NON-OFFICIAL COURTESY TRANSLATION

IN THE NAME OF THE REPUBLIC OF ARMENIA
DECISION OF THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF ARMENIA

ON THE CASE OF CONFORMITY OF CLAUSE 2 OF ARTICLE 1 OF THE LAW OF THE REPUBLIC OF ARMENIA ON MAKING AMENDMENTS AND ADDENDA TO THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA, AND ARTICLE 1 OF THE LAW OF THE REPUBLIC OF ARMENIA ON MAKING A SUPPLEMENT TO THE LAW OF THE REPUBLIC OF ARMENIA ON BANK SECRECY ADOPTED BY THE NATIONAL ASSEMBLY ON 22 JANUARY 2020 WITH THE CONSTITUTION ON THE BASIS OF THE APPLICATION OF THE PRESIDENT OF THE REPUBLIC

Yerevan June 18, 2020

The Constitutional Court composed of H. Tovmasyan (Chairman), A. Gyulumyan, A. Dilanyan, F. Tokhyan (Rapporteur), A. Tunyan, A. Khachatryan, H. Nazaryan, A. Petrosyan,

With the participation of (in the framework of the written procedure)**:**

Applicant: G. Danielyan and A. Khachaturyan, representatives of the President of the Republic, and H. Hovakimyan, Head of the Legal Department at the Office of the President of the Republic of Armenia,

Respondent: K. Movsisyan, official representative of the National Assembly, Head of the Legal Support and Service Division of the National Assembly Staff,

Pursuant to Clause 1 of Article 168, Clause 4 of Part 1 of Article 169 of the Constitution, as well as Articles 22 and 73 of the Constitutional Law on the Constitutional Court, examined in a public hearing by a written procedure the case on conformity of Clause 2 of Article 1 of the Law of the Republic of Armenia on Making Amendments and a Supplement to the Criminal Procedure Code of the Republic of Armenia, and Article 1 of the Law of the Republic of Armenia on Making a Supplement to the Law of the Republic of Armenia on Bank Secrecy adopted by the National

Assembly on 22 January 2020 with the Constitution on the basis of the application of the President of the Republic.

According to Clause 2 of Article 1 of the **Law of the Republic of Armenia on Making Amendments and a Supplement to the Criminal Procedure Code of the Republic of Armenia,** fully adopted in the second reading by the National Assembly on 22 January 2020, Part 3.2 of Article 172 of the Criminal Procedure Code of the Republic of Armenia dated 1 July 1998 (hereinafter – also the Code) was supplemented with the following new paragraph:

"In criminal cases under Article 104, Article 112, Article 125.1, Parts 2 and 3 of Article131, Article 132, Article 132.2, Parts 2 and 3 of Article 133, Article 154.2, Article 154.9, Article 168, Parts 2 and 3 of Article 178, Parts 2 and 3 of Article 179, Part 3 of Article 180, Parts 2 and 3 of Article 181, Article 182, Article 188, Article 188.1, Article 189, Article 189.1, Article 190, Parts 2 and 3 of Article 190.1, Parts 2 and 3 of Article 190.2, Article 191, Article 192, Article 193, Article 194, Articles 200-203, Article 205, Article 207, Article 213, Article 214, Article 215.1, Part 3 of Article 216, Article 217, Article 217.1, Article 218, Articles 219-224, Article 233, Article 235, Article 235.1, Article 261, Article 262, Article 266, Article 267.1, Article 274, Article275, Articles 308-314.3, Article 332, Article 336, Article 352, and Article 375 of the Criminal Code of the Republic of Armenia, the court through the reasoned decision shall satisfy the investigator's motion for permission to conduct a search or seizure (approved by the Prosecutor General or his deputy, with the consent of the supervising prosecutor) in order to obtain information constituting bank secrecy regarding persons not involved as suspects or accused, official information on transactions with securities carried out by the Central Depository in accordance with the Law of the Republic of Armenia on Securities Market, as well as confidential insurance information, if the motion contains reliable and sufficient data that the above mentioned information is necessary to disclose the circumstances, which have essential importance for the case, and they cannot be clarified in any other reasonable manner".

Article 1 of the **Law of the Republic of Armenia on Making a Supplement to the Law of the Republic of Armenia on Bank Secrecy,** fully adopted in the second readingby the National Assembly on 22 January 2020, establishes:

"To supplement Part 1 of Article 10 of the Law HO-80 of the Republic of Armenia on Bank Secrecy adopted on 7 October 1996, with the words "as well as in the cases prescribed by the

second paragraph of Part 3.2 of Article 172 of the Criminal Procedure Code of the Republic of Armenia" after the words "relating to the suspect or accused in a criminal case".

The aforementioned laws adopted by the National Assembly were not signed by the President of the Republic.

The case was initiated on the basis of the application of the President of the Republic submitted to the Constitutional Court on 6 February 2020.

Having examined the application, the explanation of the parties to the case, as well as the relevant laws and the other materials of the case, the Constitutional Court **FOUND:**

1. Applicant's arguments

The applicant considers that the proposed regulation in fact makes unpredictable the scope of the entities whose rights may be restricted without providing a relevant procedural status; hence it isseemingly does note correspond to the constitutional principle of legal certainty.

According to the applicant, if the proposed regulation is applied, then no sufficient guarantees in terms of the effective legal protection of a person's rights without procedural status are provided. In the procedural aspect, they are not factually informed about the seizure of the information or the search; they are even deprived of the opportunity to express and substantiate their position, agree or disagree with the arguments presented by the investigator.

