LEGAL MEMORANDUM ON VIOLATIONS OF CONSTITUTIONAL AND CONVENTION RIGHTS OF SLOVENIAN BORROWERS OF MORTGAGES DENOMINATED IN SWISS FRANCS[1]

To:

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From:

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Introduction

We have prepared the legal memorandum in order for it to serve as the basis for possible future filing of a constitutional complaint in the Constitutional Court of Slovenia – following the decisions of the regular courts of private law –, on the grounds of violations of Constitutional and Convention rights of borrowers of loans (mortgagees) denominated in Swiss francs –, and for the lawful rectification of their aggrieved position. Should there be no success under domestic law, the authors, established on a new mandate, shall prepare the proposal with the Convention-customized argumentation (in English), for the subsequent application to the European Court of Human Rights in Strasbourg.

In the memorandum, we respond – based on examining the constitutional law theory and the case-law of ordinary courts, the Constitutional Court, the Court of Justice of the European Union and the European Court of Human Rights –, to the client's question as to whether this is a case of a fictitious aleatory of capital loan contract – concealing financially speculative (in essence, ForEx futures or a foreign exchange futures) contractual relationship. Such contracts creat disproportionate risks for the uninformed and unaware mortgage borrowers. They were outside their control.[2]

In this regard, we have thus prepared a position on the private law nature of the questionable mortgages as (pseudo-aleatory, toxic) financial products, such as the banks have mislead with and even imposed on the unsuspecting borrowers.

Fundamental Characteristics of the Euro Loans (Mortgages) Denominated in Swiss francs

The disproportionate risks of borrowers with loans denominated in Swiss francs (hereinafter: ChF) are particularly manifest in the case of long-term credit relationships. These are specific for housing loans (mortgages) in terms of annuity repayments, with primary repayment of interest charged at the beginning of the interest period, and the currency clause at the variable interest rate.

Typically, the repayment of capital debt comes into play, often but not always, after the

[2] *The disclosure of information and risk management that arise from loans in foreign currency, loans pegged to foreign currency and loan products that expose the customer to market risk, was mandated by Bank of Slovenia, Ljubljana, 4 July 2006.* This material, which was prepared by Božo Jašovič, member of the Governing Board of the Bank of Slovenia, was sent to the Management Boards and Internal Audit Departments of all commercial banks and savings banks in Slovenia.

We are now being informed that in the Spanish Supreme Court, too, the central issue is one of »free and informed consent« of the borrowers. The consent of the borrowers was on an induced false perception of the monetary status and stability of the Swiss franc that has for a long time been known to be lower than its prospective value –, is therefore legally null and void.

interests on the mortgage has already been paid.

The combination of these elements has resulted (and is still resulting) in an explosive mixture, a time bomb with a destructive effect triggered in case of even minimal changes of the currency ratio between the Swiss Franc and the Euro. This, obviously, is not the case in an ordinary Euro loan relationship, which would successfully pass the assessment of conformity with the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ECHR).

The effects for borrowers are similar to risks specific to projected future monetary speculations the difference being that in stock-exchange manipulations the investor, at worst, loses only his invested input. In our case, contrariwise, the recipient of the long term, e.g. housing loan may be bound to keep repaying the bank loan for decades with the interest may increasing exponentially –, and the repayment of the principle amount may seem not to occur at all or not in the amount that would be at least approximately proportionate to the total amount of repayments.

In addition, the banks have ensnared the borrowers with low interests and intentional – despite the *inter alia* inconsequential warnings of the Central Bank (the Bank of Slovenia) –, concealing information about the risks borne by consumers. The banks have taken advantage of their position and have debited uniformed and misled borrowers with risks, which under the dictated "general terms and conditions" they were unable to influence. They were *ab initio* in the dire "take it or leave it" situation.

Again, the Bank of Slovenia has, prior to this (already in 2006), warned the managements of commercial banks with in-house instructions on restraint when entering into such contracts, i.e., loans in foreign currency, loans pegged to foreign currency and products that expose the customer to market risk.[1] These recommendations, as pointed out above, had not been followed by the commercial banks.

Even earlier (in June 2005) there was a salient report on financial stability of the Bank of Slovenia. On that occasion the commercial banks have been explicitly advised that the respective currency risk does not involve greater risk for the banks, that *"the stress tests.... indicate a relatively small susceptibility of banks to the variations of the exchange rate",* and that due to high (sic!) volatility of ChF, there are possible risks for the customers (thus, not the banks!), and also:

"For banks' customers the exposure of foreign-exchange risk may be very high, in particular taking into account that ChF is currently at relatively low levels and with regard to the exchange rate of forward contracts appreciation may be expected in the future." (Concrete forecast to be expected).

This clearly proves that even according to the official guidelines of the Central Bank (Bank of Slovenia), the banks were not only aware that their financial products are toxic, but did wilfully (intentionally, with *dolus malus directus* or at least with *dolus eventualis*) placed such loans (mostly

mortgages).[3]

However, the borrowers have not had, in the critical period, such assistance. Later, it was provided by the Slovenian Consumers' Association, but this assistance was less effective, and above all it was provided too late for a large number of borrowers –, in particular in Slovenia, where the warnings to the consumers were significantly delayed in comparison to Austria or France. The informing of borrowers was followed-up in a form of reports on what had already happened due to the depreciation of Euro against the Swiss franc.[4] Thus, the borrowers were able to observe the impact of changes of currency ratios on the amount of the principal value and the interest with their loans denominated in Swiss francs, only *ex post facto* in the reports of the Slovenian Consumers' Association.[5] The imposing of long-term toxic loans under such conditions and concealing risks assumed by the borrowers has deformed the loan relationship between the borrowers and the banks beyond recognition.

This, *inter alia,* implies a grave violation of several principles of the private (civil) law of obligations, which should in principle guarantee a fair mutual relationships between lenders and borrowers. The banks' conduct when creating and selling such pseudo-aleatory products, whereby one party is adeptly informed of the (non) risk, and the other one is not, and which only simulate as an ordinary loan relationship –, cannot be considered as banks' acting in good faith.

Private law characteristics of (pseudo) aleatory contracts

In ancient Greece (4th century BC), the aleatory contract was an agreement based on an uncertain mutual risk (*ἀργύριον ναυτικός, nautica*), e.g. where a third party had insured the transported cargo of a ship-owner to remote destinations for the insured person – at higher interest rates (20 % to 100 %). This is the first known origin of an aleatory contract, which reappeared in France only in the 14th century. As we shall see, the cause (*causa*) of the contract applies here only with *mutual (balanced)* ignorance of all three parties (the insured, the insurer, the ship owner). It is a case of a "aleatory an original version of aleatory loan".[6]

Napoleon's *Code civil* (1804) had restrictive provisions on terms and limits of the aleatory contracts, which as typically in insurance contracts, games of chance, wagers, etc. –, were based on a mutual uncertainty of some future event.[7] The text of Article 1964 in that time (in 1804) is seemingly

[3] See below the interrogation of the senior bank executive of the BNP Paribas in Paris, in 2013, *infra* note no. 11
[4] Partial report on the issue of foreign-currency loans, ZPS, Ljubljana, 20 February 2015 with attachments
[5] Vuksanović, *Ničnost nepoštenih pogodbenih pogojev (Nullity of unfair contract terms)*, Pravna praksa no. 6/2015, points out that it would have beeen very simple to forewarn those interested in such loans, by providing them with several calculations for different simulations of changes in currency ratios between Euro and the Swiss franc. In such a case, as pointed out above, such consent would, legally speaking, be "informed" – a *sine qua non* for its validity
[6] See Gonzague, de MontRichard, at http://masterproassurance.alloforum.com/theme-contrat-aleatoire-t21- 1.html
[7] *Code civil, Titre XII : Des contrats aléatoires. Article 1964, Créé par Loi 1804-03-10 promulguée le 20 mars 1804 : Le contrat aléatoire est une convention réciproque dont les effets, quant aux avantages et aux pertes, soit pour toutes les*

misleading, since it mentions ignorance not necessarily of all the parties involved. But Article 1104 of the *Code civil* decrees, as in Slovenia's own Code of Obligations, that a contract is to be entered into in good faith (*bona fides*, *bonne foi*). In the case of unjust enrichment at the expense of another (*enrichissement injustifié au détriment d'autrui*, unjust enrichment, *condictio*) such contract is – untenable. The enriched party must return everything obtained by unjust enrichment, with interest accrued on the date of publication of the judgment.[8]

Therefore, the currency clause in Swiss francs or a Euro loan denominated in Swiss francs may be a misleading form of pseudo-aleatory insurance contract. The bank *fictitiously* insures itself with the denomination in Swiss francs – against potential depreciation of the Euro currency. Such contract (*analogia inter legem*) thus falls under the impact of provisions of the Code of Obligations on insurance contracts.

