decision to withdraw its licence (see *onp. № 363 om 13.01.2015 г. no адм. д. № 14782/2014 г., BAC, VII о.*).

32. One judge dissented. In her view, there were grounds to hold that KTB's shareholders were, exceptionally, entitled to seek judicial review of the decision to withdraw its licence, because no one else could effectively do so. KTB's management had been removed from office, and the special administrators were under the BNB's control. Denying the shareholders standing would mean leaving the BNB's decision without review, despite the statutory rule expressly providing for that possibility (see paragraph 94 below), thus rendering KTB's rights theoretical and illusory. It also had to be borne in mind in that connection that the withdrawal of KTB's licence could not be examined by the civil courts in the ensuing winding-up proceedings which would be triggered by it.

33. In its decision, the panel did not refer to the written submissions made on KTB's behalf by its former executive directors (see paragraph 29 above); when describing the submissions made by KTB in its capacity as an interested party, it referred only to the submissions made on the bank's behalf by the special administrators (see paragraph 30 above).

B. Proceedings on appeal

34. Bromak appealed against that decision to a five-member panel of the Supreme Administrative Court. It reiterated its arguments that the withdrawal of KTB's licence had affected its rights as a shareholder in it. It also pointed out, *inter alia*, that the three-member panel had omitted to rule on the request to appoint a special representative *ad litem* for KTB (see paragraph 29 *in fine*

above). It relied on, *inter alia*, Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

35. The other three shareholders in KTB also appealed.

36. Bromak reiterated the request, made by KTB's former executive directors in the first-instance proceedings, for the court to appoint a special representative *ad litem* for KTB under Article 29 § 4 of the Code of Civil Procedure (see paragraph 29 *in fine* above and paragraph 105 below). It pointed out that there was a conflict of interests between it and the special administrators, who were by law representing KTB and had a disincentive to challenge the withdrawal of its licence, which they had already demonstrated by their conduct in the first-instance proceedings.

37. Bromak also asked the five-member panel to seek a preliminary ruling from the Court of Justice of the European Union (CJEU). In its view, the proper resolution of the case required answers to several questions under European Union (EU) law. Bulgarian Acquisition Company II Sarl also sought a preliminary ruling by the CJEU.

38. At the suggestion of counsel for Bromak, made on 4 February 2015, on 10 March 2015 the Supreme Bar Council asked the plenary of the Supreme Administrative Court to give an interpretative decision on who had standing to seek judicial review under section 151(3) of the Credit Institutions Act 2006 (see paragraph 94 below) of a decision by the BNB to withdraw a bank's licence. On 19 March 2015 Bromak asked the five-member panel to stay the examination of its appeal pending that interpretative decision.

39. The panel declined to stay the proceedings pending the interpretative decision requested by the Supreme Bar Council. It noted, *inter alia*, that no proceedings had yet been formally opened in relation to that request.

40. The panel also refused the request that a special representative *ad litem* be appointed for KTB (see paragraphs 29 *in fine* and 36 above). It noted that KTB, which was not a claimant but simply an interested party, was represented in the proceedings by its special administrators, as required by law. The special administrators had already commented on all requests by the claimants, and appointing a special representative *ad litem* would clash with their mandate.

41. In a decision of 2 April 2015 (*onp. № 3725 om 02.04.2015 г. no адм. д. № 3438/2015 г., ВАС, немчл. с-в*), the five-member panel of the Supreme Administrative Court refused to seek a preliminary ruling from the CJEU and upheld the three-member panel's decision. The five-member panel noted, *inter alia*, that section 151(3) of the Credit Institutions Act 2006 (see paragraph 94 below) expressly provided for judicial review of decisions by the BNB to withdraw a bank's licence, which meant that there was no direct discrepancy between Bulgarian and EU law. The panel then analysed in detail the EU law provisions cited by KTB's shareholders, holding that none of them required that they be granted standing to seek judicial review of the decision to withdraw KTB's licence. Those provisions had already been

analysed by the CJEU and could be construed without difficulty. It was hence unnecessary to seek a preliminary ruling from the CJEU. For the same reasons, the claimants' appeals against the three-member panel's decision were unfounded.

V. PROCEEDINGS RELATING TO THE SUPREME BAR COUNCIL'S REQUEST FOR AN INTERPRETATIVE DECISION

42. The Supreme Administrative Court's president opened proceedings relating to the Supreme Bar Council's request for an interpretative decision (see paragraph 38 above) on 28 September 2015.

43. The court, sitting in plenary session, examined the request in private on 29 March 2016. On 14 June 2016 it declined, against the dissent of eleven judges, to give an interpretative decision. It noted that section 151(3) of the Credit Institutions Act 2006 was silent on who could seek judicial review of a decision by the BNB to withdraw a bank's licence, and that any interpretation aiming to elucidate that point would amount to supplementing the provision rather than construing it and would thus be outside the court's remit. Under the general rules governing judicial review, an administrative decision could be challenged by persons whose rights, freedoms or legal interests were infringed or imperilled by it; this was a question that had to be determined on a case-by-case basis rather than in an abstract manner, as requested by the Supreme Bar Council. In so far as the request relied on provisions of EU law, the Supreme Administrative Court had no jurisdiction to interpret those; only the CJEU was competent to do so. But it was not possible to seek a preliminary ruling from the CJEU in interpretative proceedings, as this could only be done with respect to a specific case (see *опр. № 1 от 14.06.2016 г. по тълк. Д. № 4/2015 г., BAC, OCC на I и II к.*).

VI. ATTEMPT BY KTB'S DIRECTORS TO SEEK JUDICIAL REVIEW OF THE WITHDRAWAL OF ITS LICENCE

A. Proceedings at first instance

44. Meanwhile, on 18 November 2014, KTB's (then former) executive directors, whom the BNB had removed from office when placing KTB under special administration (see paragraphs 5 and 12 (e) above) likewise applied to the Supreme Administrative Court for judicial review of the BNB's decision to withdraw KTB's licence. They argued that they had standing to do so because the withdrawal of KTB's licence had perpetuated their removal from office and the stripping of their powers to act on its behalf. It had thus directly affected them on a professional, pecuniary and personal level, restraining their rights to work, to free movement and to freely dispose of

their assets. The decision had also affected their professional reputation and limited their chances of finding similar employment in the future.

45. On 4 December 2014 a three-member panel of the Supreme Administrative Court refused to examine the former executive directors' claim (see *onp. № 14630 om 04.12.2014 г. no адм. д. № 14813/2014 г., BAC, VII о.*). It held that they had no standing to seek judicial review of the BNB's decision to withdraw KTB's licence, for the following reasons:

“The claimants were not the addressees of [the BNB]'s decision to withdraw [KTB]'s licence. The claim was made in their capacity as individuals. Their declared capacity as ‘removed executive directors’ does not add a new element to their legal capacity or standing. The claimants do not represent [KTB], [which is] the addressee of [the BNB]'s decision. The management board and the executive board are bodies of the bank ... but they do not have their own legal personality and cannot seek to vindicate any rights different from the rights and interests of the bank which they run ... The procedure ... for withdrawing a banking licence takes place between the ... bank and the BNB, without the participation of any interested [third] parties ... By [a decision] of 20 June 2014 ... supplemented by a decision of 22 June 2014, issued in connection with [KTB]'s stopping payments to clients ... and [two letters] from the bank's executive directors, [the BNB] ... placed [KTB] under special administration for a period of time; appointed special administrators; suspended the payment of all debts owed by KTB for three months; restricted the activities of the bank, depriving it of the right to carry out all licensed forms of business; removed all members of KTB's management and supervisory boards from office; and deprived all shareholders in KTB directly or indirectly holding more than [10%] of its shares of the right to vote. It follows that in decisions prior to [the contested one], the activities of [KTB] have already been restricted, and it has been deprived of the right to engage in any form of business. The appointment of special administrators ... removed all powers of the management and supervisory boards, and their exercise was taken over by the special administrators. In any event, the legal consequences were for the bank placed under special administration, not for its management bodies or their members.”

B. Proceedings on appeal

46. On 13 December 2014 KTB's former executive directors appealed against the above-mentioned decision to a five-member panel of the Supreme Administrative Court. They argued that since by law persons who had been members of the boards of a bank which had been declared insolvent over the course of the two years preceding that declaration could not hold such positions in another bank, the BNB's decision to withdraw KTB's licence had directly affected their employment prospects. The finding in the BNB's decision that KTB's management had engaged in “vicious banking and business practices” (see paragraph 20 *in fine* above) had further jeopardised their chances of being approved by the BNB to hold such a position in another bank in the future. In view of the applicable statutory requirements, the BNB's decision had in addition jeopardised their chances of obtaining such positions in any company, not just in a bank. The BNB's decision had also affected their right to receive remuneration for holding managerial positions in KTB. It was true that KTB's earlier placement under special administration

had already affected their rights, but the effects of that earlier decision had been temporary, whereas the effects of the decision to withdraw KTB's licence were permanent. Each of them had had rights *vis-à-vis* KTB, and the withdrawal of its licence had affected those rights. They were thus entitled to challenge that decision.

47. In a decision of 25 February 2015 (*onp. № 2038 om 25.02.2015 г. no адм. д. № 1813/2015 г., BAC, немчл. с-в*), the five-member panel upheld the three-member panel's decision, stating as follows:

“It is not disputed that when the claimants lodged their claim with the [three-member panel], they had been stripped of their powers as executive directors of [KTB] and had no rights of representation. In view of the [the BNB's] decision [to place KTB under special administration] ... and the appointment of special administrators, the powers of the bank's management bodies, and in particular its management board, were terminated. The fact that those powers had been terminated by the time of [the BNB's] contested decision means ... that [the claimants] cannot be seen to have been affected by the rights and obligations arising from that decision, as they were not its addressees. The sole addressee of [that] decision was [KTB] as a legal person ... but not the appellants in their capacity as ‘removed executive directors’. They have no standing distinct from that bank to challenge [the BNB's] decision [to withdraw the licence] in their capacity as individuals, as correctly held by the three-member panel. Since [the BNB's] decision did not have a direct and immediate effect on their legal position, they have no legal interest in contesting it. In the absence of a legal interest, their claim [for judicial review] was correctly left without examination ...

In this connection, the arguments in the appeal that such a legal interest stems from possible negative consequences for [the claimants] at a personal level are ill-founded. The potential negative [consequences] to which [they] refer do not make them interested parties entitled to seek judicial review ... which is why [those consequences] are irrelevant to whether a legal interest exists.”

VII. ATTEMPT BY MR VASILEV TO SEEK JUDICIAL REVIEW OF THE WITHDRAWAL OF KTB'S LICENCE

48. On 17 December 2014 Mr Vasilev (see paragraphs 8 and 9 above) likewise sought judicial review of the BNB's decision to withdraw KTB's licence. A three-member panel of the Supreme Administrative Court found that his claim had been made out of time (see *onp. № 2116 om 25.02.2015 г. no адм. д. № 1527/2015 г., BAC, VII о.*). Mr Vasilev appealed. On 14 April 2015 (see *onp. № 4124 om 14.04.2015 г. no адм. д. № 3732/2015 г., BAC, немчл. с-в*) a five-member panel of the Supreme Administrative Court upheld that ruling, adding that Mr Vasilev had no standing to seek judicial review of the BNB's decision as he had not been directly affected by it. The panel noted, in particular, that, as was apparent from the wording of the power of attorney given to his lawyer, Mr Vasilev had brought the claim in his personal capacity. The panel added that neither the claim for judicial review nor the appeal against the three-member panel's decision contained arguments that Mr Vasilev was acting in a capacity other than his own.