According to the applicant, the proposed regulation can seriously jeopardize the country's economic well-being by undermining the confidence in the banking system.

Based on the above-mentioned and other arguments, the applicant concludes that the disputed legal regulations contradict Articles 31, 32, 34, 75, 78 and 79 of the Constitution.

2. Respondent's arguments

The respondent considers that the restriction of the right of access to the personal data related to the disputed provision corresponds to the criterion defined by the law, as the confidentiality stems from the inadmissibility of publishing preliminary investigation data which is prescribed by Article 201 of the Criminal Procedure Code of the Republic of Armenia. Moreover, the restriction is lifted after the preliminary investigation is completed.

The respondent also finds that the disputed provision, at the same time, pursues the aim to prevent or reveal the crimes prescribed in the cited article.

The respondent considers necessary to note that although the State also has positive responsibilities regarding the exercise of the right to inviolability of private and family life (for instance, to ensure that individuals do not infringe on the inviolability of private and family life of the others), the disputed provisions relate to the State's negative responsibility to ensure that, in particular, the interference by the State shall be only to the extent necessary to achieve the legitimate aim.

The respondent considers it appropriate to note that the review of the case law of the European Court of Human Rights shows that obtaining confidential bank information on the persons not involved as suspects or accused does not contradict the Convention for the Protection of Human Rights and Fundamental Freedoms, if all the criteria for permissibility of interference are preserved.

According to the respondent, although due to the nature of the interference, the right of a person to participate in the investigation of the provision of data related to him/her is limited, nevertheless, the legislation provides numerous mechanisms that allow appealing the processing of data by a state body.

Based on the above-mentioned and other arguments, the respondent finds that the disputed legal regulations are in conformity with the Constitution.

3. Circumstances to be ascertained within the framework of the case

When assessing the constitutionality of the legal regulations disputed in this case, the Constitutional Court considers it necessary to address, in particular, the following questions:

1) Does the fundamental right of a person to private life *include bank secrecy concerning the person, service information on securities transactions made by the Central Depository as defined by the Law of the Republic of Armenia on Securities Market, as well as the information constituting insurance secrecy* (hereinafter - other confidential information), and if it includes, *does the restriction of the mentioned fundamental right by the disputed legal regulations pursue the aim to prevent or reveal crimes* mentioned in Part 2 of Article 31 of the Constitution as a ground for restricting the inviolability of private life?

2) Does the restriction of the fundamental right to inviolability of private life of *a person not involved in criminal proceedings as a suspect or accused* (without any direct or indirect relation to the crime) as a mean chosen by the disputed legal regulations, comply with the *constitutional principles of certainty and proportionality in their interconnectedness from the perspective of achieving the goals of crime prevention or detection?*

3) Are the disputed legal regulations and (or) the laws envisaging them *prescribe the necessary organizational structures and procedures for the effective exercise of the fundamental right of judicial protection* by a person not involved in criminal proceedings as a suspect or accused?

The Law of the Republic of Armenia on Making a Supplement to the Law of the Republic of Armenia on Bank Secrecy, in addition to the disputed Article 1, envisages one more article (Article 2) only related to the entry into force of that Law, which may not act separately from the disputed article; therefore, the Constitutional Court must assess the constitutionality of the entire law.

Based on the above, the Constitutional Court considers it necessary to assess the constitutionality of the legal regulations disputed in this case from the standpoint of Article 31, Part 1 of Article 61, Articles 75, 78 and 79 of the Constitution.

4. Legal assessments of the Constitutional Court

4.1. According to Part 1 of Article 31 of the Constitution, everyone shall have the right to inviolability of private and family life, honour and good reputation. Part 2 of the same article defines the grounds for restricting this fundamental right by law, which are the goals of state security, economic welfare of the country, prevention or disclosure of crimes, protection of public order, health, morals or fundamental rights and freedoms of others.

The legal provisions disputed in this case refer to the *fundamental right to inviolability of private life* enshrined in Part 1 of Article 31 of the Constitution, as the bank secrecy relating to a person and other confidential information relate to a person's private rather than family life.

The enshrinement of the right to inviolability of private life is aimed at guaranteeing the person a framework (space) where the person, free from any guidance or coercion of the State or society, will be able to freely express and develop his/her individuality in terms of respect of his/her dignity, general and certain freedoms and rights respected by the State, the society and other

individuals. Therefore, the inviolability of a person's private space, in combination with the other fundamental rights and freedoms, enables to ensure from the State, society and third parties both his/her *internal self-determination* in accordance with his/her vital interests and *the secrecy of his/her private-vital relations with the other individuals*; and in this sense, the Constitution guarantees the *inviolability* of the person's private life.

It should be noted that the European Court of Human Rights (hereinafter referred to as the ECHR) also interprets the private life as the right of a person to live without undue attention (see *Smirnova v. Russia*, 24.07.2003, app no. 46133/99 and48183/99, § 95).

The inviolability of the home, freedom and privacy of communication, as well as the protection of personal data are the particular manifestations of the fundamental right to inviolability of private life, and they are structured at the constitutional level as a separate fundamental right or freedom in the Republic of Armenia (Articles 32-34 of the Constitution, respectively).

The protection of the fundamental right to inviolability of private life includes **not only the State refraining from interfering in private life,** but also **the positive obligation of the State** to guarantee and ensure it through the *necessary* and *effective* legislative and law enforcement measures. Therefore, the State, first of all, should not interfere with this fundamental right, except for the cases permitted by the Constitution, as well as the State is obliged to define *the necessary procedures and structures for effective protection* in case of violations of this fundamental right not only by the State but also by the third parties; and finally, the State is also obliged *to ensure in practice* the protection of this fundamental right from the third parties.