This might have been acceptable in the Croatian[9] and in the Hungarian case, but only as far as the risk was probable, i.e., that the state could in fact have devalued the local currency (Croatian *kuna*, Hungarian *forint*), or that the latter would be subjected to high inflation. But since Croatian kuna was pegged to the value of Euro anyway, this also was deemed unacceptable. Therefore, the quoted judgment, *infra*, of the Croatian Constitutional Court is logical.[10] Anyhow, we cannot speak of good faith, since the banks knew very well that the Swiss franc, in its foreign-exchange value vis-à-vis Euro could only rise.

The Slovene Code of Obligations (OZ) explicitly prohibits the insurance of claims. The reason is to be found in the fact that the OZ limits aleatory contracts to an insurance company. The *ratio legis* of the OZ proscribing the securing of claims (with the insurance company) lies in preventing derivative stock-exchange speculations (options, etc.) in the context of common obligations (and not the stock-market) law.

As we shall see, the pseudo-aleatory contracts within the context of variable (volatile) ratio between ChF/€ were in essence concealed stock-exchange transactions.[11] The difference was that with the latter the investor loses only what he has invested into the business transaction, whereas in our case the borrower vis-à-vis the bank is in for a long-term, so to speak permanently, and obliged to pay the amounts, which due to the interest by far and sometimes many times over, exceed its expected

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parties, soit pour l'une ou plusieurs d'entre elles, dépendent d'un événement incertain.

[8] *See* ***Article 1303-4*** *Créé par Ordonnance n°2016-131 du 10 février 2016 - art. 2 L'appauvrissement constaté au jour de la dépense, et l'enrichissement tel qu'il subsiste au jour de la demande, sont évalués au jour du jugement. En cas de mauvaise foi de l'enrichi, l'indemnité due est égale à la plus forte de ces deux valeurs.*

[9] Very strongly, of course from the constitutional law point of view, Croatian Constitutional Court confirmed this even after the Croatian legislation had already regulated it. Croatia is thus at least two legal steps ahead of Slovenia. This even more so (*argumento a minori ad majus*), because for the banks there, the Croatian Kuna, despite the fact that it had been nominally pegged to Euro, nevertheless presented a certain risk. See *infra*, note no.43

[10] See, *infra*, notes no. 43 in 44

[11] See *infra*, note no. 11

investment into the bank loan.

In the French criminal case *Helvet Immo,* the subsidiaries of an otherwise reputable BNP Paribas bank, Mme Nathalie Chévalier, former senior executive of this bank and essentially a whistle-blower, had been questioned. As a witness, Mme Chévalier testified concisely as to how the BNP Paribas bank had, with excessive irrelevant information, obscured the toxic nature of the proposed business transactions and intentionally misled first the bank's middle management and then the borrowers themselves – and how in this case for them the only credible information would have been the so-called *crash-test*, i.e., the simulation of a disproportionate increase of interest and the principal amount already at a minimal increase of value of ChF vis-à-vis Euro.[12] At that time already, this was a *criminal case* (and a claim for damages of injured parties of a "*contre X*", i.e., against an unknown perpetrator). It follows from her testimony how the *higher management* intentionally misled and pressured at first the lower *bona fide* administration in the bank, and then, through them, the inexperienced borrowers.

These *Helvet Immo* business transactions were mathematically so complex/concealed that even Mme Chévalier as a knowledgeable banker had a difficulty understanding them.[13] It is hard to appreciate, how the French legal system already in 2013 was able criminally to respond against such a deception (*pratique commerciale trompeuse*) –, whereas in the Republic of Slovenia the case is still under only private law review; where there is still, although this would be imperative, not an inkling of a criminal prosecution.[14]

In the Slovenian case the claims of the banks vis-à-vis the borrower were likewise locked into (unnecessary and misleading) currency clause. Formally and legally it does not follow from this that it would inevitably be proscribed for the bank to secure the credit entitlements with the currency clause. However, as it transpired in the French legal system, the true nature of the transaction at issue here is a stock-exchange speculation (*pratique commerciale trompeuse*) – and not a legitimate bank loan.

An analogy *inter legem* – in comparison to the aleatory contract – is apposite because the toxic bank product faked a *pseudo*-aleatory contract as if both arties were equally and mutually ignorant of the probabilities of future change of value of the Swiss franc. According to the *inter legem* analogy

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[12] See *Procès verbal de Déposition de témoin, No. du Parquet: 1229076010. No. Instruction 2437/13/3, dated* 28 March 2013, the certified translation and the original are annexed to the review in this case. Mme Chévalier explicitly takes the position, as mentioned above, that this was not a case of credible loan transactions; rather these were transactions, which in their essence were financial speculations. This, of course, the French borrowers at BNP Paribas did know.

[13] See above note no. 11, page 6 of the minutes.

The investigating judge asked Mme. Chévalier if she had any knowledge of the COMETE Programme, which according to her opinion would have the potential of the abovementioned simulation. See http://www.aexae.fr/contenu/produits/logiciel- securite-gardiennage-comete . This programme was not at Mme Chévalier's disposal at the BNP Paribas.

[14] The bank managers responsible for the mass deception of borrowers could have been very easily identified in the Slovenian context. The criminal law-enforcement system should react rigorously against the perpetrators. The fact is, there is no indication that this would follow and as usually the question is *cui bono*…!

this is a case of a speculative form of securing a claim, i.e., binding provisions on mutual uncertainty of both parties about the fact that an "insurance case" could arise.[15]

In this sense, the private law question is whether the future event (increase in value of the Swiss franc) was equally uncertain for both parties to the contract. The definition of uncertainty implies the *ignorance of both parties*, and not just one –, in our case, the ignorance of a financially uneducated party (the borrower).

"Uncertainty" in such case cannot be the simple opposite of "certainty". This was a case of a probabilistic assessment of the prospect of upturn in value of the Swiss franc. We all know (a notorious fact) that banks today, for their foreign-exchange speculations, use complex mathematically proven algorithms. In the case of BNP Paribas, for example, even the higher bank officials were unable to unravel them since they were intentionally concealed behind the complex mathematical computations.

The Difference between a Stable and an Unstable Currency

If to some extent it is logical that such use of currency clauses occurred in countries with potentially unstable national currencies (Poland, Croatia, Hungary, Slovenia before they were included in the Euro area and if not pegged to Euro), this is most definitely not tolerable in countries from the EU, Euro being a stable and trustworthy currency. The very absence of such motive proves beyond reasonable doubt that the commercial banks had no other reason to market their toxic loans –, except for their anticipation of the rise of the Swiss franc and the consequent speculative profit on the backs of the deceived borrowers.

Contrariwise, the legitimate currency clause is designed for the borrower to return borrowed funds in their real value in case that, due to inflation or devaluation, the lender bank would be losing money.

Such foreign currency (ForEx) clause is not acceptable in the countries of the Euro group. Therefore, it is no wonder that the courts in certain Western European Euro countries quickly and strongly reacted to the misleading speculative banking practices. Meanwhile, the consistently delayed regular courts' reaction in Slovenia falls behind the judiciary even in the countries not members of the Euro area.