VIII. ATTEMPTS BY DEPOSITORS, CLIENTS AND BONDHOLDERS OF KTB TO SEEK JUDICIAL REVIEW OF THE WITHDRAWAL OF ITS LICENCE

49. Many depositors and other clients of KTB likewise sought judicial review of the BNB's decision to withdraw its licence. In a series of decisions given between December 2014 and March 2015, three-member panels of the Supreme Administrative Court held none of them had standing to do so as the BNB's decision had not affected them directly (see, among many other authorities, *onp. № 14618 om 04.12.2014 г. no adm. д. № 14792/2014 г., BAC, VII о.; onp. № 14765 om 09.12.2014 г. no adm. д. № 14794/2014 г., BAC, VII о.; onp. № 14825 om 10.12.2014 г. no adm. д. № 14788/2014 г., BAC, VII о.; onp. № 14834 om 10.12.2014 г. no adm. д. № 14799/2014 г., BAC, VII о.; onp. № 14853 om 10.12.2014 г. no adm. д. № 14805/2014 г., BAC, VII о.; onp. № 14859 om 10.12.2014 г. no adm. д. № 14866/2014 г., BAC, VII о.; onp. № 14877 om 10.12.2014 г. no adm. д. № 14793/2014 г., BAC, VII о.; onp. № 1336 om 05.02.2015 г. no adm. д. № 14790/2014 г., BAC, VII о.; and onp. № 2467 om 09.03.2015 г. no adm. д. № 928/2015 г., BAC, VII о.). Some of those rulings were appealed against, and in all cases five-member panels of the same court upheld them (see *onp. № 1378 om 09.02.2015 г. no adm. д. № 863/2015 г., BAC, петчл. с-в; onp. № 1621 om 16.02.2015 г. no adm. д. № 1220/2015 г., BAC, петчл. с-в; onp. № 2067 om 25.02.2015 г. no adm. д. № 1217/2015 г., BAC, петчл. с-в; onp. № 2101 om 25.02.2015 г. no adm. д. № 1216/2015 г., BAC, петчл. с-в; onp. № 2229 om 27.02.2015 г. no adm. д. № 1219/2015 г., BAC, петчл. с-в; onp. № 2832 om 16.03.2015 г. no adm. д. № 2492/2015 г., BAC, петчл. с-в; onp. № 2937 om 18.03.2015 г. no adm. д. № 2494/2015 г., BAC, петчл. с-в; onp. № 3082 om 19.03.2015 г. no adm. д. № 1312/2015 г., BAC, петчл. с-в; onp. № 3347 om 25.03.2015 г. no adm. д. № 2274/2015 г., BAC, петчл. с-в; onp. № 3676 om 01.04.2015 г. no adm. д. № 1812/2015 г., BAC, петчл. с-в; and onp. № 4053 om 09.04.2015 г. no adm. д. № 3395/2015 г., BAC, петчл. с-в).**

50. The Supreme Administrative Court reiterated the same position with respect to the holders of bonds issued by KTB (see *onp. № 15523 om 18.12.2014 г. no adm. д. № 15482/2014 г., BAC, VII о., upheld by onp. № 1693 om 17.02.2015 г. no adm. д. № 1552/2015 г., BAC, петчл. с-в).*

IX. THE BNB'S APPLICATION FOR KTB TO BE WOUND UP

A. Proceedings before the Sofia City Court

51. Meanwhile, following its decision to withdraw KTB's licence (see paragraph 20 above), on 7 November 2014 the BNB applied to the Sofia City Court to have KTB declared insolvent and wound up.

52. On 13 November 2014 Bromak sought permission to intervene in the proceedings under section 11(4) of the Bank Insolvency Act 2002 (see paragraph 96 *in fine* below), as did the other major shareholder in KTB, Bulgarian Acquisition Company II Sarl (see paragraph 8 above).

53. On 17 November 2014 the court scheduled a hearing for 24 November 2014 and directed that KTB be summoned via the special administrators previously appointed by the BNB, who were, under section 11(3) of the Bank Insolvency Act 2002, the persons empowered to represent it in the proceedings (see paragraphs 12 (b), 15 and 21 above and paragraph 96 below).

54. On 20 November 2014 Bromak, as it had done in the proceedings before the Supreme Administrative Court (see paragraph 36 above), requested the court to appoint a special representative *ad litem* for KTB under Article 29 § 4 of the Code of Civil Procedure (paragraph 105 below). It pointed out that the applicant in the proceedings was the BNB, and that KTB was being represented by special administrators appointed by, and accountable to, the BNB. The BNB had, moreover, fixed their remuneration and withdrawn KTB's licence on the basis of their reports. The special administrators and the BNB had a common interest: to have winding-up proceedings opened against KTB. This went against the interests of both KTB and its shareholders, which wanted to preserve the bank. There was thus a conflict of interests justifying the appointment of a special representative *ad litem* for KTB.

55. At the hearing on 24 November 2014 the court allowed the intervention requests by Bromak and Bulgarian Acquisition Company II Sarl and stayed the proceedings pending the determination of their claims for judicial review of the BNB's decision to withdraw KTB's licence (see paragraphs 22-23 above).

56. On 25 March 2015 the Deposit Insurance Fund, which was taking part in the proceedings pursuant to section 11(2) of the Bank Insolvency Act 2002, asked the court to appoint two provisional liquidators for KTB (see paragraphs 96 and 100 below). The court allowed the request the same day. It noted, *inter alia*, that whereas the special administrators were officers assisting the BNB, the provisional liquidators were officers assisting the insolvency court.

57. On 2 April 2015 Bromak appealed to the Sofia Court of Appeal against the appointment of the provisional liquidators. On 7 May 2015 the

Sofia Court of Appeal held that the Sofia City Court's decision to do so was not amenable to appeal. Bromak appealed against that decision to the Supreme Court of Cassation, which on 30 September 2015 upheld it (see *onp. № 539 om 30.09.2015 z. no u. m. d. № 2099/2015 z., BKC, II m. o.*).

58. Meanwhile, on 3 April 2015, after all claims for judicial review of the BNB's decision to withdraw KTB's licence had been dismissed with final effect (see paragraphs 41 and 47-50 above), the Sofia City Court resumed the main proceedings.

59. The court heard the case in private on 15 April 2015. It rejected Bromak's request to appoint a special representative *ad litem* for KTB (see paragraph 54 above), noting that by law the bank had to be represented by its provisional liquidators. Those liquidators defended no interests of their own in the proceedings, and it was hence impossible for there to be a conflict of interests between them and KTB.

60. On 22 April 2015 the Sofia City Court allowed the BNB's application and:

- (a) declared KTB insolvent and fixed the date on which it had, in its view, become insolvent (6 November 2014);
- (b) opened winding-up proceedings in respect of KTB;
- (c) terminated the powers of KTB's bodies;
- (d) divested KTB of the right to administer its property; and
- (e) ordered the sale of KTB's assets.

61. The court held that the BNB's decision to withdraw KTB's licence appeared to be valid, and that it was not competent to check whether that decision was correct. The only court which could do so was the Supreme Administrative Court, in proceedings under section 151(3) of the Credit Institutions Act 2006 (see paragraph 94 below). For the Sofia City Court, the only material consideration was whether the BNB's decision had become final, which was indeed the case (see *peuu. № 664 om 22.04.2015 z. no m. d. n. № 7549/2014 z., CTC*).

62. The following day, 23 April 2015, the Deposit Insurance Fund appointed the provisional liquidators as permanent ones (see paragraph 101 below).

B. Proceedings before the Sofia Court of Appeal

63. Bromak and the other shareholder in KTB, Bulgarian Acquisition Company II Sarl, appealed against the Sofia City Court's judgment to the Sofia Court of Appeal. Bromak argued that it had standing to appeal in its own right since KTB's special administrators were unable and unwilling to do so, because their mandate had been brought to an end with the appointment of provisional liquidators and because they were dependent on the BNB. The liquidators would not appeal either, because they were dependent on the BNB and the Deposit Insurance Fund, a creditor of KTB, and because their job

depended on there being winding-up proceedings in respect of KTB. This conflict of interests meant that only a shareholder of KTB could vindicate its interests in the proceedings. That was the only way of obtaining judicial review of the BNB's decision to withdraw KTB's licence. Bulgarian Acquisition Company II Sarl also asked the Sofia Court of Appeal to seek a preliminary ruling from the CJEU on whether the Sofia City Court's refusal to examine the BNB's decision to withdraw KTB's licence (see paragraph 60 above) was contrary to EU law.

64. Bromak and KTB's former executive directors also appealed against the Sofia City Court's judgment on behalf of KTB itself. In support of their contention that they had standing to do so, they raised arguments similar to those made in Bromak's own appeal (see paragraph 63 above).

65. KTB's liquidators (acting on behalf of KTB), the BNB and the Prosecutor's Office (which was taking part in the proceedings *ex officio*) also appealed, but only against the Sofia City Court's ruling about the date on which KTB had become insolvent (see paragraph 60 (a) above). In their view, that was not 6 November but 20 June 2014.

66. Bromak also appealed to the Sofia City Court against the decision of the Deposit Insurance Fund to appoint permanent liquidators for KTB (see paragraph 62 above).

67. The Sofia Court of Appeal heard the appeals against the Sofia City Court's judgment on 19 June 2015. It held, *inter alia*, that the BNB's decision to withdraw KTB's licence had not directly affected KTB's shareholders such as Bromak. Moreover, that decision had been amenable to judicial review by the Supreme Administrative Court and could not therefore be examined by the civil courts in the proceedings relating to the BNB's application for KTB to be wound up.

68. On 3 July 2015 the Sofia Court of Appeal found the appeals by Bromak and Bulgarian Acquisition Company II Sarl in their capacity as shareholders in KTB inadmissible, on the basis that shareholders were not among the persons empowered to appeal under section 16(1) *in fine* of the Bank Insolvency Act 2002 (see paragraph 99 below). The list of persons with standing to appeal set out in that provision was exhaustive and could not be construed expansively, given the specific nature of the proceedings in which the BNB was seeking the winding-up of a bank. For the same reason, the appeal by Bromak and KTB's former executive directors on behalf of KTB was likewise inadmissible. KTB's executive directors had, moreover, been removed from office and could not act on its behalf. As for Bromak, the 2002 Act did not provide for an exception to the general rule of civil procedure that the parties to a case were the claimant and the defendant, and that a person could vindicate another's rights before a court only when enabled to do so by a special rule. By contrast, the appeals by the BNB, the Prosecutor's Office and KTB's liquidators were admissible and well-founded (see *peu. № 1443 om 03.07.2015 z. no m. d. n. № 2216/2015 z., CAC*).

C. Proceedings before the Supreme Court of Cassation

1. First phase of the proceedings before the Supreme Court of Cassation

69. Bromak appealed to the Supreme Court of Cassation against the Sofia Court of Appeal's ruling that it had no standing. It also asked the Supreme Court of Cassation to seek a preliminary ruling from the CJEU.

70. Bromak and KTB's former executive directors, acting on behalf of KTB, also appealed against the Sofia Court of Appeal's ruling that they had no standing to appeal against the Sofia City Court's decision on behalf of KTB itself. In that appeal, they also asked the Supreme Court of Cassation to seek a preliminary ruling from the CJEU.

71. KTB's former executive directors and Bromak, acting both in its own name and on behalf of KTB, also appealed on points of law against the Sofia Court of Appeal's decision reversing the Sofia City Court's ruling about the date on which KTB had become insolvent.

72. Bulgarian Acquisition Company II Sarl lodged similar appeals and likewise asked the court to submit a preliminary reference to the CJEU.

73. On 11 January 2016 the Supreme Court of Cassation refused to seek a preliminary ruling from the CJEU. It did, however, invite the Constitutional Court to declare sections 11(3) and 16(1) *in fine* of the Bank Insolvency Act 2002 (see paragraphs 96 and 99 below) unconstitutional and contrary to Article 6 § 1 of the Convention (see *onp. № 4 om 11.01.2016 z. no m. d. № 3343/2015 z., BKC, I m. o.*).

2. Proceedings before the Constitutional Court

74. On 4 February 2016 the Constitutional Court found the Supreme Court of Cassation's request to declare sections 11(3) and 16(1) *in fine* of the Bank Insolvency Act 2002 unconstitutional admissible, but the concurrent request to find them contrary to Article 6 § 1 of the Convention inadmissible.

75. On 14 June 2016 the Constitutional Court rejected the request to declare sections 11(3) and 16(1) *in fine* of the 2002 Act unconstitutional. It pointed to the specific nature of bank insolvency, holding that misgivings that a bank's special administrators and liquidators would not effectively protect its interests was not sufficient reason to declare section 11(3) of the 2002 Act (see paragraph 96 below) unconstitutional. It noted in that connection that in case of doubt about a conflict of interests between a bank and those representing it in given proceedings, it was possible to appoint a special representative *ad litem* under Article 29 § 4 of the Code of Civil Procedure (see paragraph 105 below). The court added that the question whether a bank was insolvent had to be decided in proceedings for judicial review of the BNB's decision to withdraw its licence on that ground, not in the ensuing proceedings relating to the BNB's application for the bank to be wound up. It was thus not unconstitutional to bar the bank's shareholders from appealing

against the insolvency court's decision on the BNB's winding-up application against the bank. Section 16(1) *in fine* of the 2002 Act (see paragraph 99 below) was hence not unconstitutional either (see *peu. № 6 om 14.06.2016г. no κ. д. № 1/2016 г., KC, обн., ДВ, бр. 47/2016 г.*).

76. Three constitutional judges dissented in respect of the ruling on section 16(1) *in fine* of the 2002 Act. In their view, the limitation on standing to appeal set out in that provision unjustifiably deprived bank shareholders of effective access to a court and of equality of arms in the proceedings relating to the BNB's application for the bank to be wound up.