The right to inviolability of private life also includes *all information* relating to the holders of that right, his/her personal space, to person's other *vital or personal interests* protected therein, as long as such information may influence a person's conduct or otherwise have an impact on the inviolability of his/her private life. **Any secret relating to an individual is already protected by the force of Part 1 of Article 31 of the Constitution**, so it shall also be protected by the legislation, regardless of whether the secret relates to the narrow personal characteristics of a person, the other components of internal self-determination, or his/her *confidential communication* with the state, the public, or the other individuals. This applies not only to bank secrecy, but also to the other confidential information.

According to Article 4 of the Law of the Republic of Armenia on Bank Secrecy: "1. Bank secrecy is considered information about the customer's accounts known to the bank in connection with customer service, information on the customer's assignment or operations performed on behalf of the customer, as well as his trade secret, information about any program or elaboration, invention, industrial sample, and any other information about the latter, that the customer intended to keep confidential, and the bank is aware or could have been aware of that intention.

2. The information available to the Central Bank in connection with the supervision of banks and the information about banks and their customers as prescribed by Part 1 of this Article shall be considered as bank secrecy. Banks are considered Central Bank customers".

The Constitutional Court states that in the mentioned Law, *any information* about an individual, in this case a customer, *that the customer intended to keep secret, and the bank is aware or could have been aware of that intention*, is considered to be a bank secrecy.

The Constitutional Court considers it necessary to note that in the above-mentioned provisions of the Law of the Republic of Armenia on Bank Secrecy, the legislator has rightly chosen to combine the listing of information constituting bank secrecy with the intention of an individual to keep any other information confidential that the bank was aware of or could have been aware of. Therefore, it is obvious that within the framework of communication between the bank and its customer, this Law in secrecy mode protects *the privacy of any information about the customer that the customer intends to keep secret, and which is directly or indirectly available to the bank*.

These wordings of the Law indicate that the bank secrecy includes any information relating to an individual who communicates with any bank, which that individual entrusts to the bank, and which he/she deems necessary to keep confidential regardless of the bank's assessment, and the bank's reasonable acknowledgement of the intention to do so is sufficient for the State to ensure and protect its immunity.

The ECHR has also reiterated in its practice that bank secrecy is a component of a person's private life. In particular, the ECHR has stated that information retrieved from banking documents undoubtedly amounts to personal data concerning an individual, irrespective of it being sensitive information or not. The ECHR has also concluded that the means of interfering with the right to private life may include actions attributed to public authorities, such as the copying and subsequent

storage of bank records by the authorities (M.N. and Others v. San Marino, 07.07.2015, app. no. 28005/12, § 51, 55).

Thus, as a result of the study of the concept of bank secrecy in the Law of the Republic of Armenia on Bank Secrecy, taking into account the relevant judgments of the European Court of Human Rights, the Constitutional Court finds that within the meaning of Part 1 of Article 31 of the Constitution, **the fundamental right to private life of a person also includes bank secrecy**. At the same time, the bank secrecy is protected by the State, in particular, represented by the Central Bank with regard to the information provided by its client banks, and namely by those banks.

4.2. According to Part 2 of Article 31 of the Constitution, the right to inviolability of private and family life may be restricted only by law. The grounds for restriction include *crime prevention and detection.* Therefore, *for these purposes, the legislator is empowered to restrict the inviolability of bank secrets and the other confidential information deriving from the right to inviolability of private life.*

The Law of the Republic of Armenia on Making Amendments and a Supplement to the Criminal Procedure Code of the Republic of Armenia adopted by the National Assembly on 22 January 2020 stipulates that the bank secrecy and other confidential information may be requested only when the criminal case is initiated and within the framework of the procedures implemented on the initiative of the investigator and prosecutor. In other words, the restriction of inviolability of private life under consideration is a measure taken by the prosecuting authorities related to an alleged crime, i.e. an investigative action, the purpose of which is to obtain certain factual data, i.e. evidence in a particular criminal case.

The Constitutional Court notes that the regulations chosen by the legislator, which limit the inviolability of bank secrets and other confidential information, *per se comply with the requirements of Part 2 of Article 31 of the Constitution,* as they are aimed at achieving the constitutionally stipulated (legitimate) aim of preventing or detecting crimes.

4.3. The Constitutional Court notes that the restrictions on the fundamental right to private life shall also comply with the requirements of Article 79 of the Constitution in conjunction with the requirements of Article 78 of the Constitution. In addition, the laws stipulating such restrictions shall establish the necessary structures and procedures, i.e, they must comply with the requirements of Article 75 of the Constitution in conjunction with Part 1 of Article 61 of the Constitution.

According to Article 79 of the Constitution, when restricting fundamental rights and freedoms, the laws must define the grounds and extent of those restrictions, **which shall be sufficiently certain** for the holders of such rights and freedoms and addressees to be able to engage in appropriate conduct (emphasis added by the Constitutional Court).