Croatia, for example, has adopted an *erga omnes* binding parliamentary Act mandating that the banks should assist in the condition of the borrowers. This Act recently effectively passed the constitutional review.[16] In France, as already pointed out, criminal proceedings have been instituted

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[15] Slovenian *Code of Obligations*, *Article 922: (1) The event, with regard to which an insurance is taken out (insurance case) must be future, uncertain and independent of the exclusive will of contracting parties.*

[16] The decision in *case no. U-I-3685/2015 dated 4 April 2017*

against those who designed and sold such toxic bank products. *Et cetera…*

The loans denominated in Swiss francs have obviously not been granted because this would have been in the interest of borrowers needing a loan in Swiss francs.[17] Also, these loans have no connection to the banks' real operation in Swiss francs. Their advertising maintaining that these loans were in consumers' best interest, that it is in their interest to peg the loan to the most credible currency, was completely deceitful. In the criminal law context, this is a case of *fraud;* therefore, not only banks as legal entities should be responsible in terms of strict liability, but also subjectively personnel in the banks who intentionally introduced such practices (*dolus*), allowed it and maintained, i.e., connived with it (*dolus eventualis*).[18]

Thus, for example, the appendices to the reports of the Slovenian Consumers' Association[19] to the effect that individual banks in offering loans in Swiss francs, prove intentionally false advertising of the financial product: *"pegging your loan to the Swiss franc (currency clause) guarantees that the amount of monthly annuity shall not be increasing significantly".*

To advertise such loans with justification that it provides safety to the borrower has no support in reality. Thus, the banks' catchphrase *"Rely on solid currency!"* was false and misleading.[20] When this relation to Swiss currency is further wired with special requirements regarding the calculation of the method of loan repayment, it changes for the borrower into an extremely dangerous contractual relationship. The Swiss franc thus served in the context of such toxic products, which were offered by the banks to the consumers as a projected means of banks' profit, and not for preservation of the loan's real value, which should have been the only reasonable function of the currency clause.[21]

The aforesaid report of the Slovenian Consumers' Association, for example, notes that within the context of the "products" offered by the banks, the currency clause had not served the purpose of

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[17] These mortgages were offered at a lower initial interest rate. Obviously, this was not only a lure to the potential borrowers who otherwise could not have afforded a mortgage. The banks had a reason to advertise such mortgages knowing full well that these loans would eventually result in a much higher – in comparison with mortgages denominated in Euros – annuities. There could however, as we shall see later, have been other more devious motives on the part of the banks' management.

Anyhow, this amounts to the double dishonesty played upon the unsuspecting borrowers. Not only were they *ab initio* less credit-worthy, i.e., less capable of paying the annuities, but the banks knowingly (*dolus eventalis*) offered them deceptively lower interest rates (why?) that were certain to rise far above the level of regular Euro mortgages they were not capable of accepting in the first place. In other words, why have the banks approved the loans to incapable borrowers in the first place, knowing full well (1) that the value of Swiss franc will rise and (2) that the borrowers will not be able to repay their mortgages.

[18] *Dolus eventualis* has, as usually, the cognitive and the volitive components. If the cognitive component amounts to "practical certainty", the connivance with the criminal act is a given.

[19] Ljubljana, 20 February 2015

[20] Again, in terms of criminal law, this corresponds to the offence of the conspiracy to defraud, which is a combination of theft and lying, in this case misleading the borrowers. The question may legitimately be raised as to why, except in France, no criminal procedures to the best of our knowledge have in fact been initiated in Europe against the responsible bankers.

[21] It is interesting to note that the ForEx currency clause by Austrian banks, although they had not been allowed by the Austrian central bank to do this in Austria, was introduced as a discriminatory practice in Slovenia –, without any legal or moral reservations. The reasons for such conduct are supposedly clear.

preservation of the loan's real value, *"but as a method of obtaining new customers with the offer of fictitiously more favourable loans and of obtaining an additional profit"*.[22] Such banking practices endangered the existential position of the borrowers.[23] The latter is, as we shall see, of a constitutional importance in the Republic of Croatia and similarly in the Republic of Slovenia.

Meanwhile, if it is needful to emphasize again, the commercial banks of course did not do business in Swiss francs. Accordingly, the repayment by the borrowers in Swiss francs was in most cases out of the question. The foreign currency clause was used as a virtual dicey tool.

The Court of Justice of the European Union

The Court of Justice of the EU (CJEU) in Luxembourg did take partially relevant positions on the ForEx denominated loans in the member states of the EU. There were several of CJEU decisions that required the banks in the member states to inform the borrowers beyond the mere technical information provided formally. CJEU requested that the borrowers be specifically informed of all the possible future economic repercussions deriving from the pre-specified loan terms, the currency clause and the method of repayments of the long-term loans. CJEU also formalistically and superfluously [24] pointed out that, when applying the European Union law, it is necessary to consider the contents of national law and interpret it as far as possible within the meaning of the context and purpose of EU Directives.[25]

The banks' offering loans in Swiss francs was not just a problem of directly misleading (absence of) information to the borrowers. The borrowers were entitled to expect from the banking institutions, enjoying public trust, that the banks would not offer "products", which at the change of currency ratios would change into means for reduction of borrowers to bankruptcy and to *disproportionate* enrichment of banks.[26] From the perspective of the European Union law it is highly questionable that it tolerates the sales of such banking toxic products, at their origin a reflection of

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[22] *Partial report on the issue of foreign-currency loans*, p. 4.

[23] One horrific measure of this existential threat to the borrowers is the number of suicides in consequence of absolute pauperization of the borrowers. In Bosnia and Herzegovina this number, to the best of our knowledge had been, up to the time of writing this report, 56. In Slovenia the heretofore known number is 3. Epidemiologic studies have been presented in Barcelona, proving, apart from the suicide *in extremis*, that the general mental and consequently the physical health of the aggrieved population have been significantly reduced.

[24] It is really difficult to understand why the CJEU took such an incomplete position on the obviously lurking fraud in practically all of the ForEx loans. In other words, when the case comes to the ECtHR, this formalistic attitude of the CJEU will have to be corrected.

[25] Preliminary ruling of the Court of Justice of the European Union *in the case C-26/13,* issued on the grounds of a request of the Hungarian court with regard to binding loans in forints, the repayment of which was related to the current exchange rate of the Swiss franc.

[26] That such expectation of potential borrowers vis-à-vis the bank is justified, again arises from the testimony of Mme Chévalier before the investigating judge in Paris. Mme Chévalier, as a witness, specifically emphasized that she had been concerned about the reputation of the BNP Paribas Bank, because this bank had been previously renowned as a reliable banking institution –, which a customer when conducting his business operations could rely on. See the interrogation minutes cited *supra*, note 12

distrust concerning the credibility of the Euro currency.

Euro, unlike some national currencies (Croatian kuna, Hungarian forint, Polish zlot etc.) is a completely stable currency – at least as much if not more than the Swiss franc, since it is a joint currency of the nineteen of the twenty-eight members of the European Union. Thus there was absolutely no need to "secure" the loan taken out in Euros with the clause on Swiss francs.

Transition from the Domestic to European Law: Consequences for the Country

In case of dismissal of the extraordinary review ("*revizija*") by the Supreme Court of the Republic of Slovenia, [27] the judicial decision-making is approaching the point where the issue shall no longer be the responsibility of banks. It shall be the responsibility of the Republic of Slovenia as far as such practices, contrary to the Constitution, the EU law, and above all the law of the ECtHR, will be permitted to stay in force.[28]

In Slovenia, the Constitutional Court is the final and supreme domestic judicial instance, after which the consideration of loans in Swiss francs as private business obligations between the banks and the borrowers will turn to the liability of *the state.* If the Constitutional Court approves the deception of mortgage borrowers, their unequal treatment and the transfer all of the risks of a banking speculative and toxic transactions to the consumers, it will be the ECtHR's turn to condemn the state.[29]

In other words, the positive dealing with the constitutional complaint is *the final opportunity for the state* to sanction domestic private law violations of the rights of the borrowers. After that, the state's own operation and responsibility for violation of human constitutional and Convention rights

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[27] Extraordinary legal remedy of "*revizija*", filed on 8 March 2016, in which the respondent is Nova kreditna banka Maribor (hereinafter NKBM) and was filed against the judgments of the Higher Court of Ljubljana and the District Court of Maribor –, points out that in this particular case the currency clause was used in a manner that constitutes violation of fundamental principles of the law of obligations, in particular *(1) the principle of good faith and fair dealing, (2) prohibition of abuse of rights, (3) prohibition of creating and (4) taking advantage of monopolistic position, equal value of duties and (5) prohibition of causing damages*. The timing of this extraordinary legal remedy here is of essence due to the fact that the exhaustion of this remedy is a precondition of access to the Constitutional Court.

However, if it were possible to show that the remedy is inefficacious, as per art. 13 of the ECHR, the exhaustion of this remedy would be unnecessary. In any event, all delay on the part of the Supreme Court in the case of 16.000 borrowers and their families is morally and procedurally inexcusable.

Moreover, when the case reaches the ECtHR the late payment interests will accrue, again not vis-à-vis the banks but vis-à-vis though budget of the state.

[28] At the outset, we should point out the possibility that this would be in the best interest of the coconspirators in the relevant Slovenian banks. In the case the State of Slovenia were to cover the damages to the exploited borrowers, there is in the law no obvious mechanism whereby the State would be able to recuperate from the banks the amount in question.