3. Second phase of the proceedings before the Supreme Court of Cassation

77. After the Constitutional Court's decision, the proceedings before the Supreme Court of Cassation were resumed.

(a) Decision of the three-member panel

78. On 6 July 2016 a three-member panel of the Supreme Court of Cassation (a) upheld the Sofia Court of Appeal's decision not to examine the appeals lodged by Bromak and Bulgarian Acquisition Company II Sarl in their own name and that lodged by Bromak and KTB's former executive directors on KTB's behalf (see paragraphs 69-70 and 72 above), and (b) refused to examine their appeals on points of law against the Sofia Court of Appeal's ruling on the starting point of KTB's insolvency (see paragraphs 71-72 above). The court noted that the Constitutional Court had rejected its request to declare sections 11(3) and 16(1) *in fine* of the Bank Insolvency Act 2002 unconstitutional (see paragraph 75 above), and held that it was bound by that decision and had to apply those provisions as they stood. It further held that the appeal against the Sofia City Court's judgment lodged by KTB's former executive directors and Bromak on behalf of KTB was inadmissible because it had been lodged by persons who, under section 11(3) of the 2002 Act, had no power to act on KTB's behalf, and that the Sofia Court of Appeal had been right not to examine it. The appeals against the Sofia City Court's judgment lodged by Bromak and Bulgarian Acquisition Company II Sarl in their capacity as shareholders in KTB were also inadmissible because, under section 16(1) *in fine* of the 2002 Act, a bank's shareholders had no standing to appeal against the decision opening winding-up proceedings against the bank. The Sofia Court of Appeal had thus been correct not to examine those appeals. The appeals on points of law by KTB's former executive directors and by Bromak and Bulgarian Acquisition Company II Sarl against the Sofia Court of Appeal's decision reversing the Sofia City Court's ruling about the date on which KTB had become insolvent were likewise inadmissible, for the same reasons (see *onp. № 172 om 06.07.2016 г. no m. д. № 3343/2015 г., BKC, I m. o.*).

(b) Appeals against part of that decision

79. As permitted by the rules of procedure, KTB's former executive directors and Bromak (acting both in its capacity as a shareholder in KTB and on behalf of KTB itself) appealed against the three-member panel's refusal to examine their appeals on points of law against the Sofia Court of Appeal's ruling on the starting point of the insolvency to another three-member panel of the Supreme Court of Cassation. They argued that they had standing to appeal against the Sofia Court of Appeal's decision on that point under EU law, and that the original three-member panel had failed to analyse that point. In their view, the refusal to grant them standing, coupled with the Supreme Administrative Court's earlier refusals to do so (see paragraphs 31, 41 and 44-47 above), meant that the BNB's decision to withdraw KTB's licence would remain without any judicial scrutiny.

80. Bulgarian Acquisition Company II Sarl lodged a similar appeal. It likewise argued that it had standing to appeal under EU law, Article 6 § 1 and Article 14 of the Convention, and Article 1 of Protocol No. 1. It also asked the three-member panel to seek a preliminary ruling from the CJEU.

81. On 9 November 2016 the other three-member panel of the Supreme Court of Cassation (a) refused to seek a preliminary ruling from the CJEU and (b) upheld the original three-member panel's refusal to examine the appeals on points of law (see *onp. № 583 om 09.11.2016 г. no ч. м. д. № 1875/2016 г., BKC, II м. о.*). That decision was not amenable to further appeal. The panel pointed out that the subject matter of the proceedings before it was limited to the question of standing to appeal, which meant that the issues relating to the possibility of reviewing the BNB's decision to withdraw KTB's licence were irrelevant. The arguments based on EU law could not alter that conclusion. The panel added that the original three-member panel had fully followed the Constitutional Court's decision, and held that it had not erred by not directly applying EU law. The panel also found that all points relating to the question whether it had been appropriate to withdraw KTB's licence were irrelevant in the proceedings before it.

X. ATTEMPT BY KTB'S DIRECTORS TO SEEK A JUDICIAL DECLARATION THAT THE BNB'S DECISION TO APPOINT SPECIAL ADMINISTRATORS WAS NULL AND VOID**A. Proceedings at first instance**

82. In the meantime, on 16 January 2015, KTB's former executive directors (see paragraph 5 above), purporting to act both in their personal capacity and on behalf of KTB, sought a judicial declaration that the BNB's decision to appoint special administrators and remove them from office (see paragraph 12 (b) and (e) above) was null and void. Unlike a claim for judicial review, a claim for an administrative decision to be declared null and void is

not subject to any time-limit (Article 149 § 5 of the Code of Administrative Procedure).

83. On 8 July 2015 a three-member panel of the Supreme Administrative Court refused to examine the two parallel claims (see *onp. № 8440 om 08.07.2015 г. no адм. д. № 1807/2015 г., BAC, VIII о.*). It held, with reference to the earlier decisions on the judicial review claim by KTB's former executive directors against the withdrawal of KTB's licence (see paragraphs 45 and 47 above), that, in so far as the former executive directors were acting in their personal capacity, they had no standing to challenge the BNB's decision, as they were not its addressees and had no legal interest in contesting it. The panel added that the former executive directors could not validly claim to act on KTB's behalf:

“... In contrast to the current records in the register of companies about [KTB]'s manner of representation, the claim says that it has been lodged through the bank's executive directors ... who have been removed from office. By [its] decision of 20 June 2014 [see paragraph 12 above], [the BNB] ... appointed special administrators [and] removed the members of the bank's management and supervisory boards from office ... By [its] decision of 16 September 2014 [see paragraph 16 above], [the BNB] extended ... [KTB's] special administration until 20 November 2014 ... The measures prescribed by the decision [of] 20 June 2014 ... (including the ... removal of the members of KTB's management board from office) were to remain in effect until 20 November 2014. The court [also] takes judicial notice of the fact that [on 6 November 2014 the BNB] withdrew [KTB]'s licence and extended the mandate of the special administrators ... pending the appointment of a liquidator. Moreover, [on 22 April 2015] the Sofia City Court ... terminated the powers of [KTB]'s bodies and opened winding-up proceedings [against it – see paragraph 60 above], and, at the date of this decision, the bank is represented by [its] liquidators ...”

B. Proceedings on appeal

84. KTB's former executive directors appealed to a five-member panel of the Supreme Administrative Court, again purporting to act both in their personal capacity and on behalf of KTB.

85. On 3 December 2015 the five-member panel stayed the proceedings pending the interpretative decision by the plenary of the court on who had standing to seek judicial review of a decision by the BNB to withdraw a bank's licence (see paragraph 42 above). On 18 July 2016, shortly after it became clear that no such decision would be given (see paragraph 43 above), the appeal proceedings were resumed. When doing so, the five-member panel noted, *inter alia*, that (a) the appeal had been lodged on behalf of KTB by its former executive directors, even though according to the register of companies KTB was represented by its liquidators, and that (b) the lawyer purportedly acting on KTB's behalf in the appeal proceedings had not produced a power of attorney from the bank. The panel accordingly instructed the appellants to submit proof that the lawyer had authority to lodge the

appeal on behalf of KTB, or, failing that, have the appeal co-signed by persons entitled to represent KTB.

86. In response to those instructions, the lawyer who had lodged the appeal filed, *inter alia*, declarations by KTB's former executive directors that they agreed with all procedural steps taken by him, both in their personal capacity and in their capacity as representatives of KTB.

87. In a decision of 6 October 2016 (*onp. № 10401 om 06.10.2016 г. no адм. д. № 9467/2015 г., BAC, немчл. с-в*), the five-member panel dismissed the appeal in so far as it had been lodged by KTB's former executive directors in their personal capacity. It agreed with the three-member panel that they personally had no standing to seek judicial review of the BNB's decision. The five-member panel also refused to examine the appeal in so far as it had been lodged by the former executive directors on behalf of KTB, giving the following reasons:

“The appeal ... on behalf of [KTB] ... says that it has been lodged through [the executive directors and members of KTB's management board], and has been signed by [a] lawyer ... When he lodged the appeal and when he [later] filed [papers] seeking to rectify the irregularities in it, that lawyer undoubtedly had no authority to represent [KTB]. As can be seen from the register of companies, [KTB] ... is represented by the permanent liquidators ... appointed by the Deposit Insurance Fund [see paragraph 62 above]. This is not being disputed by the lawyer who lodged the appeal; he ... acknowledges that both when he lodged the appeal and now [KTB] was and is represented by its liquidators, and that [the Sofia City Court] ... has terminated the powers of its bodies, including its executive directors. That decision [of the Sofia City Court] was immediately enforceable, which means that from the moment it was handed down the termination of the powers of the bank's bodies, including its executive directors and the members of its management board, stemmed not from [the BNB's] contested decision ... but from the [ensuing judicial] decision to declare [KTB] insolvent. In view of this, and since this court's instructions to rectify the fact that the appeal on behalf of [KTB] was not lodged by a duly authorised lawyer have not been complied with, the appeal must be left without examination.

For completeness, and in connection with the arguments that the removed ... members of [KTB's] management board ... should be granted standing to challenge the BNB's decision to remove them, it should be noted that the present appeal proceedings concern a challenge against the [three-member panel's] decision [not to examine the claim to have the BNB's decision to appoint special administrators declared null and void]. [That claim] was only lodged on 16 January 2015 – after [the expiry of the time-limit to seek judicial review of that decision] ... The fact that [that decision] has become final does not preclude the possibility of seeking a judicial declaration that it is null and void, but it does prevent [KTB] from lodging such a claim through its already removed legal representatives. Moreover, by 16 January 2015 the bank's representatives had already changed several times. After the opening of the winding-up proceedings against [KTB], the legal grounds to remove its executive directors were the provisions of the Bank Insolvency Act [2002 – see paragraph 101 below], and those are distinct from the legal grounds for [the BNB's] decision under challenge. It is hence impossible to accept that a challenge against that decision ... in itself bestows standing on those persons to act on [KTB's] behalf. The legislature has not made provision for that in proceedings for placing a bank under special administration ... It is even harder to accept that those individuals could lodge an appeal on behalf of [KTB] after the [insolvency court] has

given its immediately enforceable decision to declare the bank insolvent, which has [moreover] now become final ... The proceedings under the Bank Insolvency Act [2002] are distinct from the proceedings relating to the decision of [the BNB to place KTB under special administration], and this court must take into account the effects of those insolvency proceedings on ... the powers of [KTB's] bodies.”

RELEVANT LEGAL FRAMEWORK

I. THE BNB'S SUPERVISORY POWERS WITH RESPECT TO BANKS

A. To place a bank under special administration

88. Under section 115(1) of the Credit Institutions Act 2006, as worded at the material time, the BNB could place a bank under special administration if that bank was at risk of insolvency. When doing so, the BNB had to appoint special administrators and define their powers (section 116(1), as in force at the material time). The BNB could also, *inter alia*, remove the bank's management and supervisory boards from office (section 116(2)(6), as in force at the material time), and provisionally deprive the shareholders in the bank holding more than 10% of the voting shares of the right to vote, if it considered that by their actions or influence on the running of the bank they had imperilled its stability (section 116(2)(7), as in force at the material time). In any event, the special administrators take over all powers of the bank's management and supervisory boards, unless the BNB expressly prescribes otherwise in its decision to appoint them (section 107(1)).

89. The BNB may at any point dismiss or replace the special administrators, and its decisions in that regard are not amenable to judicial review (section 106(4)). The BNB may also give them instructions (section 107(3)). They are accountable solely to the BNB and must, upon request, immediately report to it about their activities (section 107(5)). Any actions taken on behalf of the bank without authority from the special administrators are null and void (section 107(6)).

B. To withdraw a bank's licence

90. Under section 36(2)(2) of the Credit Institutions Act 2006, as worded at the material time, the BNB had to withdraw a bank's licence if the bank's own funds were a negative value. Under section 36(4), the bank's own funds are to be assessed in the manner laid down out in the Capital Requirements Regulation. The BNB's decision (as indeed any decision which it makes under the 2006 Act) is immediately enforceable (section 151(2)) and cannot be stayed by a court pending the determination of any claim for judicial review (section 151(3)).

91. When withdrawing a bank's licence, the BNB must appoint special administrators if it has not already done so (section 36(5)). They continue in office until the competent court appoints a liquidator (section 106(3)).

92. Under section 36(6) of the 2006 Act, as in force at the material time, the provisions of the Code of Administrative Procedure which lay down the general rules of administrative procedure that an administrative authority which intends to make a decision must inform all persons concerned by it and give them an opportunity to make objections or representations did not apply in proceedings for the withdrawal of a bank's licence. That rule was nearly identical to that featuring in the previous banking legislation (see *CapitalBank AD v. Bulgaria*, no. 49429/99, § 53, ECHR 2005-XII (extracts)).