Analyzing the disputed legal regulations, the Constitutional Court finds:

1) *In case of a number of crimes* envisaged by the Criminal Code of the Republic of Armenia, *not related to any type or other systemic features*, the possibility of restricting the fundamental right to private life of individuals is envisaged;

2) The scope of persons, whose right to inviolibity of private life may be restricted, is uncertain: it refers to *the persons not involved in criminal proceedings as suspects or accused*, i.e, all persons who, regardless of their alleged or actual, direct or indirect relation to any crime have not been involved as suspects or accused in criminal proceedings;

3) *there is a defined duty for the court* to assess the content of a number of legal concepts provided by the law, as well as the absence of possible alternatives to the restriction of the fundamental right to private life, i.e. the court is obliged by a reasoned decision to satisfy the motionof the investigator containing information on bank secrecy on the persons not involved as suspects or accused, confidentioal information on the transactions by the Central Depository as prescribed by the Law of the Republic of Armenia on Securities Market, as well the motion of the investigator (by the consent of the prosecutor oversighting the case or the prosecutor deputy or his/her deputy) on confiscation or search if *credible* and *sufficient* information has been provided through the motion that the above information *is necessary to disclose the circumstances relevant to the case* and *it cannot be* ascertained in any other *reasonably* possible manner;

4) Within the framework of this special procedure of pre-trial proceedings, *the court is not a body conducting the criminal proceedings* (Clause 30 of Article 6 of the Code), therefore, it examines the criminal case not on the merits, but exceptionally in respect to the legitimacy of only one investigative action conducted within the preconditions provided by the law, and in non-competitive conditions, as the person concerned does not participate in the discussion of the relevant motion (Part 1 of Article 283).

Based on the above-mentioned, the Constitutional Court finds it necessary to note that, first of all, the approach chosen by the legislator is not clear, according to which some of the crimes defined in the Special Part of the Criminal Code, which have no internal logical connection and in certain cases the criminal offenses not related to securities, corruption, ensurance and finance sectors, are separated from each other. This circumstance was also admitted by the representative of the respondent in the explanation presented during the June 18, 2020 court session of the Constitutional Court, noting that the selection of the corpus delicti listed in the disputed legal regulation was based on the report of the Prosecutor's Office of the Republic of Armenia.

Furthermore, it is obvious that not only other persons participating in the criminal proceedings in the context of Clause 32 of Article 6 of the Code, but also *all persons under the jurisdiction of the Republic of Armenia, who do not have the status of a suspect or accused in any case*, may be considered as persons not involved as suspects or accused in the criminal proceedings. Since the absence of status is a rule in criminal proceedings, and the existence of status is a very rare exception, it is not clear how the legislator *considered the absence of status of a suspect or accused as a status or a distinguishing feature*, which, amongst the others, served as the basis to restrict the fundamental right of inviolibilty of private life. In this regard the representative of the respondent, in his explanation presented during the June 18, 2020 court session of the Constitutional Court, acknowledges that the relations of the persons having no status of a suspect or accused in respect to the crime under investigation is not, in fact, determined by any objective criterion.

Finally, referring to *a number of unspecified legal concepts*, the legislator actulally obliges the court to make a reasoned decision on the investigator's motion as a result of the joint assessment of the above mentioned unspecified concepts. Moreover, if the *reliability or sufficiency* of the data submitted through the motion can be verified by the instrumentarium prescribed in Part 2 of Article 282 and Part 3 of Article 283 of the Code by analyzing the documents and evidence, or the content of substantiating the motion, evidence or explanations (i.e. to a certain extent, based on the materialized information), it is not precise from the disputed legal regulations what criteria the court should exercise to assess that the circumstances to be clarified by the requested bank secrecy or other confidential information*are essential in the case*, or on what objective circumstance the court should conclude, that they cannot be revealed *in any other reasonably available manner*. In other words, the legal positions of the court on the above issues should be exclusively or mostly based on the subjective perceptions and visions of the judge.

Therefore, it is necessary to assess the constitutionality of the legislative criteria for selecting the scope of both the crimes and the persons enjoying the right to inviolability of private life, and to check the validity of the investigator's motion based on the analysis of the constitutional requirements of certainty, after which it is required to address the conformity of the disputed legal regulations with the constitutional principle of proportionality.

In a number of decisions, the Constitutional Court has addressed the content of constitutional requirements of legal certainty. Referring to a number of other decisions, particularly in its Decision DCC-1488 of November 15, 2019 (DCC-630, DCC-753, DCC-851, DCC-1142, DCC-1148, DCC-1176, DCC-1213, DCC- 1270, DCC-1357, DCC-1439, DCC-1449, DCC-1452, DCC-1475), as well as reiterating and developing its previous legal assessments, the Constitutional Court, in particular, found that:

".... 1) the legal certainty is also an important component of legal security, which, amongst the others, ensures the trust in the public authority and its institutions;

2) In the rule of law state, the protection of confidence in the continued existence of the present legal order must be guaranteed exclusively through the certain, predictable, clear and accessible legislative regulations;

3) The principle of certainty is reflected not only in Article 79 of the Constitution as a substantive requirement for laws restricting fundamental rights and freedoms, but also as a fundamental component of the principle of legality, according to which the norms authorizing the adoption of sub-legislative normative legal acts must meet the requirements of legal certainty (second sentence of Part 2 of Article 6 of the Constitution);

4) The violation of the principle of certainty by the public authorities directly affects the principle of the rule of law and significantly reduces the level of establishment of the rule of law state;

5) The clarity, predictability and accessibility of the laws restricting fundamental rights or freedoms are directly proportional to the degree of restriction of the fundamental right; **the more intensive is the restriction, the clearer, more predictable and accessible the wordings of the above-mentioned laws should be**, as long as they should not confuse the individuals in the aspect of presence and content of the prohibition, other restrictions or the obligations imposed on the latter;

6) Taking into account the diversity of vital issues and the impossibility of responding to all situations in a normative way, the requirement of certainty of legislative and sub-legislative regultions does not preclude the prescription of vague legal concepts in laws and sub-legislative normative legal acts, but it must necessarily be accompanied with the equivalent interpretation in case of similar notions, and with the uniform interpretation in case of identical notions, and the absence of such interpretation will make it impossible to prove the predictability of these provisions ....".