[29] Before the ECtHR the state is as per art. 41 sued, in this case the Republic of Slovenia, since it had not settled the case within the domestic legal system. The banks, which proffered the toxic loans could thus avoid any reimbursement to the state of the massive damages caused to the borrowers. Obviously, this means that it is not in the banks' interest to have the case resolved domestically –, because no obvious legal remedies lie that would thereafter enable the state of Slovenia to claim reimbursement of the ECtHR adjudicated damages to the aggrieved borrowers.

will be scrutinized by the European courts, in particular the ECtHR.[30] The latter of course does not focus on the responsibility of the banks; it determines the responsibility of *the state,* in this case the Republic of Slovenia, because it was incompetent or unwilling to sanction violations of Convention rights within the domestic law.

In other areas, too, the European Court of Human Rights in Strasbourg has undone the formalistic enforcement of the rules of private law interpreted restrictively. Consequently, such practices will most certainly not be able to withstand the scrutiny of the ECtHR judicial review.

In case the Constitutional Court would not *ex tunc* set aside such arbitrary loan relationships and ensure the responsibility of the banks for the obvious risks, the subject matter before the European Court of Human Rights will be the responsibility of the state and not of the banks.

In particular, the ECtHR addresses such disputes in terms of *proportionality* and in a manner that determines the responsibility of the state in terms of positive obligation to prevent disproportionate interference with human rights and fundamental freedoms – and sanctions them morally and materially when it establishes the violation of human standards of protection of human rights. Since the number of affected borrowers is high a pilot judgement of the ECtHR, which will at first define the criteria for reimbursement of the bank fraud for a couple of individual applicants, will then require the State of Slovenia to remedy the situations of all other aggrieved borrowers in a systemic fashion. All other cases shall be examined according to the same ECtHR precedent, i.e., as in the case of *Ališić*.[31]

This is particularly painful for the countries in case of the so-called pilot judgments, i.e., judgments referring to hundreds or thousands of essentially *analogous*[32] violations of human rights. Slovenia had in this area, from the moral and from the financial perspective, very bad experiences, for example in connection with the pilot judgment in the case *Ališić and Others v. Slovenia* referring to foreign currency savers of Ljubljanska banka, not to mention other judgments condemning other countries for much higher amounts on the grounds of having interfered with the assets of the

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[30] The analogous case has not yet come to the ECtHR. This is most likely the consequence of the fact that the national courts (such as, for example, the French court mentioned above) reacted to the abuse (*pratique commerciale trompeuse*) several years ago. *Mutatis mutandis* this applies to the Republic of Croatia –, whereas in Slovenia, the case is being delayed and misinterpreted. Since it is a case of 16,000 affected bank customers, we can imagine what a mass (pilot) case this would again be for Slovenia that so far repeatedly "distinguished" itself with such cases before the ECtHR. In all of these cases the Slovene domestic legal system had proven to have been woefully inadequate…

[31] A systemic legal regulation shall be needed. A law would be needed that would retroactively (*ex tunc*) address the prejudice caused by the toxic loan relationships. At this time, this is politically unlikely.

In the best-case scenario, therefore, the Supreme Court of the Republic of Slovenia should in this case adopt a precedent and enforce the case law, according to which individual cases will be decided by ordinary courts of law. Already, such organic (and not abrupt) process would take years but would be resolved with considerably lower costs and a greater degree of fairness – on case by case basis!

[32] The systemic problem with the Continental legal reasoning is its formalism. It does not yet comprehend that the sources of law coming from the ECtHR are not, as domestically, based on syllogistic formalism –, but on the superior reasoning by analogy. On this, see generally, Domingo, THE MASTER ALGORITHM, Basic Books, New York, 2015

claimants.

Therefore, the narrow and excessively formalistic treatment of the private law cases before domestic courts may backfire upon the country, the judges of which are not aware that they are obliged to address the disputes by taking into account the case law of the European Union and the case law of the ECtHR. Therefore, domestic judges should scrupulously act as European judges, i.e., if they do not wish to cause the condemnation of the Republic of Slovenia for the non-compliance with international Conventions binding on Slovenia. The damages hereby incurred for the Republic of Slovenia will be greater compared to the domestic damages. The state itself would then be made to bear the responsibility for reprehensible (*mala fide*, bad faith) conduct of the banks.

Here the law must protect the feeble party, the borrower, especially because the latter is deceived, poorly informed and not qualified to predict future currency ratios. Notoriously (judicial notce!), the banks had at their disposal the international counsel of specialised experts.

The Responsibility of the Central Bank

Moreover, the issue should be raised as to the primary responsibility of the Slovenia's Central Bank, "the Bank of Slovenia". The latter has only issued exceedingly mild recommendations to the effect that the prospective borrowers were to be "adequately informed" about the risks of ForEx mortgages.

But the comparison between the comportment of e.g. the Austrian Central bank on the one and the Bank of Slovenia on the other hand demonstrates that the Central Bank ought in fact *a limine* proscribe the advertising of the toxic mortgages upon the unsuspecting borrowers. The net result and proof of this difference between the two countries was the reprehensible behaviour of Austrian banks, abstaining from pushing such loans on the domestic territory of Austria –, but doing it instead on the territory of the Republic of Slovenia.

In the constitutional context, obviously, the central bank is a state institution. The Constitutional Court would be well advised to sanction central bank's connivance with the commercial banks' manipulations, where the latter could easily be prevented if the Bank of Slovenia were to react with requisite strictness. If not, the responsibility of the State itself at the ECtHR will be all the more obvious.

Violations of Constitutional and Convention rights

The consequences for borrowers, due to unexpected changes[33] of currency ratios between the

[33] In French criminal investigation and the examination of the Mme Nathalie Chévalier, a senior official at BNP Paribas,

Swiss franc and Euro to the benefit of the Swiss franc[34], result in cases of long-term mortgages in many existential tragedies such that they lead to endangering of social security and human dignity of borrowers. Such consequences constitute violations of the types of human rights set out in the Constitution and in the ECHR.

Violation of the Constitutional Right to Property

First and foremost, we are dealing with the violation of the right to property referred to in Article 33 of the Constitution of the Republic of Slovenia (hereinafter: the Constitution) and the social function of property referred to in Article 67 of the Constitution –, and the right to peaceful enjoyment of personal property referred to in Article 1 of the Protocol no. 1 to the ECtHR. In addition, this is a case of an excessive, disproportional and therefore unconstitutional interference with the *legal certainty* as one of the fundamental principles of the rule of law as referred to in Article 2 of the Constitution.

Since vis-à-vis the banks the borrowers are unfairly and unilaterally burdened with the now materialised risks related to the change in the currency ratio between the Euro and the Swiss franc –, the constitutional *rights to equality* before the law referred to in Article 14, paragraph 2, of the Constitution –, and the *rights to equal protection of rights* in proceedings before courts and other state authorities referred to in Article 22 of the Constitution – are now the central issue of domestic judicial review.

The loans denominated in Swiss francs, as pointed out above, were toxic business transactions. Unbeknownst to the borrowers the risks calculated by the banks were surreptitiously transferred to the borrowers. Meanwhile, however, the banks safeguarded their grounds for unjust enrichment (*condictio*) with unilaterally imposed loan terms. Such relationships between the parties to the toxic loan agreements are reminiscent of the Roman law *societas leonina,* which was null and void because exclusive benefits could only be attributable to one side, in our case the banks.

In the Chapter on human rights and fundamental freedoms, the Constitution in Article 33 addresses the right to private property without any restrictions; it emphasizes that in Slovenia, the

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Paris, in the case that is presently before the *Cour de cassation* in Paris, see *supra* note no. 11, it was made clear that the financial product was based on a complex mathematical calculation (algorithm), that had caused "tectonic" changes as consequence of minor changes in the exchange rate CHR/€. In other words, even a slightest increase of the ChF exchange rate was to have catastrophic results for the borrower.

[34] The increase in the value of the Swiss franc did not have, and still does not have, any impact on the real Euro value of the loans unnecessarily denominated in Swiss francs. Euro is the currency of 19 members of the European Union, whereas ChF is a currency of a single state. This makes it patent that there was absolutely no need to "safeguard" an Euro-denominated loan vis-à-vis ChF. Due to the singular Swiss macroeconomic conditions, the value of the Swiss franc had been for many years increasing vis-à-vis *all other* currencies, and not just vis-à-vis the Euro. This proves *ex post facto* that the ChF denomination of the mislead borrowers was solely of a deceptive speculative nature!

right to private property is guaranteed.