93. In February 2021 section 36(6) of the 2006 Act was repealed. The explanatory notes to the bill which led to that (no. 002-01-56) said that the repeal and several related amendments were necessary to give effect to the right to be heard under Article 22 of Council Regulation (EU) No 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, Article 31 of Regulation (EU) No 468/2014 of the European Central Bank establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities, and Article 41 § 2 of the Charter.

II. JUDICIAL REVIEW OF A DECISION BY THE BNB TO WITHDRAW A BANK'S LICENCE

94. In contrast to the earlier banking legislation, which expressly excluded a decision by the BNB to withdraw a bank's licence from judicial review (see *Capital Bank AD*, cited above, § 56), section 151(3) of the Credit Institutions Act 2006, in force since 1 January 2007, provides that all decisions made by the BNB under the Act are amenable to review by the Supreme Administrative Court. According to the explanatory notes to the bill which led to the enactment of the 2006 Act (no. 602-01-30), one of the most important changes it brought about was the possibility of seeking judicial review of all decisions issued by the BNB, as required under Directive 2000/12/EC relating to the taking up and pursuit of the business of credit institutions.¹ Section 151(3) of the Act is, however, silent on who has

¹ Article 33 of Directive 2000/12/EC provided that EU Member States had to "ensure that decisions taken in respect of a credit institution in pursuance of laws, regulations and administrative provisions adopted in accordance with this Directive [could] be subject to the right to apply to the courts". That Directive was superseded by Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions (recast), whose Article 55 was in the same terms. That Directive was in turn superseded by Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, whose Article 72 is in similar terms.

standing to seek such a review. Until 2014, there had been no cases under it in relation to the withdrawal of a bank's licence. Since after 2014 no other bank in Bulgaria has had its licence withdrawn, after the cases relating to KTB (see paragraphs 22-50 above) there have been no other judicial decisions under that provision relating to the withdrawal of a bank's licence.

III. BANK INSOLVENCY

A. Opening of the proceedings

95. The regime of bank insolvency laid down in the Bank Insolvency Act 2002 has several special characteristics. One of them is that only the BNB, rather than the bank's creditors, may apply to the competent court to open insolvency proceedings against a bank (section 8(3)). Under section 8(1), as amended, such proceedings must be opened if the BNB has withdrawn a bank's licence pursuant to section 36(2) of the Credit Institutions Act 2006 (see paragraph 90 above). In its application, the BNB need only set out the legal ground(s) under section 36(2) of the 2006 Act for which it has withdrawn the licence rather than all considerations underpinning its decision (section 9(2) of the 2002 Act).

96. Under section 11(2) of the 2002 Act, the insolvency court examines the BNB's application at a closed hearing to which it must summon a public prosecutor, the BNB, the bank whose winding-up is being sought and the Deposit Insurance Fund. The bank is represented by the special administrators previously appointed by the BNB (see paragraphs 88-89 above), or by persons authorised by them (section 11(3)). With effect from 14 August 2015, court-appointed provisional liquidators (see paragraph 100 below) were added to that list (section 11(3), as worded since 14 August 2015). Shareholders holding more than 5% of the bank's shares at the time its licence is withdrawn may intervene in the proceedings (section 11(4), as amended with effect from 1 January 2007).

97. By section 11(6), the insolvency court must stay the proceedings until the determination of any claim for judicial review of the BNB's decision to withdraw the bank's licence (see paragraph 94 above). When that decision becomes final, the insolvency court must open winding-up proceedings in respect of the bank (section 11(5)).

98. If the insolvency court allows the BNB's application for the bank to be wound up, it, *inter alia*, terminates the powers of the bank's bodies (section 13(1)(4)).

99. Under section 16(1) *in fine*, as in force until August 2015, only the BNB, the special administrators appointed by it and the public prosecutor could appeal against the insolvency court's decision on the BNB's winding-up application against the bank. In August 2015 the bank's provisional liquidators (see paragraph 100 below) were added to that list.

B. Provisional and permanent liquidators

100. Under section 12(1)(2) of the Bank Insolvency Act 2002, as worded between 24 March and August 2015, if the BNB had appointed special administrators before withdrawing a bank's licence (see paragraph 88 above), the insolvency court could appoint a provisional liquidator for the bank at the request of the Deposit Insurance Fund. Since August 2015 that possibility is no longer premised on the prior appointment of special administrators (section 12(1)(2), as worded since August 2015). The court's decision is immediately enforceable and is not amenable to appeal (section 12(4)). The provisional liquidator takes over the powers of the special administrators (section 12(6)). He or she must be someone featuring on a list of qualified persons drawn up by the BNB (section 25(1)(12)). If the provisional liquidator is struck off that list by the BNB, the court must dismiss him or her, at the Fund's proposal (section 12a(3) taken together with section 29(1)(6)). He or she continues in office until a permanent liquidator is appointed, and his or her remuneration is fixed by the Fund (section 12a(1), effective as from 24 March 2015). He or she represents the bank, takes part in any proceedings to which the bank is party and brings proceedings on its behalf (section 12a(2)(1) and (2)(7), added with effect from 24 March 2015).

101. Permanent liquidators must be appointed by the Deposit Insurance Fund as soon as possible after the insolvency court opens winding-up proceedings against the bank (sections 13(4) and 26(1)). The Fund must choose from among the people featuring on the above-mentioned list of qualified persons drawn up by the BNB (sections 25(1)(12) and 26(1)). If a liquidator is struck off that list by the BNB, the Fund must dismiss him or her (section 29(1)(6)). The Fund's decision to appoint a liquidator is immediately enforceable (sections 26(4)). Neither the decision to appoint a liquidator nor the decision to dismiss one is amenable to judicial review (section 39(4)). The liquidator's powers include taking part in any proceedings to which the bank is party and bringing proceedings on the bank's behalf (section 31(1)(7)).

102. A liquidator must carry out his or her duties with due care and must put the interests of the bank's creditors above his or her own (section 33(1)).

103. If the Deposit Insurance Fund finds, whether on its own initiative or following a report by the BNB or a creditor of the bank, that the liquidators are carrying out their duties unlawfully or without due care, are harming the interests of the bank's creditors or are unduly protracting the insolvency proceedings, the Fund may (a) require the liquidators to take corrective action; (b) order them to take immediate steps to preserve the interests of the bank's creditors; (c) require them to cease any breaches of their duties and remedy any past breaches; (d) bar them from taking steps or making transactions which can harm the interests of the bank's creditors; (e) reduce their remuneration; or (f) dismiss them (section 41(1) and (2)).

104. A bank's liquidators are liable to compensate any damage caused through their fault. The compensation is paid into the bank's insolvency estate (section 35(4)).

IV. REPRESENTATIVE *AD LITEM* IN THE EVENT OF A CONFLICT OF INTERESTS BETWEEN A PARTY AND ITS REPRESENTATIVE

105. Article 29 § 4 of the Code of Civil Procedure provides that if there is a conflict of interests between a party and its representative, the court appoints a special representative *ad litem*. Under Article 144 of the Code of Administrative Procedure, this provision also applies in proceedings before the administrative courts.

RELEVANT COUNCIL OF EUROPE MATERIAL

106. In its Resolution [CM/ResDH\(2017\)334](#), relating to the execution of the judgment in *Capital Bank AD* (cited above), the Committee of Ministers (a) took note of the legislative reforms adopted since, "introducing, *inter alia*, a direct judicial review of decisions to withdraw the licence of a bank", and (b) observed that, in view of the recent case-law of the Bulgarian courts (which consisted of the Supreme Administrative Court's decisions relating to KTB – see paragraphs 31, 41, 45 and 47 above), the question of what additional general measures had to be taken to prevent similar breaches had been entirely taken up by the execution of the judgment in *International Bank for Commerce and Development AD and Others v. Bulgaria* (no. 7031/05, 2 June 2016), and on that basis closed the examination of the execution of the judgment in *Capital Bank AD* (cited above).

107. In point 3 of its decision [CM/Del/Dec\(2018\)1318/H46-6](#), relating to the execution of the judgment in *International Bank for Commerce and Development AD and Others* (cited above), the Committee of Ministers invited the Bulgarian authorities to "adopt legislative measures in order to provide for an independent representation of the affected bank, in line with the requirements of Article 6 of the Convention, to ensure the effectiveness of its right to obtain judicial review of the decision of the [BNB] to revoke its licence, as well as to ensure its participation in the insolvency proceedings".

108. That decision was based on the observation that when KTB's shareholders and former executive directors had challenged the withdrawal of its licence (see paragraphs 22-41 and 44-47 above), the Supreme Administrative Court "[had] considered that neither the shareholders acting on their own account, nor the bank's managers (deprived of their powers) had standing to bring claims", and the resultant conclusion that "[n]o other option for the independent representation of a bank for the purpose of initiating judicial review of the decision to revoke its licence emerged with certainty

from the recent developments in domestic practice” (see [CM/Notes/1318/H46-6](#)).

THE LAW

I. JOINDER OF THE TWO APPLICATIONS

109. The two applications raise closely intertwined issues. It is hence appropriate to join them (Rule 42 § 1 of the Rules of Court).

II. STANDING TO COMPLAIN ON KTB’S BEHALF

110. The Government argued that KTB’s former executive directors had no standing to act on its behalf before the Court since they had not tried to do so when seeking judicial review of the BNB’s decision to withdraw KTB’s licence, having instead referred to the effects of that decision on them personally.

111. The Court notes that both applications were lodged on KTB’s behalf by its former executive directors at times when they had already been removed from office (see paragraphs 4 and 5 above). When the applications were submitted to the Court on 17 September 2015 and 18 November 2016 respectively, under Bulgarian law KTB had to be represented by the liquidators appointed in the course of the proceedings relating to the BNB’s winding-up application against it (see paragraph 101 above). Those liquidators had been appointed with immediate effect on 23 April 2015 (see paragraph 62 above). However, they (and indeed the special administrators appointed by the BNB earlier) had a disincentive to apply to the Court on behalf of KTB in relation to the matters under consideration in this case, as well as a potential conflict of interests in that regard. Both applications lodged on KTB’s behalf relate to the chain of events leading to their appointment, in particular the role of the BNB in those events, and the second application also concerns their role in the proceedings relating to the BNB’s winding-up application against KTB (see paragraphs 147 and 169-170 below). Moreover, the liquidators’ ability to continue in office was fully dependent on the BNB, as to do so they had to remain on a list kept by it, and a decision by the BNB to strike them off that list was not amenable to any scrutiny (see paragraph 101 above). In view of that, KTB’s former executive directors were, exceptionally, entitled to apply to the Court on its behalf, even though when they did so they no longer represented the bank under Bulgarian law (see *Credit and Industrial Bank v. the Czech Republic*, no. 29010/95, §§ 48-52, ECHR 2003-XI (extracts); *Roseltrans, Finlease and Myshkin v. Russia* (dec.), no. 60974/00, 27 May 2004; *Capital Bank AD v. Bulgaria* (dec.), no. 49429/99, 9 September 2004; and *Feldman and Slovyansky Bank v. Ukraine*, no. 42758/05, §§ 25-28, 21 December 2017).

112. The question whether KTB's former executive directors had attempted to act on its behalf in the proceedings in which they sought judicial review of the BNB's decision to withdraw the bank's licence is irrelevant in that context, since standing under Article 34 of the Convention and standing in domestic proceedings ought not to be conflated (see, among other authorities, *Norris v. Ireland*, 26 October 1988, § 31, Series A no. 142; *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 139, ECHR 2000-VIII; and *Zehentner v. Austria*, no. 20082/02, § 39, 16 July 2009). That point pertains only to the questions whether domestic remedies have been exhausted and whether KTB was actually unable to seek judicial review of the withdrawal of its licence, which will be examined below.

113. The Government's objection must therefore be rejected.

III. SCOPE OF THE CASE

114. In its observations, KTB stated that it maintained all complaints raised in the two applications, in particular the complaints (a) under Article 6 § 1 of the Convention that the panels of the Supreme Administrative Court which had dealt with Bromak's claim for judicial review of the withdrawal of KTB's licence had been dependent and partial; (b) under the same provision that in the same proceedings the Supreme Administrative Court had refused to submit a preliminary reference to the CJEU, as had the Supreme Court of Cassation in the proceedings relating to the BNB's application for KTB to be wound up; and (c) under Article 46 § 1 of the Convention that Bulgaria had not complied with the judgments in *Capital Bank AD v. Bulgaria* (no. 49429/99, ECHR 2005-XII (extracts)) and *International Bank for Commerce and Development AD and Others v. Bulgaria* (no. 7031/05, 2 June 2016).