Referring to the constitutionality of the disputed legal regulations in the light of the above-mentioned legal positions, the Constitutional Court finds that:

1) The scope of the crimes envisaged by the legislator as a condition for restricting the fundamental right to private life, is the result of a choice which is not substantiated by any objective or reasonable criterion arising from the materials of this case, and in the conditions of prescrption by the Code of a rather low probative threshold for initiating a criminal case (Articles 27 and 175) or in the conditions of preliminary incorrect qualification of the alleged crime within the framework of judicial control over the pre-trial proceedings, the court cannot effectively guarantee the legality of the restriction of the fundamental right of the person, as it has no jurisdiction to check the legality of initiation of the criminal case and its validity;

2) In the framework of criminal proceedings, obtaining bank secrecy and other confidential information protected by the fundamental right to inviolability of a person's private life, by the reasoned decision of the court on the basis of the motion of the investigator does not apply only to the persons engaged in criminal proceedings, as well as the law does not clarify their relation with the crime at issue, including their relation with the facts on which the accusation is based or the circumstances to be proved in a specific criminal case (Article 107 of the Code);

3) Failing to possess all the materials of the criminal case by the virtue of procedural peculiarities of verifying the legality of the restriction of the person's right to inviolability of private life in the pre-trial proceedings, failing to clarify certain facts or circumstances, and guided by the stringent general and evaluative criteria predetermined by the law, the court cannot also objectively infer whether or not any circumstance mentioned in the investigator's motion is "*substantial in the case*", or conclude whether it could have been ascertained "*in a reasonably possible other way*".

In the light of the above, the Constitutional Court considers it necessary to address the requirements that the respondent has noted (as mentioned by different international institutions) that attempted to substantiate the need for the disputed legal regulations. In this regard, summarizing the arguments set forth in the respondent's explanation, the Constitutional Court notes that the requirements of international institutions presented to the Republic of Armenia include clear criteria in regard to respect to access to the information constituting bank secrecy, which relate to both the nature of the crimes being investigated and the scope of related entities, as well as the other essential terms. Thus:

1) The Organization for Economic Co-operation and Development (OECD) proposal clearly states that, if necessary, the financial data should be made available to law enforcement agencies *to identify and investigate corruption crimes*, as well as it clarifies that financial data may be made available to persons other than the suspect and the accused, such as family members or other related persons, when *there is a sufficient suspicion that they participated in and aided the crime, or were aware of the crime committed or when there are reasons to doubt that the money was provided by the suspect without any legal justification*;

2) The report by the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) states that bank secrecy information about a person who is not a "suspect" or "accused", information relating to securities transactions or insurance secrecy should be made available to the competent authorities conducting the investigation *in the cases related to money laundering, related crimes preceding it, and financing of terrorism*.

3) Although the Republic of Armenia is not a member state of the European Union, but in the preamble to the directive (referred to by the respondent) adopted by the bodies of this international organization, as a basic idea, it is emphasized that "A European Investigation Order may be issued *for the purpose of obtaining evidence of any type of criminal account opened by a person who is the subject of criminal proceedings* in a bank or any other non-bank financial institution"(emphasis added by the Constitutional Court).

It should be noted that the representative of the respondent in this case, in his explanation given during the June 18, 2020 sitting of the Constitutional Court, also confirms that the scope of crimes is wider than required by the international obligations undertaken by the Republic of

Armenia, clarifying that fact with the approaches of the Prosecutor General's Office of the Republic and the Central Bank, that there will be no problems in the case of envisaging an expanded scope of crimes.

Thus, the Constitutional Court finds that the restriction made by the legislator in respect to the fundamental right to inviolability of private life of an indeterminate number of persons, who have no judicial status to an alleged criminal offense, **does not meet the requirement of sufficient certainty** of the restrictions prescribed by Article 79 of the Constitution from the perspective of the choice of crimes, the scope of those persons and the absence of their connection to the crime, as well as the strictly general nature of the verification instruments reserved to the court.

4.4. According to Article 78 of the Constitution, *the means chosen for restricting fundamental rights and freedoms have to be suitable and necessary for the achievement of the aim prescribed by the Constitution.The means chosen for restriction have to be commensurate to the significance of the fundamental right and freedom being restricted* (emphasis added by the Constitutional Court).

The Constitutional Court states that any restriction of a fundamental right is possible only by the law, and due to the principle of proportionality, the requirements for the restriction of a fundamental right by the law are the following:

1) **legitimacy of the aim** of the restriction, that is, being defined by the Constitution;

2) measures chosen for the restriction:

a) **suitability** to achieve the aim prescribed by the Constitution;

b) **necessity** to achieve the aim prescribed by the Constitution;

c) **proportionality** to the significance of the fundamental right and freedom to be restricted.

In a number of decisions, the Constitutional Court has referred to the principle of proportionality. Summing up the essence of a number of its legal positions, the Constitutional Court states that:

1) The principle of proportionality derives from Article 1 of the Constitution (principle of the rule of law state), (DCC-917);

2) "… when defining the types and scopes of the duties and liability of natural persons and legal entitites, as well as measures of coercion …*the legislator independently determines, in particular, … the content of the provisions of the legislation, the scope of actions, the performance of which leads to… liability, … the scope of entitites subject to liability, the measures and scopes of liability*. In the mentioned issues, *however, the discretion of the legislator has its constitutional frameworks*, and the legislator is constrained by the certain constitutional principles while exercising the mentioned authority. … The exercise of public power is first and foremost limited to the *general principle of proportionality* arising from the idea of the rule of law" (DCC-920);

3) "… The principle of proportionality requires, first of all, a fair balance between the measures and scopes of liability and the legitimate aim pursued by the definition of liability".