The Constitutional Court has, in its decision in *case no. U-I-60/98 of 16 July 1998,* adopted the view that the purpose of constitutional guarantee of property is the realisation of individual's freedom. In its decision in *case no. U-I-19/92 of 26 November 1992*, it gave this principle a more specific expression to the effect that the reason for prohibiting of certain activity is an interference with the property in that it limits the possibility for obtaining assets: *"It is necessary to take into account the fact that property may represent an existential precondition for any person."* (from the decision in *case no. Up-154/95 of 11 April 1996*). According to the opinion of the Constitutional Court, the constitutional right to private property also means *"protection against interferences in other existing legal situations, which in a similar manner as the civil law ownership right have a property value for the individual and as such enable him the freedom of action in the property area"*.

In further provisions, the Constitution contains restrictions of property rights when it comes to foreigners' real estate ownership concerning the public interest, the protection of land, the protection of environment and to the protection of natural and cultural heritage. Dr Igor Kaučič in a concentrated manner summarizes the constitutional regulation of property:[35]

In the Chapter of the Constitution on economic in social relations, the Constitution contains several provisions that mainly refer to socio-economic rights and provisions that may be primarily understood as concretizations of the generally guaranteed right to private property and to a certain extent also as limitation of it. In Article 67, it is emphasized that the law (*réserve à la loi*) shall establish the manner in which property is acquired and enjoyed – in order to ensure its economic, *social,* and environmental function. This means that the law issued pursuant to Article 67 of the Constitution may limit the ownership rights only for reasons exhaustively listed in this Article.

For the *social function* of property it could be said that it represents concretisation of principles of the "social state" referred to in Article 2 of the Constitution.[36] [37]

With regard to the regulation of expropriation, Article 69 of the Constitution stipulates that the ownership rights to real estate may be revoked or limited only in public interest and with compensation in kind or monetary compensation under conditions established by law. As per

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[35] *"The Constitution thus emphasizes that the right to private property is not just an economic right, but at the same time also a fundamental human right, a classic liberal right limited by economic, social and environmental protection function.* Kaučič and Grad, USTAVNA UREDITEV SLOVENIJE *(Constitutional regulation of Slovenia)*, GV Založba, Ljubljana, 2008, p.1

[36] The decision in *case no. U-I-3685/2015 of 4 April 2017*

[37] Such constitutional regulation of property refers not only to natural persons, but also to legal entities. The Constitutional Court has, with *the decision no. U-I-25/92 of 4 March 1993,* repealed the word "natural" (in corresponding semantical interpretation) in Article 3, paragraph 1, in Articles 4 and 5 and in Article 10, paragraph 2 of the *Denationalisation Act*. The Constitutional Court has overturned this provision of the law in order to balance in this manner all entities, both natural and legal persons, as denationalisation beneficiaries.

Commentary on the Constitution[38] this even refers to municipalities (local authorities) and not just to persons of private law.[39]

The Case-Law of the ECtHR and the Case-Law of the European Court of Human Rights in Strasbourg

The ECtHR, which for Slovenia as member of the Council of Europe sets out binding minimal standards of protection of human rights and freedoms, regulates the protection of property in Article 1 of the Protocol no. 1 to this Convention.[40] This provision guarantees to all natural and legal persons the right to respect for their property. Acceptable proportionate interferences are only possible if enacted by law concerning payment of taxes or supervision in this regard, or if the property is not being used in compliance with public interest.

Pursuant to this provision, the European Court of Human Rights, on the grounds of *disproportionate* interfering with the protection of property, condemned (also to payment!) several member states of the Council of Europe, *inter alia* also in cases where the Court was not dealing property *stricto sensu*. In the case of *Hutten Chapska v. Poland* state interference occurred with individual property *entitlements* secondarily deriving from property (rent control); it concerned the entitlement of owners of residential houses to proportionate rent payments. Because the tenants were paying too low (*rent control*) a rent it was impossible for the owners of denationalised property to maintain their houses. The essence of the case was thus *disproportionality* between the both variables.

The Constitution, too, guarantees the protection of the general principle of *proportionality* as one of the principles of a state governed by the rule of law, referred to in Article 2: *"In this context, the Constitutional Court first performs an assessment in terms of the criteria of eligibility. It examines whether the interference is appropriate for achieving the objective pursued, i.e., whether the objective may be achieved other than by interfering with the person's right. […] In the context of assessing the compliance of interference with the general principle of proportionality, the Constitutional Court also assesses whether the interference is at all necessary (compelling state interest) in order to achieve the*

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[38] See, *Supplement-A*, FDŠ, Ljubljana, 2011 at p.1006

[39] A different opinion was expressed in concurring separate opinion to the decision in c*ase no. U-I-170/94* by the then judge Krivic: the Constitution guarantees the ownership right to private parties *"right vis-à-vis the state or the holders of public authorities but not vis-à-vis among private entities among themselves"*.

On the surface, this sounds reasonable in the simplest private law case. However, the moment the private dispute between private parties is being litigated, the previously private disputes transform themselves into the public question, as before the ECtHR, because the public state authority is involved in resolving the previously private controversy.

[40] [The First] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1, *"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."*

objective pursued in that the objective cannot (to the same extent) be achieved with a milder interference or even without any interference –, and if the gravity of consequences of the reviewed interference into the affected person's right is proportionate to the value of the objective pursued or benefits resulting due to this interference." (Constitutional Court's *decision no. U-I-74/12 of 13 September 2012*).

In terms of a potential appeal to the ECtHR, the focus shall be on the issue decisive in the recent case *Vaskrsič v. Slovenia.* The issue in question is *disproportionality* of property interference. In this case, the Republic of Slovenia was sentenced to pay € 85,000 because, due to a private law enforcement of a minor municipality debt, the interference of the state into the ownership right - compared to the nominal debt of about € 500, was disproportionate. This was therefore a case of a quantitative disproportionality between the debt enforced and executed vis-à-vis the complainant and the minor claim of local authorities. Instead of a proportionate seizure, the first instance court – and in the end even the Constitutional Court! – approved (without motivating the decision) this disproportionality. In the end the Republic of Slovenia incurred a moral condemnation and the payment of € 85,000.

Concerning the Slovenian ForEx mortgages, the case before the ECtHR will be financial disproportionality between the practically non-existing risk for the banks on one and the responsibility of the mortgagees on the other hand:[41] all this, as in the case of *Vaskrsić,* with catastrophic consequences for the debtor. This argumentation will be the subject matter of application to the ECtHR and the state and its taxpayer - and not the banks, which fraudulently profited in terms of unjust enrichment!. The state will have out of its budget to pay for the banks' profits and their unjust enrichment.

In this case, the state, due to the internal mechanics of legal relationships, shall not have the right to domestic recourse ("*regres*" in Roman and in domestic law). In short, the taxpayers, as so many times before, shall unjustifiably cover the unjust enrichment of the banks,.

Law of the European Union

The European Union law guarantees the protection of property and assets written in the EU Charter of Fundamental Rights. In this, the EU law in particular prevents those interferences with the ownership right that would indicate a limitation of free movement of services and people in the EU internal market.

[41] As stated above, the imbalance and thus the disproportionality derives from the fact that the banks knew exactly that they are not succumbing to the risk of depreciation of the Swiss franc, whereas the borrowers did not know that (thus: pseudo-aleatory legal transaction). Moreover, the sufficient elements of a criminal offence of fraud lie in the fact that the banks (at first Austrian ones and after that as it turned out that the Republic of Slovenia through its central bank did not appropriately and strictly react, even the domestic ones) intentionally deceived the borrowers.

The EU Charter of Fundamental Rights in its Article 17 stipulates that everyone *"has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions"*. No one may be deprived of his or her possessions (in our case: disproportionately deprived) except in the public interest and in cases and under the conditions provided for by the law –, subject to fair compensation being paid in good time for their loss.

The law may regulate the use of property so far as is necessary for the general interest. The EU adopts the ECtHR case law (precedents) as its own fundamental principles of EU law, and in addition, it undertook with the Treaty of Lisbon to accede to the Convention.

The violation of the ECHR lies in the fact that the borrowers were deceived to the effect that they were entering into the loan agreement, which was fictitious since under its auspices a pseudo-aleatory (in fact monetary speculation) business transaction was hiding, which bore risks for the borrowers that are similar as in the futures speculative stock-exchange transactions.[42] The banks, which premeditated such a loan package (*toxic loan*), failed to forewarn the consumers of the real danger of negative changes of the exchange rate ratio between the Euro and the Swiss Franc.