115. The Court notes that on 8 December 2020 those complaints – as indeed all complaints by KTB of which the Government were not given notice, as well as all complaints by Bromak – were declared inadmissible by the (then) Vice-President of the Section, sitting as a single judge (Rules 27A § 2 (a) and 54 § 3 of the Rules of Court read in conjunction with Rule 12). That decision is final (Article 27 § 2 of the Convention and Rule 54 § 3). The Court cannot therefore re-examine those complaints (see *Mazepa and Others v. Russia*, no. 15086/07, §§ 61-62, 17 July 2018).

IV. ALLEGED IMPOSSIBILITY FOR KTB TO OBTAIN JUDICIAL REVIEW OF THE WITHDRAWAL OF ITS LICENCE

116. In application no. 46564/15, a complaint was made on behalf of KTB under Article 6 § 1 of the Convention that it had been unable to obtain a review by the Supreme Administrative Court of the BNB's decision to withdraw its licence.

117. In application no. 68140/16, a complaint was made on behalf of KTB under the same provision that the Sofia City Court had refused to examine the BNB's decision to withdraw KTB's licence, even though it had not been reviewed by the Supreme Administrative Court either.

118. Article 6 § 1 of the Convention provides, in so far as relevant:

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

A. Admissibility

1. The parties' submissions

(a) The Government

119. The Government argued that KTB had failed to exhaust domestic remedies. It had not duly sought judicial review of the BNB's decision to place it under special administration (see paragraphs 12 and 13 above), even though that decision had affected its capacity to conduct its affairs, in particular its ability to operate via its management. KTB's former executive directors, purporting to act on its behalf, had only challenged that decision out of time, when KTB had already been declared insolvent and ordered to be wound up, and when it was already being run by liquidators (see paragraph 82 above). Furthermore, KTB had not sought judicial review of the BNB's decisions to (a) extend the special administration and (b) instruct the special administrators to reflect the findings of the audit reports in its accounts and report on its financial situation (see paragraphs 16 and 18 above) – indeed, it had not done so in respect of any of the decisions of the BNB preceding that to withdraw its licence.

120. The Government also pointed out that when seeking judicial review of the BNB's decision to withdraw KTB's licence (see paragraphs 20 and 44-47 above), its former executive directors had not attempted to act on its behalf, seeking instead to justify their standing solely with reference to the effects of the BNB's decision on them personally. KTB itself had thus not tried to seek judicial review of the BNB's decision.

121. Lastly, the Government submitted that KTB had not sought a judicial declaration that the BNB's decision to withdraw its licence was null and void.

(b) KTB

122. KTB submitted that its shareholders, principally Bromak, had, acting both in their own capacity and on its behalf, tried to seek judicial review of the withdrawal of its licence. As for KTB's former executive directors, they had been removed from office and thus unable to represent it in any such proceedings. They had tried to obtain a judicial declaration that the BNB's earlier decision to place KTB under special administration was null and void. Their powers, including the capacity to bring proceedings on KTB's behalf,

had been vested in the special administrators, who had been subordinate to and dependent on the BNB. Those special administrators could not have been realistically expected to contest the BNB's decision to withdraw KTB's licence.

123. KTB also argued that the financial difficulties in which it had found itself had forced it to request the BNB to place it under special administration and thus protect its assets, depositors and shareholders. Indeed, its management had been under a duty to seek such measures. It would thus have been absurd for KTB to then apply for judicial review of the BNB's decision to place it under special administration; it would have had no legal interest in doing so. KTB could not have predicted that the BNB would then misuse the procedure and push it into insolvency. Moreover, since the BNB's decision to place KTB under special administration had also removed its management from office, it would have been impossible for that management to then represent the bank in any proceedings. All those considerations applied equally to the possibility of seeking judicial review of the BNB's decision to extend the special administration. As for BNB's decision instructing the special administrators to reflect the findings of the audit reports in KTB's accounts and report on KTB's financial situation, it had not been notified to KTB's shareholders or management, or even made public.

2. *The Court's assessment*

124. The alleged impossibility for KTB to obtain judicial review of the BNB's decision to withdraw its licence lies at the heart of the present two complaints (see paragraphs 116 and 117 above). The Government's assertion that such a review could have been obtained by way of challenges against the BNB's earlier decisions in respect of KTB (to place it under special administration, appoint special administrators for it, extend the special administration and instruct the special administrators to reflect the findings of the audit reports in its accounts and report on its financial situation – see paragraphs 12, 13, 16 and 18 above) is closely linked to this issue. So are the Government's assertions that such a review could have been obtained if (a) KTB's former executive directors had formulated their claim against the BNB's decision to withdraw KTB's licence differently and if (b) KTB had sought a judicial declaration that the BNB's decision was null and void. The Government's objection that domestic remedies have not been exhausted must therefore be joined to the merits of the two complaints (see, *mutatis mutandis*, *Credit and Industrial Bank*, cited above, § 53, and *Pintar and Others v. Slovenia*, nos. 49969/14 and 4 others, § 79, 14 September 2021).

125. The two complaints are, furthermore, not manifestly ill-founded or inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

126. KTB submitted that under Bulgarian law, as interpreted by the Supreme Administrative Court, its former executive directors could not have acted on its behalf in proceedings for judicial review of the withdrawal of its licence. Its shareholders, in particular Bromak, had also been denied the right to challenge that decision. The Supreme Administrative Court had permitted only the special administrators to act on KTB's behalf in proceedings before it, even though there had been a clear conflict of interests between them and the bank, and they had been dependent on the BNB. KTB added that although the law provided for judicial review of a decision by the BNB to withdraw a bank's licence, it was unclear who could seek such a review. The bank's management were precluded from doing so, and the Supreme Administrative Court had refused to let KTB's shareholders do so either.

127. The Government submitted that by law the withdrawal of a bank's licence was amenable to judicial review. They pointed out that when KTB's former executive directors had sought judicial review of the withdrawal of its licence, they had only cited the effects of the BNB's decision on them personally rather than attempting to act on KTB's behalf. The Supreme Administrative Court had thus been justified in refusing to deal with their claim, and it was unsurprising that it had not examined the possibility for KTB itself to seek judicial review of the withdrawal of its licence. The court had simply dealt with the former executive directors' claim as formulated by them. Thus, KTB itself had not sought judicial review of the withdrawal of its licence.

2. The Court's assessment

128. The Court has already held that a bank whose licence has been withdrawn must be able to challenge that decision – which has a decisive impact on the bank's ability to continue as a going concern and manage its own affairs, and which under Bulgarian law almost automatically triggers the opening of insolvency proceedings against the bank – before a court capable of examining all points of fact and law pertaining to the lawfulness of that decision (see *Capital Bank AD*, cited above, §§ 87-88 and 98-116). The Government did not contend that there were any reasons to rule otherwise in this case. Indeed, since 2007 Bulgarian law has provided for the possibility of seeking judicial review of a decision by the BNB to withdraw a bank's licence (see paragraphs 94 and 106 above). The Government maintained that it had been possible for KTB to obtain such a review.

129. The question here is thus limited to ascertaining whether Bulgarian law ensured this possibility with a sufficient degree of certainty (see paragraph 107 above). According to the Court's case-law, for the right of

access to a court to be effective, the persons concerned must have a clear, practical opportunity to challenge an act interfering with their civil rights or obligations (see, among other authorities, *Bellet v. France*, 4 December 1995, § 36, Series A no. 333-B; *Cañete de Goñi v. Spain*, no. 55782/00, § 34, ECHR 2002-VIII; and *Kandarakis v. Greece*, nos. 48345/12 and 2 others, § 46, 11 June 2020).

130. Section 151(3) of the Credit Institutions Act 2006 provides that all decisions made by the BNB under the Act are amenable to judicial review, but does not specify who can seek a review of a decision by the BNB to withdraw a bank's licence, or lay down the procedure for doing so. This gives rise to a difficulty, because when the BNB withdraws a bank's licence, it must at the same time appoint special administrators to run the bank, regardless of whether – as in this case – it has already done so (see paragraph 91 above). Those special administrators take over all powers of the bank's management, including the power to bring proceedings on the bank's behalf, unless the BNB has prescribed otherwise in its decision to appoint them (see paragraph 88 above), which did not happen in this case (see paragraph 21 above). A decision by the BNB to withdraw a bank's licence is immediately enforceable and cannot be stayed pending the determination of any claim for it to be judicially reviewed (see paragraph 90 above). That means that from the very moment the BNB withdrew KTB's licence, the power to act on KTB's behalf, including to bring proceedings on its behalf, was conferred on its special administrators.

131. It is hence evident that even if KTB had obtained judicial decisions quashing the BNB's earlier decisions to appoint special administrators and extend their mandate (see paragraphs 12 (b) and 16 above) – indeed all decisions by the BNB preceding that of withdrawing KTB's licence – it would have still been placed under the stewardship of special administrators when it had its licence withdrawn. It follows that the remedies cited by the Government (see paragraph 119 above) could not have prevented the situation of which KTB is complaining. The first limb of the Government's non-exhaustion objection (based on the absence of timely legal challenges against the BNB's earlier decisions in respect of KTB), which was joined to the merits (see paragraph 124 above), must therefore be rejected.

132. Before KTB's case, the Supreme Administrative Court had not had occasion to interpret section 151(3) of the 2006 Act (see paragraph 94 above). It was thus unclear whether, even though with the withdrawal of a bank's licence all powers of its management were immediately conferred on the bank's special administrators, the management could retain a residual power to seek judicial review of the BNB's decision to withdraw the bank's licence. Nor was it clear whether such a review could be sought by others, such as the bank's shareholders. Indeed, this uncertainty even prompted the Supreme Bar Council to seek an interpretative decision on the point in March 2015 (see paragraphs 38 and 42 above).

133. Faced with this uncertainty, KTB's majority shareholder, Bromak, itself attempted to seek judicial review of the withdrawal of KTB's licence (see paragraph 22 above). Three other shareholders in KTB also did so (see paragraph 23 above). After somewhat convoluted proceedings, the Supreme Administrative Court held that KTB's shareholders had no standing to do that (see paragraphs 31 and 41 above). It ruled in the same way with respect to a member of KTB's supervisory board, as well as to KTB's depositors, other clients and bondholders (see paragraphs 48-50 above).

134. KTB's former executive directors likewise attempted to seek judicial review of the BNB's decision to withdraw its licence. Since they had been removed from office, they sought to justify their standing to do so with reference to the effects of that decision on them personally (see paragraphs 44 and 46 above).

135. The Government reproached the former executive directors for not trying to instead convince the Supreme Administrative Court that they should be permitted to act on KTB's behalf even though they had been removed from office (see paragraphs 120 and 127 above).

136. The Court, for its part, is not persuaded that this argument was as readily apparent in November 2014 as the Government suggested. As already noted, the uncertainty about who had standing to seek judicial review of a decision by the BNB to withdraw a bank's licence prompted the Supreme Bar Council to seek an interpretative decision on the point in March 2015 (see paragraphs 38 and 42 above). More importantly, the manner in which the Supreme Administrative Court dealt with this argument in other proceedings in which KTB's former executive directors tried to act on its behalf after the withdrawal of its licence strongly suggests that that court would have rejected that argument in the proceedings in which the former executive directors sought judicial review of the BNB's decision to withdraw KTB's licence.

137. When KTB was joined as an interested party to the proceedings in which its shareholders were trying to seek judicial review of the withdrawal of its licence, both its former executive directors and the special administrators made submissions on its behalf, and the former executive directors sought to justify their capacity to do so with the argument that they had a residual power to represent KTB (see paragraphs 28-30 above). In its subsequent decision, the Supreme Administrative Court did not even mention the submissions made by the former executive directors and instead referred only to the submissions made on KTB's behalf by its special administrators. That court thus implicitly rejected the former executive directors' assertion that they had a residual power to act on KTB's behalf.

138. More tellingly, when KTB's former executive directors later tried to seek a judicial declaration that the BNB's initial decision to appoint special administrators was null and void, the Supreme Administrative Court expressly held that since the BNB had removed the executive directors from office, the only persons who could act on KTB's behalf were the special

administrators, and that the former executive directors had no residual power do so (see paragraphs 83 and 87 above). It is true that the reasons given by the Supreme Administrative Court in that regard were to some extent coloured by the fact that the former executive directors' claim had been made outside the normal time-limit, and that in the meantime the special administrators had been replaced by liquidators. However, as is clear from the phrase "[f]or completeness, and in connection with the arguments that ..." featuring in the beginning of the relevant paragraph in the decision of the Supreme Administrative Court's five-member panel (see paragraph 87 above), its remarks on the point were *obiter*. Moreover, the panel's reasoning on the point could hardly be read as suggesting, by converse implication, that the Supreme Administrative Court would have been inclined to permit the former executive directors to act on KTB's behalf in the event of a timely legal challenge against the BNB's decision to withdraw its licence.