"… The constitutional principle of proportionality, which is the basis of legal liability, also requires that the scope of liability shall be differentiated according to the gravity of the act committed, the degree of public danger, the damage caused, the degree of guilt and other essential circumstances…" (DCC-924);

4) "… *such a broad limitation* … **is not sufficiently grounded by the substantive criteria**. It … is a *disproportionate restriction* of constitutional law *from the perspective of the principle of proportionality deriving from* Article 1 of the Constitution (*principle of the rule of law state*)…" (DCC-917);

5)"... the legislator, exercising its right to envisage restrictions on the rights and freedoms, shall do so in such a proportion that the chosen restriction is consonant with the principle of proportionality prescribed by Article 78 of the Constitution of the Republic of Armenia, i.e. be suitable and necessary for the achievement of the aim prescribed by the Constitution…"(DCC-1293).

In view of the above, the Constitutional Court considers that *the principle of proportionality is one of the components of the fundamental principle of the rule of law state* as prescribed by Article 1 of the Constitution. It is explicitly (expressis verbis) enshrined in the Constitution (in force) with the amendments of 2015.

The essence of the principle of proportionality is the **restriction of restrictions** on the fundamental rights of a human being and a citizen by ensuring a reasonable balance between private

and public interests, as well as it is of *particular importance* among the constitutional requirements to the restriction of fundamental rights and freedoms.

The first element of the principle of proportionality is the *legitimacy of the purpose of restricting* the fundamental right, that is, to be envisaged by the Constitution. This means that when exercising the power to limit a fundamental right, the legislator must be grounded on the purpose prescribed by the Constitution. In all cases, where those purposes are directly prescribed by the constitutional provisions relating to a restricted fundamental right or liberty, such as the fundamental right to private life, the legislator has the power to specify them only in the laws; in other cases, the legislator itself discloses the constitutional content of the purpose of the restriction defined by the law, based on the interpretation of the relevant norms of the Constitution.

Convinced of its constitutional purpose disclosed, the legislator shall then choose the means to achieve it. Therefore, *the constitutionality of the chosen means is predetermined primarily by the purpose pursued by them*.

As for the choice of means by the legislator to achieve the constitutionally justified aim, first of all, they must be *suitable* for achieving the mentioned constitutional aim. That is to say the legislative means, by which the *legislator is able to achieve the pursued aim*, are suitable; in other words, when the probability is ensured that the result, that the legislator aspires to, will appear.

The *necessity* of the remedy chosen by the legislator is the next element of the principle of proportionality, that is, this remedy together with the others, must presuppose the most moderate interference with any fundamental right or freedom. From all the means suitable for achieving the goal defined by the Constitution, the legislative measure should be chosen, which, with the same probability of achieving the goal, that is, with the same effectiveness yet more moderately restricts any fundamental right or freedom.

The fourth and last element of the principle of proportionality requires the legislator to compare the chosen *suitable and necessary* measure with the *constitutional significance* of the restricted fundamental right or freedom to determine wheter, by virtue of that means, the State actually achieves the aim pursued; and the restricted fundamental right or freedom, by its significance, *does not maintain its supremacy over the public interests*, and for the purpose of the protection of the latter, the legislator applies the restriction of the fundamental right or freedom. Ultimately, this means that **it is a rule not to interfere with or guarantee a fundamental right or**

freedom, depending on their nature, and its restriction is an exception, which must be justified in each case of restriction. Thereto, **more intensive is the restriction, the greater is the burden of justifying the restriction**.

As it has already been mentioned above, the purposes of restricting the fundamental right to inviolability of private life enshrined in Part 1 of Article 31 of the Constitution, according to the content of the disputed legal legislation, are the purposes of preventing or detecting crimes set forth in Part 2 of the same Article, that is, the obtainment of information about the bank secrecy and other confidential information concerning anindividual pursues legitimate goals, i.e, *constitutionally prescribed goals.*

When it comes to the choice of means, the means chosen by the legislator must first be *suitable* to achieve that goal.

Given the fact that it is a question of the *suitability of a measure chosen by the law* restricting a fundamental right, it depends first and foremost on other constitutional requirements relating to the restriction of fundamental rights and freedoms, especially the constitutional principle of certainty.

In the Decision DCC-1488, the Constitutional Court also expressed legal positions on the systemic link between *the constitutional principles of legal certainty and proportionality*. In this decision, the Constitutional Court, in particular, assessed the vagueness of the legislative wording as the absence of adequate preconditions to ensure the proportionality of the restriction of a particular fundamental right.

In addition, in another decision cited above (DCC-917), the Constitutional Court *assessed the broad* legislative restriction *as disproportionate on the grounds that it was not sufficiently grounded by the substantive criteria*.

It should be also noted that the solutions chosen by the legislator *exclude the correlation between* the legal, in this case *criminal liability* of *the person who committed the offense, the nature or severity of the offense, as well as any other objective feature*. On the contrary, the legislator did not explicitly condition the disclosure of alleged crimes attributed to other persons either by the fact of those crimes or by the restriction of the fundamental rights of individuals related to the accused. The legislator justifies this approach in respect of the suitability component of the fundamental

principle of proportionality by the “disproportionate or insurmountable restrictions during the activities” contained in the current Criminal Procedure Code by which the composition of subjects entitled to obtain information on bank or other secrecy is significantly limited. The legislator justifies the abrupt and *essential expansion of the composition of subjects*, on the one hand, by the need to identify the person who committed the crime in cases when the person who committed the crime is unknown, and on the other hand, by the need to detect crimes in the cases when the alleged perpetrator is identified and has a procedural status, but committed the alleged crime not in his/her person but in the name of other persons by the means of using banking services.