The borrowers, as laymen in financial terms in counter distinction to the banks, could not have imagined the changes in currency ratios, and the banks failed to present them with *simulated calculations* in case of the increase of interest and the principal amount were there to be a changed ratio between the two currencies. These simulated calculations (according to the respective algorithm) would immediately show the disproportionate increase in borrower's charges with even a minimal increase in the value of the ChF exchange rate.

Slovenian Domestic Legal Instances

Such attitude towards the borrowers is unacceptable from the perspective of principles of

[42] Even if "adequate" information given by the banks to customers were to be proffered, a lay customer may have been unable to appreciate the implicit risk. *A fortiori*, if the customer had been unable to obtain a Euro loan in the first place but was instead only able to obtain a ChF loan, this in itself obtains in a double problem.

First, such a customer was practically forced to obtain a ForEx loan, irrespective of the "adequate warning", because this was the only one available to him and, *second*, the banks knew full well that there was a subsequent probability that such a mortgage will be, for the borrower, impossible to repay. This derives from the obvious probability deriving from the customer's inability to obtain a Euro loan in the first place. This reminds of the bursting of the infamous "housing bubble" causing a global financial crisis, where similar loans were, by mathematical algorithm, packaged into indiscernible toxic financial products, later re-sold to unsuspecting third parties as if they had been insured against possible losses due to the impossibility of them ever being repaid.

The consequence in our case was less profitable to the banks. The unpaid toxic loans were ceded to the virtual corporation in Switzerland by an 80% discount (see *infra in fine*). This entity, created by Slovenian commercial banks (NLB, NKBM), is now proceeding in ruthlessly pushing the incapable borrowers into bankruptcy, seizing all their movable and immovable assets and extorting from these appalling practices to its differential benefice, a greater than 20% profit. This amounts to the cartel-like behaviour of Slovenian commercial banks, a veritable *conspiracy to defraud* and to extort. The *question préalable*, the preliminary question, is, of course, whether the commercial banks were planning and premeditating this in the first place. They must have certainly been aware that the loans obtained for less capable (of repayment) borrowers, will inexorably result in their (1) inability to pay and (2) in their unavoidable subsequent bankruptcy. The name of the loansharking corporation in Switzerland is DDM Invest. See, *infra in fine*!

domestic (and foreign) private law of obligations, because it cannot be deemed as an act of good faith, and is even less acceptable from the perspective of the human rights law.

The regular private courts of law in Slovenia (as opposed to national courts in some other European countries) have in such conduct neither recognized the violations of the principles of fair treatment customary in the private law of obligations, nor has a legislative proceeding been instituted yet that would facilitate the situation of the borrowers.[43] Therefore, it will now be the turn of assessing the violations of human rights before the Constitutional Court, and if necessary also before the ECtHR and the Court of Justice of the European Union.

The borrowers, in the first place, *did not need* their loans in Swiss francs but in Euros, i.e., in a well-known trustworthy currency, the stability of which is guaranteed by the most successful economies in the European Union. It has now, in the process of dealing with this case, become abundantly clear that the financial experts in Europe (and elsewhere) were *au courant* with the concomitant underestimated value of Swiss franc, i.e., were fully aware that its monetary nominal value was going to rise. In legal terms, this implies that the knowledge was *notorious*. The courts, therefore, should take, in processing these cases, *judicial notice*.

In terms of Slovene constitutional law, the toxic mortgages resulted in "excessive interference with the ownership right" of the borrowers –, as referred to in Article 33 of the Constitution. The borrowers, who in repaying the loan and interest are now overpaying the real value of funds they had received, are aggrieved also in terms of Article 69 of the Constitution referring to *the social function* of property.[44] The banks have contracted the loan agreements in such a manner as to lead to disproportionate increase of annuities in repayments of loans denominated in Swiss francs. In turn, this led to the endangering of constitutional "social security" clause [45] and even to the very financial (and even physical) existence of many borrowers.

In view of this, the Republic of Slovenia should now take care that *the banks,* unjustly enriched (*condictio*, unjust enrichment) with such transactions, would domestically attend to the borrower's recovery of damages. In other words, this should not fall upon the shoulders, as so many times before, of the Slovene taxpayers.[46]

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[43] The Slovenian Consumers' Association also advocates the active role of the state in resolving the problems of the borrowers in the already cited material *Partial report on the issue of foreign-currency loans*, p. 6.

[44] If anything, such practices are, at a minimum, "antisocial", i.e., in demonstrably criminal actions of the banks' management.

[45] This is inconsistent with the constitutional decision concerning the right to social security referred to in Article 50 of the Constitution. This, in Slovenia, is a fundamental human right the basis of which is in the provision of Article 2 of the Constitution on the "social state". See, Kresal, *The right to social security*, in: *The Commentary on the Constitution of the Republic of Slovenia,* Šturm, ed., FDŠ, Ljubljana, 2002, p. 518 et seq.

[46] Other countries should heed this advice. If the domestic legislation and/or the courts will not remedy the situation in the country, the cases will rise to the ECtHR. If they do, the state concerned – and not the domestic banks – will be held responsible for the human rights violations as per Protocol I, art. 1, par. 1 of the ECHR. Whether *ex post facto* the state will be able to compensate itself vis-à-vis the banks, is an open question.

Violation of the Principle of Legal Certainty as one of the Principles of the Rule of Law referred to in Article 2 of the Constitution

The principles of the rule of law referred to in Article 2 of the Constitution are of a universal nature; they are not soft law; they are legally binding.[47]

In our case, the legal certainty means *bona fide* bank operations, i.e., that the borrower must be legally protected against the fraudulent conduct of the banks. If legal certainty has not been guaranteed in advance, it is the least that is expected from the state to sanction this legal non-certainty vis-à-vis the banks after the legal and factual consequences have already occurred, i.e., *ex tunc* and *ex post facto*.[48]

The Constitutional Court points out that everyone has the right to maintain trust in the applicable law and accordingly to adjust his actions and expectations (*decision in case no. U-I-322/96*).[49]

The Constitution, in its Article 2, associates the principles of the rule of law and of a social state.[50] The "social state" is, in Article 2, placed on an equal footing with the rule of law. Unfortunately this doctrine has not yet in the decisions of the Constitutional Court been subject of the dynamic and sufficiently wide interpretation.[51]

Social state (*"socialna država"*)

The Constitutional Court, in the social field, has maintained that the prohibition of unjust discrimination is not sufficient; the State is required to act positively, has a *positive obligation*, to guarantee the equality and the attendant social security, which is frequently more significant (compare the *decision in case no. U-I- 298/96*).[52]

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[47] According to H.L.A Hart, these are *prescriptive* norms. In relation to them all other respective norms are *instrumental*. It is thus for the Constitutional Court to give these prescriptive norms their imperative significance.

[48] In practical terms, as in Croatia, this means that the ForEx loans should be reprogrammed *ex tunc*.

The contractual relationship between the bank and the borrower is retroactively brought to its beginning in time. The bank, for all of his currency-dependent overpayments, compensates the borrower; his principal and his interests are retroactively recalculated, which is thereafter computed into his future payments of the principal and of his interests!

[49] This raises an additional question. The *legal tender* on the territory of the Republic of Slovenia has been in the critical period, at first the Slovenian *tolar* and later on the European Euro. In the transitional period, the Slovenian tolar was pegged to the value of Euro. The banks behaved as if that this does not apply.

The foreign-currency of a private Slovenian loan agreement implicitly denies that the domestic currency on the territory of the Republic of Slovenia would be the legal tender. This issue would require a special discussion, but the least that is true here is the fact that the country has tolerated and ignored violation of the provision (also constitutional) concerning the Slovene legal tender on its domestic territory.

[50] The somewhat awkward syntagm of the so-called "social state" is idiosyncratic to the new East European constitutions. It refers to the social security, in the broad sense, of the citizens and is semantically analogous to the "legal state" (German *Rechtsstaat*), i.e., the state governed by the rule of law.