139. In the light of the Supreme Administrative Court's approach in those two cases, it appears highly unlikely that it would have acceded to a residual-power argument when examining the former executive directors' claim for judicial review of the BNB's decision to withdraw KTB's licence. It follows that the second limb of the Government's non-exhaustion objection, which was likewise joined to the merits (see paragraphs 120 and 124 above), must also be rejected.

140. The Supreme Administrative Court's reasons in the second of those cases (see paragraphs 83 and 87 above) also suggest that it would not have accepted for examination any claim by KTB's former executive directors for the BNB's decision to withdraw KTB's licence to be declared null and void. The third limb of the Government's non-exhaustion objection, which was also joined to the merits (see paragraphs 121 and 124 above), must therefore also be rejected.

141. In the light of the above, it is clear that the special administrators could apply on KTB's behalf for judicial review of the BNB's decision to withdraw its licence. But the special administrators were dependent on and accountable to the BNB, and had little if any incentive to challenge its decision (see *Capital Bank AD*, § 117, and *International Bank for Commerce and Development AD and Others*, § 115, both cited above). Indeed, that decision had been, at least in part, based on their reports to the BNB (see paragraphs 19 and 20 above). Moreover, the right of access to a court entails that the person whose civil rights and obligations are at stake be able to bring proceedings before the courts directly and independently (see *Vujović and Lipa D.O.O. v. Montenegro*, no. 18912/15, § 41, 20 February 2018, and, *mutatis mutandis*, *Philis v. Greece (no. 1)*, 27 August 1991, § 65, Series A no. 209).

142. KTB was thus left in a situation in which there was no one with both standing and an interest in seeking judicial review of the withdrawal of its licence.

143. The Court is not persuaded that this state of affairs could have been overcome by appointing a special representative *ad litem* for KTB in the proceedings brought by its shareholders (see paragraph 105 above), since KTB was a mere interested party in those proceedings. In any event, the Supreme Administrative Court refused the repeated requests of KTB's former management to do so (see paragraphs 29 *in fine*, 36 and 40 above).

144. The civil courts dealing with the BNB's ensuing application for KTB to be declared insolvent and wound up also refused to examine the BNB's decision to withdraw KTB's licence (see paragraphs 61, 67 and 81 *in fine* above).

145. The relevant legislation and the way in which it was applied by the Bulgarian courts did not offer KTB itself, by proper representation, a clear and practical possibility of seeking and obtaining proper judicial review of the withdrawal of its licence (see, *mutatis mutandis*, *Kandarakis*, cited above, §§ 58 and 62). KTB's situation was thus effectively the same as those of the applicant banks in the cases of *Capital Bank AD* (cited above, §§ 98-116) and *International Bank for Commerce and Development AD and Others* (cited above, § 116), even though the statutory bar on judicial review of decisions by the BNB to withdraw a bank's licence had been lifted in 2007.

146. There has therefore been a breach of Article 6 § 1 of the Convention.

V. KTB'S REPRESENTATION IN THE PROCEEDINGS RELATING TO THE BNB'S APPLICATION FOR KTB TO BE WOUND UP

147. In application no. 68140/16, a complaint was made on behalf of KTB under Article 6 § 1 of the Convention that in the proceedings relating to the BNB's application for it to be declared insolvent and wound up, KTB had first been represented by the special administrators appointed by the BNB and then by the liquidators, who had also been dependent on the BNB.

148. The relevant part of Article 6 § 1 of the Convention was set out in paragraph 118 above.

A. Admissibility

1. *The Government's non-exhaustion objections*

(a) **First objection**

149. From the tenor of the Government's observations, it remains unclear whether their non-exhaustion objection with respect to the first two complaints under Article 6 § 1 of the Convention (see paragraphs 119 and 120 above) was also intended to concern the present complaint. Even if that was the case, the fact remains that, having been joined to the merits of the first two complaints under Article 6 § 1 of the Convention, that objection was already rejected in its entirety (see paragraphs 124, 131, 139 and 140 above).

(b) Second objection*(i) The Government's submissions*

150. In their initial observations, the Government argued, with reference to the complaint under Article 13 of the Convention, that (a) it had been open to KTB to complain to the Deposit Insurance Fund that the liquidators were not acting properly, or seek compensation from the liquidators themselves; (b) the claim for judicial review of the BNB's decision to appoint special administrators had been made out of time; and (c) the BNB's decision to extend their mandate had not been challenged.

151. In their additional observations, the Government referred to those arguments in support of their assertion that the complaint was inadmissible.

(ii) The Court's assessment

152. The Government formulated the above-mentioned arguments as a non-exhaustion point for the first time in their additional observations. It is hence open to question whether there is estoppel (see, *mutatis mutandis*, *G.S. v. Bulgaria*, no. 36538/17, §§ 69-70, 4 April 2019). There is, however, no need to resolve this issue, as the complaint cannot in any event be rejected for non-exhaustion of domestic remedies on the basis of those arguments.

153. The first argument was that KTB could have complained about the procedural conduct of the liquidators to the Deposit Insurance Fund or sought compensation in that regard from the liquidators themselves. But the present complaint does not relate to the actual conduct of the liquidators during the proceedings relating to the BNB's application for KTB to be declared insolvent and wound up (contrast, *mutatis mutandis*, *Camberrow MM5 AD v. Bulgaria* (dec.) (no. 50357/99, 1 April 2004). The issue is rather that under Bulgarian law it was the liquidators and not KTB's management who could represent KTB in those proceedings. It is unclear how a complaint against the liquidators to the Deposit Insurance Fund or a compensation claim against them could have remedied that state of affairs. Moreover, it is apparent from the relevant provisions of the Bank Insolvency Act 2002 that the primary duty of the liquidators is to the bank's creditors, not to the bank, and that any liability that the liquidators could face in connection with their work is chiefly premised on a failure to act with due care with respect to the bank's creditors (see paragraphs 102-104 above).

154. The second and third arguments were, respectively, that the legal challenge against the BNB's decision to appoint special administrators had been made by KTB's former executive directors belatedly, and that the BNB's decision to extend the special administrators' mandate had not been contested. But, as already noted in paragraph 131 above, even if KTB had obtained judicial decisions quashing the BNB's decisions to appoint special administrators and extend their mandate in the run-up to the BNB's decision to withdraw KTB's licence, KTB would have still been placed under the

stewardship of such special administrators when it had its licence withdrawn. Special administrators would have thus still represented KTB at the initial stage of the proceedings relating to the BNB's application for it to be declared insolvent and wound up. It follows that the remedies cited by the Government could not have prevented the situation of which KTB is complaining.

155. The Government's objection of non-exhaustion of domestic remedies must therefore be rejected.

2. *The Court's decision on the admissibility of the complaint*

156. The complaint is not manifestly ill-founded or inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

157. In KTB's view, the situation in its case had been almost exactly the same as those in the cases of *Capital Bank AD* and *International Bank for Commerce and Development AD and Others* (both cited above), as it had throughout the proceedings been represented by persons dependent on the opposing party, the BNB: at first the special administrators and then the liquidators. The possibility for KTB's shareholders to intervene had not corrected the resulting procedural imbalance. The need for a special representative *ad litem* had been apparent even before the Constitutional Court's decision and had not arisen as a result of it.

158. The Government submitted that the special administrators had only represented KTB for a short while, during the initial stage of the proceedings. Both the special administrators and the liquidators had had to meet a number of criteria ensuring their impartiality and professionalism. There had thus been enough guarantees that they would protect KTB's interests effectively and in good faith. The fact that they had not opposed the BNB's application for KTB to be wound up did not in itself suggest that they had been dependent on the BNB. The possibility for KTB's shareholders to take part in the proceedings had been a further guarantee that KTB's interests would be properly defended. Moreover, KTB's former executive directors had been able to appeal against the Sofia City Court's decision to allow the BNB's application, based on arguments almost fully coinciding with those raised by Bromak. As a result, the Sofia Court of Appeal had in effect engaged with their arguments. Furthermore, the request for the appointment of a special representative *ad litem* for KTB had not been renewed after the decision of the Constitutional Court, even though that court had expressly adverted to that possibility.

159. The Government also underlined the special nature of the proceedings and the limited scope of the issues falling to be decided in them,

pointing out that the question whether the bank's licence had been properly withdrawn had to be decided in proceedings for judicial review before the Supreme Administrative Court. They further argued that the State's liability could not be engaged by actions or omissions of the liquidators. In any event, the conduct of the liquidators had demonstrated that they had been capable of effectively protecting KTB's interests.

2. *The Court's assessment*

160. In *Capital Bank AD* (cited above, §§ 117-18), the Court found that if a bank facing an application by the BNB to be declared insolvent and wound up is represented in those proceedings by its special administrators and liquidators, who are all dependent to varying degrees on the BNB, the bank could not properly state its case and protect its interests, in breach of the rights of access to a court and of adversarial proceedings enshrined by Article 6 § 1 of the Convention. In *International Bank for Commerce and Development AD* (cited above, § 115), the Court came to the same conclusion.

161. Despite some differences in the way in which the proceedings relating to KTB unfolded, the present case does not present any material difference.

162. The applicant in those proceedings was the BNB (see paragraph 51 above).

163. As required by section 11(3) of the Bank Insolvency Act 2002 (see paragraph 96 above), at the outset KTB, the respondent, was represented by its special administrators (see paragraph 53 above). Those special administrators were directly dependent on the BNB: it had appointed them and fixed their remuneration, and could dismiss them without any external scrutiny (see paragraphs 88 and 89 above). Indeed, they were described by the Sofia City Court as "officers assisting the BNB" (see paragraph 56 above).

164. Later, when the Sofia City Court appointed provisional liquidators, they took on the role of representing KTB in the proceedings, again in line with the requirements of section 11(3) of 2002 Act (see paragraphs 56 and 96 above). One day after that court declared KTB insolvent and ordered that it be wound up, those provisional liquidators were appointed by the Deposit Insurance Fund as permanent ones and continued to represent KTB in the proceedings by virtue of their powers under section 31(1)(7) of the 2002 Act (see paragraphs 56, 62 and 101 *in fine* above). Although to a lesser degree, those liquidators were likewise dependent on the BNB, since it could strike them off its list of persons qualified to act as bank liquidators and thus bring about their automatic discharge (by the insolvency court while they were still provisional liquidators, and by the Deposit Insurance Fund after they became permanent liquidators – see paragraphs 100 and 101 above).

165. All attempts to circumvent that situation were unsuccessful. The courts denied KTB's former executive directors standing to act on its behalf

(see paragraphs 68 and 78 above). The Sofia City Court also refused Bromak's request to appoint a special representative *ad litem* for KTB (see paragraphs 54 and 59 above). The Government suggested that this request could have been renewed after the Constitutional Court had adverted to the possibility of appointing such a special representative *ad litem* as a means of overcoming the potential conflicts of interests between KTB and the special administrators, and KTB and the liquidators (see paragraphs 75 and 158 *in fine* above). But it cannot be overlooked that the Constitutional Court's decision came at a late stage in the proceedings relating to KTB: at the time it was issued, the main issues falling to be decided by the Supreme Court of Cassation had little to do with the question whether KTB was indeed insolvent and should be wound up; they were rather whether KTB's shareholders and former executive directors had standing to appeal, in their own capacity or on KTB's behalf (see paragraph 78 above). It is thus hard to see how the participation of a special representative *ad litem* for KTB at that stage of the proceedings would have served to protect its rights and interests, as represented by its shareholders and former executive directors. Moreover, asking a court to reconsider a procedural decision is normally not an avenue which an applicant needs to pursue (see, *mutatis mutandis*, *Vasil Vasilev v. Bulgaria*, no. 7610/15, § 112, 16 November 2021).

166. It is true that KTB's two biggest shareholders were permitted to intervene in the proceedings (see paragraphs 52 and 55 above, and contrast *International Bank for Commerce and Development AD*, cited above, § 69), as has been possible under Bulgarian law since 2007 (see paragraph 96 *in fine* above). But their participation could not in itself remedy the absence of proper representation for KTB, since (a) they were a mere third party, and (b) section 116(1) *in fine* of the 2002 Act barred them from appealing against the first-instance judgment (see paragraphs 68, 78, 81 and 99 above). More importantly, it is not apparent that their interests as shareholders in KTB and those of KTB itself should fully coincide.