The Constitutional Court considers it necessary to note that, first of all, the commission of a crime in relation to other persons, or at least the existence of sufficient suspicions in connection with the commission of such a crime, is already an *objective criterion*, which allows determining the subjective circle of persons whose fundamental right to inviolibity of private life may be restricted. However, despite such an approach by the respondent, which provides a substantive possibility of reasoning, there is no objective criterion in the disputed legal regulations that would allow determining the subjective scope of individuals, who are subjected to the restriction of the fundamental right. The enshrinement of such a substantive criteria in the law would already allow the Constitutional Court to address their constitutionality in terms of content.

As for the difficulties in detecting the crimes, as it has already been mentioned, it is not clear how the legislator has chosen the scope of crimes under the disputed legal regulations, which is beyond any systemic logic. Thus, without any restriction on the scope of entities, the legislator has equally highlighed the disclosure of bank and other secrets through various crimes, such as *intentional infliction of grievous bodily* harm (Article 112 of the Criminal Code), *usury* (Article 213 of the Criminal Code), *piracy* (Article 220 of the Criminal Code), and *promoting prostitution* (Article 262 of the Criminal Code).

The Constitutional Court does not consider reasonable the approach that the difficulties or obstacles to the detection of crimes can arise only from crimes separated by the legislator. It is obvious that depending on different circumstances, such problems may arise in connection with the detection of other, if not all, crimes. At the same time, the Constitutional Court finds that the alleged effectiveness of crime prevention or detection *at the expense of an* restricting, securing or enhancing fundamental rights of *indefinite number of persons unrelated to a particular crime* (with de facto lack of scope of entities) **is not necessary to achieve constitutional goals of crime**

prevention or detection. Otherwise, it would be possible to legislate for all fundamental rights and liberty holders, regardless of the scope of entities, to prevent or detect crimes as a ground for restriction, without substantiating the substantive criteria, i.e. without properly substantiating the need for restraint.

Analyzing the disputed provision as well as the relevant legal provisions stipulated in the Code, the Constitutional Court notes that for the restriction of any fundamental right or freedom, the legislator, as a rule, considers the feature of a clarified scope of entities to be an essential condition for the prevention or detection of crimes. Thus, by a court decision, only correspondence, postal, telegraphic and other messages sent or received by the suspect or accused (Part 1 of Article 239 of the Code) can be monitored, and telephone conversations are permitted to be tapped if the conversations made by the suspect, the accused and other persons by telephone or other means of communication may contain information relevant to the case (Part 1 of Article 241 of the Code). Part 4 of Article 31 of the Law of the Republic of Armenia on Operational Intelligence Activity stipulates that the operational intelligence measures such as internal monitoring, control of correspondence, postal, telegraphic and other communication, control of telephone conversations, as well as ensuring access to financial data and confidential surveliance of financial transactions can be conducted only in the case when the person, against whom they are to be carried out, is suspected of committing a serious and particularly serious crime.

Thus, the Constitutional Court finds that under the disputed legal regulations, the list of crimes selected by the legislator, as well as the uncertainty of the scope of entities of the holders of the fundamental right to private life, lead to *a lack of substantive grounds for restriction,* and **contradict the principle of certainty enshrined in Article 79 of the Constitution, and thereby also the principle of proportionality enshrinrd in Article 78 of the Constitution in part of the suitability of a legally chosen remedy**.

4.5. According to Part 1 of Article 61 of the Constitution, everyone shall have the right to effective judicial protection of his or her rights and freedoms. And according to Article 75 of the Constitution, when **regulating** fundamental rights and freedoms, laws shall define *organisational mechanisms and procedures necessary for* effective exercise of these rights and freedoms.

The Constitutional Court states that any legislative regulation, and not just any restriction of a fundamental right or liberty, should aim to and provide for (3) *organizational* (4) *structures* and

(5) *procedures* (2) *necessary* for the (1) *effective exercise* of all fundamental rights. Only the simultaneous existence of all these conditions in any legislative regulation, especially in a legislative regulation restricting the fundamental right or freedom, can ensure its compliance with the Constitution.

In this regard, the Constitutional Court considers it necessary to distinct the fundamental right to judicial protection as a *fundamental right not directly subject to restriction by the legislator* (without legitimation by the conflicting constitutional right), and its provision must be unequivocally guaranteed to challenge at court the lawfulness of the restrictions on the fundamental right to private life.

The Constitutional Court attaches the importance to the fact that under the disputed legal regulation, bank secrecy and other confidential information can be obtained exceptionally by the prior consent of the court. This structure is itself a guarantee of the legitimacy of the restriction of the fundamental right of a person to inviolability of private life.