[51] Kresal, in: *The Commentary on the Constitution of the Republic of Slovenia*, *ibidem*, p. 90 *et seq.*

[52] In the language of the ECtHR this, as opposed to the *negative obligation,* refers to the *positive obligation* of state. In the given case, thus the Republic of Slovenia shall not be able to come up with an excuse before the ECtHR, as though it is not "to blame for the bank abuses" subject to the prior constitutional appeal. No, the state has a positive obligation in such case to actively (e.g. with the law or through ordinary courts of law) intervene into the events on the banking market, prevent

Position taken by the Croatian Constitutional Court

The Constitutional Court of the Republic of Croatia has also referred to the principles of a social state in its decision (*case no. U-I-3685/2015*). It recognized that the respective Croatian law, which alleviates the position of the borrowers who have taken out loans denominated in Swiss francs, is not unconstitutional.[53]

According to the Croatian constitutional assessment, the basis for such finding are in the provisions of the Constitution of the Republic of Croatia concerning the "social state" and the *positive obligation of the state* is to promote economic progress and social welfare of its citizens. The Croatian Constitutional Court refers to the "*social justice as a component of the social state"* and maintains that the legislator has a wide discretion in his efforts to establish equitable social regulation.[54]

The Constitutional Court of Slovenia, too, has repeatedly reversed the validity of legal provisions –, due to the breach of the principle of *legal certainty*. Thus, for example in the *case no. U-I-356/02*, it established the violation of the principle of the rule of law, referred to in Article 2 of the Constitution. In this case the competent tax authority had mandated the extent of tax obligations of the assessable person and thereby placed him into a legally precarious situation because the interests had been running at the time when the tax obligation of the taxpayer was not yet determined. The Constitutional Court prevented such running of interest by an immediate provisional measure to be applied in the interim period, while it was processing the case. In the end, it found the situation to have been unconstitutional.

The Constitutional Court has also, with several of its decisions, guaranteed that the anticipated (future) entitlements of claimants, i.e., their legitimate expectations, are protected, in particular in the process of denationalisation.

In case of loans denominated in Swiss francs or pegged to the currency clause, the borrowers could not have anticipated and could not have foreseen that it shall compel a drastic increase of the principal amount and the interest, due to the change of currency ratios between the Swiss franc and the Euro.[55] Instead, the banks misleadingly pretended to the stability of the loan; in individual cases they

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toxic bank products and settle the violations of human rights, which are manifestly contrary to the ECHR.

[53] (*U-IP-3820/2009, U-IP-3826/09*, "Narodne novine" no. 143/09)

Unlike Croatia, the Slovene legislator has not adopted such a law. Instead of the problem being gradually and incrementally – drop by drop trickling down to the individual borrowers –, resolved through the binding precedent case law by the Supreme Court, partially, a systemic legislative regulation of this issue would be much more in place. When the case will be addressed before the ECtHR, it shall most likely require just that, as for example in the case of *Ališič v. Slovenia*, i.e., a systemic legislative solution of the problem will be mandated.

[54] See http://hrvatska-danas.com/2017/04/07/ustavni-sud-odbio-banke-konverzija-chf-je-zakonita-izjednaceni- su-s-ostalim-kreditima/

[55] This could perhaps be at least partly excusable in the event the borrowers would been clearly and explicitly, with an applicable simulation/calculation, warned of such possibility in advance, for example, by offering them *specific probability financial calculations* that would have revealed the possibility of drastic increases in values of loans denominated in foreign currency. Given the complexity of this calculation, only a computerized simulation program would

have promised that the principal amount and the interest would increase less than they would if the loans were not to be denominated in Swiss francs. With such marketing of toxic bank products of domestic and foreign banks in Slovenia, the consumers were deceived and placed in a precarious position. This resulted in a disproportionate increase of the principal amount and interest of their loans, which they had not been able to expect, while the banks were in fact able to forecast them.

In the end, this resulted in a violation of the principle of *legal certainty* and in *disproportionate interference* into their social security referred to in Article 2 and 50 of the Constitution.

Violation of the Right to Equality before the Law and to Equal Treatment referred to in Article 14, paragraph 2, and Article 22 of the Slovenian Constitution

Article 14, paragraph 2 of the Constitution stipulates that all are equal before the law. This is an introductory provision of the constitutional Chapter on rights and freedoms, which have a special significance and gravity in the Constitutional Court's decisions.[56]

The constitutional law theory emphasizes that the legislator must regulate essentially equal and similar relations equally and different differently.[57] Also when applying the law, the state authorities must address and settle essentially identical cases equally, so that before the law under equal conditions all are equal.

The principle of equality must therefore be complied with when setting up and applying the law. In this regard, Article 22 of the Constitution is also important, which says that everyone *"shall be guaranteed equal protection of rights in any proceeding before a court and before other state authorities, local community authorities, and bearers of public authority that decide on his rights, duties, or legal interests"*. In our case, the ordinary courts of law should have established the violation of equality when dealing with customers, who were *de facto* discriminated against vis-à-vis the banks in taking out loan agreements in Swiss francs. Since the ordinary courts failed to do so,[58] they also

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have been sufficient. See, *supra*, note 12

[56] Adamovich, former president of the Austrian Constitutional Court, has in his address on the Constitution Day at the Constitutional Court of the Republic of Slovenia, emphasized the significance of the principle of equality before the law, which is in German, Slovene and Austrian Constitutions defined in a very similar way. The law must be applied equally for all without any privileges. "*This corresponds to the usual historical comprehension of the principle of equality already since the French Revolution onwards..."* Adamovich, *Keynote speech on the Constitution Day at the Constitutional Court of the Republic of Slovenia, Ljubljana*, December 2003, p. 5, available on web sites of the Constitutional Court: www.us-rs.si.

[57] *Thlimenos v. Greece* http://hudoc.ECtHR.coe.int/eng?i=001-58561. In this case, the doctrine of the ECtHR on the duty of the state to address unequal situations in different ways was established for the first time. In our case it is a contractual inequality of customers, i.e., for the ordinary courts of law (and in the end of the Constitutional Court) to consider this inequality (in informing contractual parties) and repeal the contracts based on such inequality. If this is not done, the domestic courts are in conflict with the case law of the ECtHR, because they failed to address different situations of the contracting parties differently.

[58] Two such cases, to be precise, are now pending before the Supreme Court of Slovenia, some of them are on second instance appeals and many others are pending before the first instance courts. Given the grave situation of certain of borrowers, the Supreme Court should prioritize these cases and come to an adequate conclusion. If this were to be the case, because the Sup.Ct. judgment acts *de facto* as a precedent, the number of ca. 16.000 aggrieved borrowers will proceed on

caused unequal treatment of the parties to the legal controversy, the dispute. This does not comply with Article 22 of the Constitution and Article 6, paragraph 1 of the ECtHR.

Also, according to the established Constitutional Court's judicial review case law, equality before the law means that those who are essentially in the same position must be treated equally, and those, who are essentially in a different situation, be treated differently. According to the established constitutional case law of the Constitutional Court, the constitutional principle of equality before the law, referred to in Article 14, paragraph 2 of the Constitution, binds the legislator to address equal situations equally. If the legislator regulates such positions differently, then a valid reason must exist for such inequality, which arises from the nature of things (*decision in case no. U-I-239/14)*.[59] This applies equally to the regulation and to the constitutional case law in other European countries where the banks offered loans denominated in Swiss francs.

Usually, the violations of the adversarial principle and the principle of equality of arms are addressed as violations of the procedural right to equal treatment referred to in Article 22. In any case, further to Article 22, the equal protection of rights *"in particular in relation to the other party"* (*decision in case no. Up-74/95*) is of decisive importance.

The issues of equality before the law and equal treatment before the courts are associated with the comparison of different, here contractual, positions of the parties, which is essential for the case under consideration.[60] The Constitutional Court, for example, when the case was about the blind and the visually impaired complainant, upheld such a comparison in order to assert the principle that in essence it is also necessary to regulate different situations differently, in this case for the benefit of the blind and the visually impaired (*decision in case no. U-I-146/07*).

This, most certainly, may be compared to the unequal position of the borrower vis-à-vis the bank, who is taking out a bank loan. It was simply not within the plain scope of the consumer to be able to anticipate long-term changes in ratios of the currencies of the European countries and be able to predict and take this into account when entering into a loan agreement, where the ratio between the

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case-by-case basis through the regular courts across the country.

Because the treatment of these cases would then be individualized, this would be for all concerned parties an acceptable – although slow and incremental – solution. If the case ends up in the Constitutional Court, it, too, may issue a precedent. But it may also request the legislature (*Državni zbor*) to promulgate a law that would tackle the problem systemically. This, in turn, would most probably imply a mandate to the regular courts to act as described above.