167. KTB was thus effectively in the same position as the applicant banks in *Capital Bank AD* and *International Bank for Commerce and Development AD and Others* (both cited above): as it was represented exclusively by persons dependent on the opposing party, the BNB, it was unable to properly state its case and protect its interests, as it saw them.

168. There has therefore also been a breach of Article 6 § 1 of the Convention in this regard.

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

169. In application no. 46564/15, a complaint was made on behalf of KTB under Article 1 of Protocol No. 1 that the BNB's decision to withdraw its licence had been based on incorrect findings about KTB's situation, and had been unlawful (both in terms of Bulgarian law and in terms of not being surrounded by sufficient safeguards against arbitrariness) and unjustified.

170. In application no. 68140/16, a complaint was made on behalf of KTB under the same provision that the judicial decision to declare it insolvent and wind it up had been unlawful and disproportionate, owing to, *inter alia*, a lack of sufficient safeguards, in particular the refusal of the Sofia City Court to examine whether the findings underpinning the withdrawal of KTB's licence had been correct.

171. 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. Whether a separate examination of the complaints is necessary

172. The Government invited the Court to not deal with those two complaints, saying that they raised the same issues as those under Article 6 § 1 of the Convention.

173. The Court notes that the two complaints under Article 1 of Protocol No. 1 and the first two complaints under Article 6 § 1 of the Convention both touch upon the alleged lack of safeguards surrounding the BNB's decision to withdraw KTB's licence. The complaints under Article 1 of Protocol No. 1 are however broader in scope, since they relate not only to the possibility of seeking judicial review of the BNB's decision, but more generally to the possibility of contesting that decision (see paragraphs 116-117 and 169-170 above). There is, moreover, a difference in the nature of the interests protected by Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 in such situations: the former affords an explicit procedural safeguard (to have any dispute relating to one's civil rights or obligations determined by a court), whereas the procedural requirements inherent in the latter are ancillary to the purpose of ensuring respect for the right peacefully to enjoy one's possessions (see, *mutatis mutandis*, *Iatridis v. Greece* [GC], no. 31107/96, § 65, ECHR 1999-II; *Karamitrov and Others v. Bulgaria*, no. 53321/99, § 75, 10 January 2008; and *Borzonov v. Russia*, no. 18274/04, § 50, 22 January 2009). In the circumstances of this case, the complaints under Article 1 of Protocol No. 1 are hence not absorbed by the

complaints under Article 6 § 1 of the Convention, and they must be examined separately (see, *mutatis mutandis*, *Project-Trade d.o.o. v. Croatia*, no. 1920/14, § 38, 19 November 2020).

B. Admissibility

174. From the tenor of the Government's observations, it can be seen that their non-exhaustion objection with respect to the first two complaints under Article 6 § 1 of the Convention (see paragraphs 119 and 120 above) relates to the present two complaints as well. However, that objection, having been joined to the merits of the first two complaints under Article 6 § 1 of the Convention, was already rejected in its entirety (see paragraphs 124, 131, 139 and 140 above).

175. With reference to Article 1 of Protocol No. 1, the Government further submitted that none of the legal challenges against the withdrawal of KTB's licence had argued, expressly or in substance, that this had been contrary to that provision. KTB replied that when seeking judicial review of the BNB's decision to withdraw its licence, Bromak had relied on Article 1 of Protocol No. 1.

176. The Court notes, in relation to this assertion by the Government, that it was already established that KTB itself did not have a clear and practical possibility of seeking judicial review of the withdrawal of its licence by proper representation (see paragraph 145 above). It is therefore hard to see how KTB could have, by such representation, usefully argued in any such proceedings that this withdrawal had been in breach of Article 1 of Protocol No. 1. In so far as this argument can be seen as a further non-exhaustion objection by the Government in respect of the two complaints under that provision, this objection must therefore be rejected.

177. The two complaints are, furthermore, not manifestly ill-founded or inadmissible on any other grounds. They must therefore be declared admissible.

C. Merits

1. The parties' submissions

(a) KTB

178. KTB submitted that the BNB's decision to withdraw its licence had been based on unreliable reports (which, moreover, had been kept secret from it), and on arbitrary findings which KTB had been unable to contest. The way in which the BNB and the special administrators had acted in the run-up to that decision had also been illegitimate and shown a lack of independence. The difficulties experienced by KTB had been wholly due to actions and omissions by the authorities. The BNB's failure to take any steps to support KTB while it had been under special administration had also made the

ensuing withdrawal of its licence arbitrary. The authorities had, moreover, not provided KTB with State aid, even though they had provided such aid to another bank.

179. KTB added that, owing to the approach of the Bulgarian courts to the question of who could act on its behalf, it had been impossible for it to seek judicial review of the BNB's decision to withdraw its licence.

(b) The Government

180. The Government submitted that in the light of the auditors' findings about KTB's financial situation in June 2014, it could hardly be said that its difficulties could be attributed to acts or omissions by the authorities. In their view, the difficulties had actually resulted from the way in which it had been run. Moreover, it could not be said that the State had had to provide financial aid to KTB, or that the special administration under which it had been placed should have necessarily averted its insolvency.

181. The Government also pointed out that KTB had itself asked to be placed under special administration, and that it had not sought judicial review of the BNB's decisions in that regard. KTB could not therefore pretend that it had been unaware of its difficulties or surprised by the steps taken by the BNB with respect to it, especially in the light of the powers which the law gave to the special administrators.

182. The BNB's decision to withdraw KTB's licence had been fully in line with the applicable rules, had been based on proper findings about KTB's insolvency and had not resulted from any discretionary assessment by the BNB. Moreover, the BNB and its officers were independent and required to abide by the law, and there was no evidence that anyone had influenced its decision to withdraw KTB's licence. That decision had been amenable to judicial review, but KTB's former executive directors had failed to apply for such a review properly, since in their claim they had only cited the effects of that decision on them personally. Further safeguards had been available in the proceedings relating to the winding-up application made by the BNB.

183. The Government also emphasised the need to regulate banks more strictly, and that the authorities had acted with a view to protecting the interests of KTB's clients and the stability of the banking system. Those interests had trumped those of the bank itself and of its shareholders.

2. The Court's assessment

184. The withdrawal of KTB's licence, which was almost automatically followed by the Sofia City Court's decision to declare KTB insolvent and order that it be wound up, amounted to an interference with its possessions (see *Capital Bank AD*, cited above, § 130, and, *mutatis mutandis*, *Feldman and Slovyanskyy Bank*, cited above, § 51).

185. It has already been established that KTB could not obtain judicial review of the BNB's decision to withdraw its licence, whether directly, in judicial review proceedings before the Supreme Administrative Court, or indirectly, in the proceedings relating to the BNB's application for it to be declared insolvent and wound up (see paragraphs 130-145 above).

186. No other procedural safeguards surrounded the BNB's decision to withdraw KTB's licence. KTB was not informed that the BNB would adopt the decision or given an opportunity to object to it, either before the decision was made or afterwards. That was because section 36(6) of the Credit Institutions Act 2006, as in force at the time, expressly excluded those general procedural safeguards in administrative proceedings for the withdrawal of a bank's licence (see paragraph 92 above). Nor was there any possibility of contesting the BNB's decision before a non-judicial authority. There was therefore no opportunity for KTB to challenge the grounds for that decision: the BNB's findings that its own funds were a negative value and that its management had engaged in "vicious banking and business practices" (see paragraph 20 above).

187. KTB's situation was thus effectively the same as those of the applicant banks in *Capital Bank AD* (cited above, §§ 130-40) and *International Bank for Commerce and Development AD and Others* (cited above, § 106): the withdrawal of its licence was not surrounded by any safeguards against arbitrariness.

188. It follows that the interference with KTB's possessions was not lawful within the meaning of Article 1 of Protocol No. 1. There has therefore been a breach of that provision.

189. That said, the Court expresses no opinion on whether the decision to withdraw KTB's licence was correct in terms of Bulgarian law. Its power to review compliance with domestic law is limited, and it is not its task to do so in the place of the competent national authorities and courts (see *Capital Bank AD*, § 132; *International Bank for Commerce and Development AD and Others*, § 108; and *Feldman and Slovyanskyy Bank*, § 54, all cited above).

190. Nor is it necessary to assess in this judgment whether the withdrawal of KTB's licence was in the general interest or struck a fair balance between that general interest and KTB's right to the peaceful enjoyment of its possessions (see *Capital Bank AD*, cited above, § 139; see also, *mutatis mutandis*, *Project-Trade d.o.o.*, § 87, and *Pintar and Others*, § 110, both cited above).

VII. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

191. In application no. 46564/15, a complaint was made on behalf of KTB under Article 13 of the Convention that it had not had an effective remedy in respect of the alleged breaches of its rights under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.

192. In application no. 68140/16, a complaint was made on behalf of KTB under the same provision that it had not had an effective remedy in respect of its complaint under Article 1 of Protocol No. 1, as it had been unable to obtain any sort of review of the BNB's decision to withdraw its licence and of the Sofia City Court's decision to declare it insolvent.

193. Article 13 of the Convention reads:

“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.”

A. The parties' submissions

194. KTB submitted that the law, as interpreted by the Bulgarian courts, in particular as regards the question of standing, had deprived it of a practical and effective opportunity to challenge the withdrawal of its licence and participate in the ensuing proceedings in which it had been declared insolvent and ordered to be wound up.

195. As regards the existence of effective remedies in respect of the complaints under Article 6 § 1 of the Convention that KTB could not obtain judicial review of the withdrawal of its licence and the complaints under Article 1 of Protocol No. 1, the Government referred to their submissions on the admissibility of those complaints (see paragraphs 119-120 and 174 above). As for the existence of effective remedies in respect of the complaint under Article 6 § 1 of the Convention about the way in which KTB had been represented in the proceedings relating to the BNB's application for it to be declared insolvent and wound up, the Government argued that it had been open to KTB to complain to the Deposit Insurance Fund that the liquidators were not acting properly, or to seek compensation from the liquidators themselves. The Government further pointed out that the claim for judicial review of the BNB's decision to appoint special administrators had been made out of time, and that its decision to extend their mandate had not been challenged.

B. The Court's assessment

196. In the light of the findings in respect of KTB's complaints under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 (see paragraphs 128-146, 160-168 and 184-190 above), it is not necessary to rule on the admissibility or merits of these two complaints (see *Capital Bank AD*, cited above, § 121).

VIII. APPLICATION OF ARTICLE 46 OF THE CONVENTION

197. Under Article 46 §§ 1 and 2 of the Convention, a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a duty to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be taken in its domestic legal order to end the violation and make all feasible reparation for its consequences by restoring as far as possible the situation which would have obtained if it had not taken place. Furthermore, it follows from the Convention, and from its Article 1 in particular, that in ratifying the Convention and its Protocols the Contracting States undertake to ensure that their domestic law is compatible with them (see, among other authorities, *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I; *Roman Zakharov v. Russia* [GC], no. 47143/06, § 311, ECHR 2015; and *Ekimdzhiev and Others v. Bulgaria*, no. 70078/12, § 427, 11 January 2022).

A. Individual measures*1. The parties' submissions*

198. KTB requested the Court to indicate to the Bulgarian State to reopen (a) the proceedings in which Bromak and its other shareholders had tried to seek judicial review of the BNB's decision to withdraw KTB's licence and (b) the ensuing proceedings in which KTB had been declared insolvent and wound up, and to carry out the reopened proceedings fully in line with the requirements of a fair trial. That was, in KTB's view, the most fitting way to put right the breaches of Article 6 § 1 of the Convention found in the case.

199. The Government argued that although a reopening of the domestic proceedings was in principle an appropriate way of remedying a breach of Article 6 § 1 of the Convention, this could not be ordered by the Court and was ultimately for the competent domestic court to decide. In their view, in this case such a reopening would upset legal certainty, since the BNB's decision to withdraw KTB's licence and the ensuing judicial decision to declare it insolvent and wind it up had already affected many other persons. The public interest in not reopening those proceedings was stronger than KTB's interest in obtaining *restitutio in integrum*.

2. The Court's assessment

200. The Court has no competence to order the reopening of domestic proceedings (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 89, ECHR 2009; *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, §§ 48-49, 11 July 2017; and *Tsonyo Tsonev v. Bulgaria (no. 4)*, no. 35623/11, § 61, 6 April 2021).