The Constitutional Court notes that the ECHR, in its turn, has emphasized that the examination and control of secret surveillance measures can be launched in three phases: when it is authorized at the beginning, during its implementation or after its completion. As for the first two phases, the essence and the logic of secret surveillance imply that not only surveillance but also the relevant consideration about it should be carried out without the knowledge of the person to be surveilled. Consequently, since the person is necessarily deprived of the opportunity to voluntarily use effective remedies or to participate directly in any supervisory proceedings, it is important that the established procedures themselves provide adequate guarantees for the protection of the individual's rights. In the domain where the possible abuse of individuals can easily take place, it is in principle desirable to hand over the control of secret survelliance to a judge, as judicial control offers the best guarantees of independence, impartiality and due process. As for the third phase, the issue of further notification in regard to secret survelliance is closely linked to the effectiveness of legal remedies in the courts and, consequently, the existence of effective safeguards against the abuse of supervisory powers. In principle, there is little opportunity for the person concerned to apply to the court, if the latter has not been notified of the measures taken without his/her knowledge, and therefore he/she has the opportunity to challenge their legitimacy after implementation (see Roman Zakharov v. Russia [GC], 04.12.2015, app. no. 47143/06, § 233-234):

At the same time, having examined the disputed legal provisions and the relevant provisions of the Criminal Procedure Code, the Constitutional Court states that the persons, with respect to whom bank secrecy or other confidential information was obtained by a court decision, have no opportunity to challenge it, since neighter the disputed legal regulations, nor the other provisions of the mentioned Code *contain any mechanism or procedure for either preliminary or further notification of those persons*.

As for the respondent's allegations that the persons, whose rights have been violated, may enjoy general opportunities to challenge, the Constitutional Court considers it necessary to state that:

1) the motion to obtain bank secrecy or other confidential information shall be examined by a court without the participation of the person concerned (Part 1 of Article 283 of the Code);

2) if the person concerned does not have any of the statuses listed in Part 1 of Article 265 of the Code, he/she also shall have no right to get acquainted with the materials of the case, and, consequently, with the judicial act restricting the fundamental right to inviolability of private life;

3) the structure prescribed in Article 290 of the Code refers to the appeal of the decisions and actions of the officer of the investigative body, the investigator, the prosecutor, and the bodies conducting operative-investigative activities, and it is not applicable to the appeal of judicial acts;

4) if the person concerned is not an entity prescribed in Part 1 of Article 376 of the Code, he/she is deprived of the right to appeal the court decision on obtaining bank secrecy or other confidential information, even if he/she receives it;

5) neither the current Law of the Republic of Armenia on Bank Secrecy, which was supplemented by the disputed legal regulation, nor any other provision of the Code provide a *separate (special) procedure* by which a person whose fundamental right to private life is restricted, would be notified or provided with the relevant court decision.

In this regard, the Constitutional Court considers it necessary to refer to the assertion made in the explanation of the respondent's representative that the investigator's motion may relate to the bank secrecy or other confidential informationboth existing at the time of its submission and after the relevant court decision is rendered. If it is reasonably expected that the requested information will be generated in the future, the non-involvement of the person concerned in that procedure is

fully justified, as otherwise this secret means of achieving the purpose of preventing or detecting crime would become meaningless. As for the cases when the requested information was generated in the past, in non-competitive conditions, i.e. without the participation of the person concerned, the examination of the motion is not justified, as in that case the data which is a matter of interest for the criminal prosecution body is already available in the bank or other financial institution, they are beyond the control of the person concerned, and he/she cannot hide, change or dismiss them. Thus, the Constitutional Court finds that such undifferentiated legal regulation does not protect any legitimate public interest; therefore, it leads to an unjustified restriction of the fundamental right to effective judicial protection of a person and the principle of competition.

The Constitutional Court also finds it necessary to note that with respect to the above-mentioned, the ECHR has stated in one of its judgments that, in particular, with respect to bank secrecy, because of the absence of the possibility by the applicant to appeal the search and seizure or revocation of its results, the "effective review" and "effective control" proceeding from Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, were not available to the applicant, and the citizens owe these rights in acoordance with the rule of law, and which could limit the interference in question to what was "necessary in a democratic society" (see M.N. And Others v. San Marino, 07.07.2015, app no. 28005/12, § 81-83):

Thus, according to the assessment of the Constitutional Court, the disputed legal regulations **violate the requirements of Article 75 of the Constitution**: the disputed legal regulations and the laws stipulating the latter do not contain *any structures or procedures* that would enable the person to be informed about the decisions or actions that interfere with his/her fundamental right to inviolability of private life and protect him/herself in the framework of proper proceedings. Therefore, by not envisaging the provisions on notifying the holders of the fundamental right to inviolability to private life on violating their right at the time of submitting the relevant motion, after the court decision is rendered, as well as after the relevant investigative action is conducted, the **right to effective judicial protection** of persons, not involved in criminal proceedings as a suspect or accused **(**as prescribed in Part 1 of Article 61 of the Constitution as a suspect) **is also violated**.

Based on the review of the case and governed by Clause 1 of Article 168, Clause 4 of Part 1 of Article 169, Parts 1, 2, 4 and 5 of Article 170 of the Constitution, as well as Articles 63, 64 and 73 of the Constitutional Law on the Constitutional Court, the Constitutional Court **HOLDS:**

1. To declare Clause 2 of Article 1 of the Law of the Republic of Armenia on Making Amendments and a Supplement to the Criminal Procedure Code of the Republic of Armenia, adopted by the National Assembly on 22 January 2020, contradicting Part 1 of Article 61, Articles 75, 78 and 79 of the Constitution.

2. To declare the Law of the Republic of Armenia on Making a Supplement to the Law of the Republic of Armenia on Bank Secrecy, adopted by the National Assembly on 22 January 2020, contradicting Part 1 of Article 61, Articles 75, 78 and 79 of the Constitution.

3. Pursuant to Part 2 of Article 170 of the Constitution this Decision shall be final and shall enter into force upon its promulgation.

Chairman **H. Tovmasyan**

June 18, 2020
DCC-1546