201. It has, however, many times observed that when someone has been the victim of proceedings entailing a breach of Article 6 of the Convention, a reopening of those proceedings, if requested, is in principle an appropriate way of redressing the breach (see *Verein gegen Tierfabriken Schweiz (VgT)*, § 89; *Moreira Ferreira (no. 2)*, § 49; and *Tsonyo Tsonnev (no. 4)*, § 61, all cited above). This is particularly so when the breach has consisted in an inability to obtain effective access to a court (see, for instance, *Yanakiev v. Bulgaria*, no. 40476/98, § 90, 10 August 2006; *Lesjak v. Croatia*, no. 25904/06, § 54, 18 February 2010; *Cudak v. Lithuania* [GC], no. 15869/02, § 79, ECHR 2010; *Fazliyski v. Bulgaria*, no. 40908/05, § 76, 16 April 2013; *Kardoš v. Croatia*, no. 25782/11, § 67, 26 April 2016; *Miryana Petrova v. Bulgaria*, no. 57148/08, § 50, 21 July 2016; *Centre for the Development of Analytical Psychology v. the former Yugoslav Republic of Macedonia*, nos. 29545/10 and 32961/10, § 54, 15 June 2017; and *Inmobilizados y Gestiones S.L. v. Spain*, no. 79530/17, § 45, 14 September 2021).

202. At the same time, the execution of the Court's judgments should not unduly upset the principles of *res judicata* and legal certainty in civil litigation, in particular where such litigation concerns third parties with their own legitimate interests to be protected (see *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 57, ECHR 2015, and *Beg S.p.a. v. Italy*, no. 5312/11, § 162, 20 May 2021). The lapse of time since the domestic decisions complained of is also a material consideration in that regard (see *Bochan (no. 2)*, cited above, § 72).

203. It is not in doubt that the decision to withdraw KTB's licence and the ensuing judicial declaration of insolvency and order that it be wound up, all made more than seven years ago, have affected many other persons, such as KTB's clients and creditors, as well as Bulgaria's financial system as a whole. Thus, although the only way to put right the breach of Article 6 § 1 of the Convention relating to the absence of a clear and practical possibility for KTB itself to seek and obtain proper judicial review of the withdrawal of its licence is to give it such a possibility, it does not necessarily follow that the form of redress following a possible finding that the BNB's decision to withdraw KTB's licence was unlawful or unjustified should consist in the annulment of that decision and a reversal of its effects rather than in an award of compensation. In accordance with the general position under public international law, restitution is the rule under Article 46 § 1 of the Convention, but not when it is materially impossible or would involve a burden out of all proportion to the benefit deriving from it (see *Ilgar Mammadov v. Azerbaijan* (infringement proceedings) [GC], no. 15172/13, § 151, 29 May 2019).

204. Any such proceedings should, however, be organised in a way which gives KTB an effective opportunity to contest the findings which prompted the BNB to withdraw its licence by proper representation. In particular, KTB

should be able to access any reports or other material which had a bearing on those findings (see, *mutatis mutandis*, *Pintar and Others*, cited above, §§ 99 and 114).

B. General measures

1. The parties' submissions

205. KTB also requested the Court to indicate to Bulgaria that the general measures required to prevent such breaches of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 entailed altering Bulgarian law – in particular the Credit Institutions Act 2006 and the Bank Insolvency Act 2002 – in a way that provided effective legal safeguards for banks facing special administration and insolvency.

206. The Government submitted that the Committee of Ministers was better placed to assess what general measures would be required to abide by the Court's judgment.

2. The Court's assessment

207. Since this is the third case against Bulgaria (the previous two being *Capital Bank AD* and *International Bank for Commerce and Development AD and Others*, both cited above) in which issues arise with regard to the way in which the withdrawal of a bank's licence on grounds of insolvency and the ensuing winding-up proceedings are regulated under Bulgarian law, it seems appropriate for the Court to give some indications on how breaches of the kind found here are to be avoided in the future.

208. The breach of Article 6 § 1 of the Convention flowing from the absence of a clear and practical possibility for KTB itself to seek and obtain judicial review of the withdrawal of its licence resulted, depending on how the matter is seen, either from a gap in the relevant legislation or from the manner in which the Supreme Administrative Court construed and applied that legislation (see paragraphs 130-146 above). It is not for the Court to say whether one or the other has to change to avoid future breaches of that kind. Be that as it may, Bulgaria should take steps to ensure that a bank whose licence has been withdrawn be able to directly and independently seek and obtain effective judicial review of that measure.

209. For its part, the breach of Article 6 § 1 of the Convention relating to the manner in which KTB was represented in the proceedings relating to the BNB's application for it to be declared insolvent and wound up flowed chiefly from the terms of sections 11(3) and 16(1) *in fine* of the Bank Insolvency Act 2002 (see paragraphs 163-164 and 166 above). Bulgaria should hence amend those provisions in a way that permits a bank facing an application by the BNB to be declared insolvent and wound up to be represented in those proceedings, both at first instance and on appeal, in a

way which enables it to properly state its case and protect its interests, as it sees them.

210. As for the breach of Article 1 of Protocol No. 1, it should be noted that the statutory provision removing all procedural safeguards from the BNB's decision-making process in relation to the withdrawal of a bank's licence – section 36(6) of the Credit Institutions Act 2006 – was repealed in 2021 (see paragraph 93 above). This legislative amendment, seen in the light of the explanatory notes to the bill which led to it, appears to have largely eliminated the underlying cause of the breach, the only other component of which was the absence of a clear and practical possibility for KTB itself, by proper representation, to seek and obtain judicial review of the BNB's decision to withdraw its licence (see paragraphs 185 and 186 above). It is hence superfluous to indicate any general measures in addition to those already indicated in paragraph 208 above with reference to the first breach of Article 6 § 1 of the Convention (see, *mutatis mutandis*, *Sejdovic v. Italy* [GC], no. 56581/00, §§ 121-24, ECHR 2006-II, and *Lenev v. Bulgaria*, no. 41452/07, § 173, 4 December 2012).

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

211. 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. Pecuniary damage

1. *KTB's claim and the Government's comments on it*

(a) **KTB's claim**

212. KTB claimed 5,337,582,081 Bulgarian levs (BGN), plus interest, in respect of the pecuniary damage which it had allegedly suffered as a result of the breach of Article 1 of Protocol No. 1, to be broken down as follows:

(a) BGN 4,392,137,000, representing the difference between KTB's own capital on 31 December 2013 and 31 December 2014;

(b) BGN 13,149,880, representing the reduction in the fair market value of KTB's trademark between 31 December 2013 and 31 December 2014;

(c) BGN 14,997,000, representing KTB's profit for the period from January to May 2014;

(d) BGN 887,189,000, representing KTB's loss of profit for the period 2014-20; and

(e) BGN 30,109,201, representing a sum transferred by KTB's special administrators to the Deposit Insurance Fund on 25 June 2014 pursuant to instructions by the BNB.

213. KTB submitted that all these heads of damage had resulted directly from unlawful acts and omissions by the BNB, the Prosecutor's Office and other State authorities, since they had led to the withdrawal of its licence. KTB also pointed out that the withdrawal had caused it to cease to exist as a going concern.

214. KTB requested that any award under this head be made payable to its shareholders (those at the time its licence had been withdrawn) or their successors.

(b) The Government's comments on the claim

215. The Government submitted that there was no causal link between the breach of Article 1 of Protocol No. 1 and the damage allegedly suffered by KTB, since it could not be speculated whether the BNB would have withdrawn its licence even if that decision had been surrounded by sufficient safeguards. The Government hence invited the Court to reject the claim as a whole.

216. In the alternative, the Government submitted that the claim was unsubstantiated and exorbitant, and challenged the evidence adduced by KTB in support of the claim and the methods on the basis of which its various heads had been estimated.

217. The Government further insisted that any award under this head be made payable to KTB itself rather than its shareholders, pointing out that KTB had not ceased to exist as a legal person and that its shareholders were no longer applicants in the proceedings.

2. The Court's assessment

218. The Court cannot speculate what the outcome of the administrative proceedings in which the BNB withdrew KTB's licence and the ensuing judicial proceedings in which KTB was declared insolvent and ordered to be wound up would have been if the breach of Article 1 of Protocol No. 1 found in relation to them had not taken place (see *Capital Bank AD*, § 144; *International Bank for Commerce and Development AD and Others*, § 160; and *Feldman and Slovyanskyy Bank*, § 69, all cited above; see also, *mutatis mutandis*, *Project-Trade d.o.o.*, § 110, and *Pintar and Others*, § 118, both cited above). No award can therefore be made under this head.

B. Costs and expenses

1. KTB's claim and the Government's comments on it

219. KTB sought reimbursement of EUR 270,000, plus 20% in value-added tax (VAT), which it had allegedly incurred for the services of its lawyer in the proceedings before the Court. It requested that any award under this head be made payable directly to the lawyer's firm. In support of its

claim, KTB submitted two fee agreements with the firm, relating to the first and second applications lodged on its behalf. The agreements had been concluded by two of KTB's former executive directors, Mr I. Zafirov and Mr G. Hristov, on its behalf.

220. The Government argued that the wording of the relevant clauses in the two fee agreements did not show that KTB was bound to pay the lawyers' fees whose reimbursement it was seeking. They further submitted that the claim was exorbitant, and that there was no information about the way in which those fees had been calculated. In their view, any award under this head had to take account of domestic legal rates and the standard of living in Bulgaria, and not exceed the awards made in previous similar cases. Lastly, the Government pointed out that two applications had been declared partly inadmissible.

2. *The Court's assessment*

221. Since the two applications were validly lodged on behalf of KTB by its former executive directors (see paragraphs 111-113 above), any costs and expenses incurred in pursuing those applications are to be reimbursed to them (see *Capital Bank AD*, § 148, and *International Bank for Commerce and Development AD and Others*, § 169, both cited above). It must, however, be established whether the former executive directors did incur any such costs.

222. The only type of costs or expenses for which reimbursement was sought were lawyer's fees. According to the Court's case-law, such fees have been actually incurred if the applicant has paid or is liable to pay them (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 221, Series A no. 324; *Merabishvili v. Georgia* [GC], no. 72508/13, § 371, 28 November 2017; and *B and C v. Switzerland*, nos. 889/19 and 43987/16, § 79, 17 November 2020). In this case, clause III of both fee agreements between KTB and the lawyer retained by its former executive directors to represent it before the Court said that the parties "agree[d] that the contracted fee [wa]s to be paid directly to the lawyer by the Bulgarian State if and when it [wa]s awarded by [the Court]". There is hence no evidence that KTB or its former executive directors have paid or are liable to pay any fees to the lawyer; agreeing that one's representative may seek his or her fees from the opposing party does not amount to actually incurring those fees (compare with the circumstances in *Palfreeman v. Bulgaria* [Committee], no. 840/18, § 107, 8 June 2021).

223. Moreover, a representative cannot seek just satisfaction for him or herself, since he or she is not an "injured party" within the meaning of Article 41 (former Article 50) of the Convention (see *Luedicke, Belkacem and Koç v. Germany* (Article 50), 10 March 1980, § 15, Series A no. 36; *Airey v. Ireland* (Article 50), 6 February 1981, § 13, Series A no. 41; and *Campbell and Cosans v. the United Kingdom* (Article 50), 22 March 1983, § 14 (a), Series A no. 60).

224. The claim must therefore be rejected in full.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins* the two applications;
2. *Joins* the Government's objection that KTB did not exhaust domestic remedies in respect of its two complaints under Article 6 § 1 of the Convention that it could not obtain judicial review of the BNB's decision to withdraw its licence to the merits of those two complaints, and *rejects* it;
3. *Declares* the complaints on behalf of KTB that (a) it could not obtain judicial review of the withdrawal of its banking licence; (b) in the ensuing proceedings in which the courts decided that it was to be declared insolvent and wound up, it was represented exclusively by persons dependent on its opponent, the BNB; (c) the withdrawal of its licence and the ensuing decision to wind it up were an unlawful and unjustified interference with its possessions admissible;
4. *Holds* that there has been a violation of Article 6 § 1 of the Convention, in that KTB itself did not have a clear and practical possibility, by proper representation, of seeking and obtaining proper judicial review of the BNB's decision to withdraw its licence;
5. *Holds* that there has been a violation of Article 6 § 1 of the Convention, in that KTB's interests were not properly represented in the proceedings relating to the BNB's application for it to be declared insolvent and wound up;
6. *Holds* that there has been a violation of Article 1 of Protocol No. 1, in that the BNB's decision to withdraw KTB's licence, which then led to the judicial decision declaring it insolvent and ordering it to be wound up, was not surrounded by any safeguards against arbitrariness;
7. *Holds* that it is not necessary to examine the admissibility or merits of the complaints under Article 13 of the Convention;
8. *Dismisses* KTB's claim for just satisfaction.

KORPORATIVNA TARGOVSKA BANKA AD v. BULGARIA JUDGMENT

Done in English, and notified in writing on 30 August 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth
Deputy Registrar

Gabriele Kucsko-Stadlmayer
President