[59] The precedent case law of the ECtHR refers to the theory of "proportionality". However, the ECtHR doctrine indirectly (according to the German administrative-legal tradition) derives from the U.S. constitutional principle of equality (*equal protection of the laws*). At this point, before the case comes before the ECtHR, we should only mention that according to the Convention, we are speaking of the second paragraphs of all the relevant Articles of the Convention.

In case of Article 1, paragraph 2 of the First Protocol, the critical text reads as follows: *"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."*

The issue will therefore be whether the critical omission of the Republic of Slovenia to intervene (positive obligation) in the given problem in compliance with this text, was "disproportionate" within the meaning that was not covered by any of the elements listed exhaustively in the above citation.

[60] See, the leading decision of the ECtHR, *Thlimenos v. Greece*, *supra* note no. 47

currencies such as the Euro and the Swiss franc shall change on a long-term basis. When assessing the inequality between the contracting parties, this should have already been considered by the ordinary courts of law.[61]

The second case, where the Constitutional Court compared different positions of the parties is even more similar to the present case. The Constitutional Court prevented the complainants in a civil dispute, with regard to determining the value of the subject of dispute, to be in a more favourable position due to the currency clause –, in comparison to those, the claims of who were in domestic currency (*decision in case no. Up-613/02*). Here, when we compare the positions of the bank and of the borrowers, we must take into account that on one side there are financial institutions, which according to the nature of things have the guaranteed assistance of the best financial experts, and on the other side there are mostly inexpert customers, borrowers who do not possess such knowledge and are therefore also the weaker party when it comes to the conclusion of loan agreements. The inequality and the consequent discrimination are therefore for anyone to see.

Certainly, the borrower cannot invoke the lack of knowledge of the regulations. However, this is not about the principle *ignorantia juris nocet*, because this was not the case of ignorance of (otherwise non-existent) laws and regulations. It is about the issue as to whether which of the both sides could have anticipated future long-term *financial* changes in the value of the currency. The ignorance, therefore, had not been "about the law" –, it was about the *financial probabilities* of which the borrowers were understandably ignorant.

From the materials concerning *criminal* investigations in France, it derives that the banks have silenced in their own ranks those professionals, who had warned about the unacceptability of bank toxic products, where in the context of the loan relationship, the borrower bears the entire uninformed risk related to future changes in currency ratios.

However, the same was obviously happening in the banks that offered loans in Slovenia, at least judging by the misleading advertising of alleged advantages of loans in Swiss francs. The banks speculated in bad faith (*mala fide*) that the value of the Swiss franc shall again and significantly upturn. At this point, it is necessary to point out the fact that the toxic algorithm was set up in such a manner that minimal increases in the value of ChF resulted in large increases of debt of a deceived borrower.[62]

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[61] In European law, in constitutional law and in domestic private law the consent of the party to any contract must be free and informed. As far as we know from the contribution of a collaborator (Barcelona meeting, May 2017) in the Spanish Supreme Court, the latter focuses on uninformed consent while deciding the issue of ForEx mortgages in Spain.

[62] As per testimony of Mme Chévalier, she, as BNP Paribas manager, the ForEx mortgages were literally forced upon the midlevel management. She did not (!) understand the financial implications, she only suspected them, because the whole toxic bank product was dissimulated in a complex mathematical calculation (algorithm).

Accordingly, she maintained that the sole mode of figuring out the financial consequences would be to have a simulation program showing for how much would an increase in value of ChF result in the increment of the loan in terms

The mortgages denominated in Swiss francs or pegged to the currency clause, which allegedly should have maintained the real value of a loan over a longer period of returning the loan, caused disproportionate burden attributed to only one side, the borrowers. Such disadvantage to borrowers (unjust enrichment of banks) due to the changes, on which borrowers had no impact (changes in ratios between the currencies), is problematic from the perspective of the principles of the *law of obligations*. This is that much more unacceptable, since this was the case of massive numbers of agreements in clear and unfair disadvantage to the borrowers. Therefore, the formalistic approach of the domestic courts is appallingly inappropriate, because the assumption of freedom of choice of borrowers (free and informed consent) is highly questionable.[63]

In comparison, the Constitutional Court of Croatia has, in the above cited decision (*case no. U-I-3685/2015*), established that the currency clause, which should otherwise be designed merely to preserve the real value of the loan, was being distorted as a basis of unjust enrichment of banks to the detriment of borrowers. The Constitutional Court of Croatia opined that this had been an interference with "the equality of contracting parties" –, to the effect that it placed the debtors in a subordinated position and forced them to repay the loans to a significantly superior extent when compared to the real value of funds acquired earlier. The warning of the Croatian Constitutional Court is convincing: the currency clause should be only be used to preserve the *real* value of the loan and the contractual balance between the parties.

In the Slovenian case, it is therefore *a fortiori* true that the banks had no legitimacy when they denominated the completely stable Euro loans in Swiss francs.[64]

Further Developments: Factoring of the Borrowers Debts to a Third Party (Cession of Receivables)

Subsequently to the first draft of this Memorandum and in time of this writing, other developments initiated by the Slovene banks gravely exacerbated the position of the borrowers unable to pay their mortgages or their other debts to the bank in question.

For example, at least the NLB and NKBM Slovenian banks are now transferring the debts

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of Euros. The investigating judge (*juge d'instruction*) then inquired of Mme Chévalier as to whether she had been aware of the simulation device called "COMET", to which the witness replied that she had never heard of it. The research by us as to the existence of such a simulation program on Internet did not yield a result.

[63] To the best of our knowledge, the formalistic treatment of these cases is prevalent not only in Slovenia but also in the Republic of Serbia. Similarly, the absurd assertion of the Slovene Ministry of Finance to the effect that such practices were "not illegal", is an outgrowth of a completely unenlightened formalistic premise as to what it means for the particular practice to be "illegal". This goes beyond simplistic legal formalism.

[64] As much prior to this the case of loans was in Slovenian *tolars*, it must be taken into account that the tolar in its value had already been pegged – similarly as the Croatian kuna still is – to the value of the Euro. Therefore, there was no legitimate fear that it would come to a decrease in the value of the bank claim.

from the aggrieved mortgage borrowers to an *ad hoc* factoring of receivables corporation set up in Switzerland. The details concerning this set up are now becoming available, as is the following information. The bank is selling, allegedly at 80% discount, the nonperforming debts to the factor. The factor, in turn, is claiming these debts vis-à-vis the mortgagee, in principle at 100% rate.

The factor from a safe place in Switzerland, in turn, is claiming these charged sums in the context of the original mortgage. The factor then proceeds adamantly to the judicial execution of the debt, i.e., in the end to the bankruptcy proceedings; the factor does not hesitate to recur to all-embracing seizure of all the assets of the debtor.

Obviously, the first asset in play is the immovable property purchased by the now insolvent mortgagee. The property is then put up on auction, presumably at a price much lower than the value of the original mortgage. However, all other non-performing borrower's assets, too, are subject to bankruptcy seizure, after the immovable property is already repossessed –, not by the bank itself who may wash their hands over this callous procedure, but by the furtive impersonal foreign–based *ad hoc* company set up only for this purpose in Switzerland. Likewise, all movable property of the borrower is put on sale and he is literally deprived of all his property, of his means of survival and finds himself on the street.

Clearly, the bankruptcy itself is the outcome of the plain failure to pay the annuities pegged to the Swiss franc but is in many cases a consequence of the borrower's loss of his or her job entailing further tragedy for a particular mortgagee.

In the business world, factoring is a companies' common practice in situations where the debts are not being paid (in time) to a particular business in need of immediate cash flow and liquidity. However, here this is done vis-à-vis separate individuals who were *ab initio* unable to repay their debt in the higher Euro denomination, which is precisely why they resorted to the lower rate Swiss franc banking loan, i.e., since they were unable to afford a higher Euro interest rate in the first place.

But here we are not dealing with a normal corporate practice! The aggravating circumstance in terms of constitutional law, as well as in terms of the European Convention on Human Rights, is of course the plain internationally illegal "disproportionality" and mercilessness of such a practice vis-à-vis individual borrowers.

We have referred above to the requirements of the "social state" both in Slovenia as well as in Croatian Constitutions to the effect that the business transactions between the banks and the individuals must be fair and equal in terms of their *bona fide* negotiating position, in this case the concealed unilateral pseudo-aleatory situation. Above all, the effects of such massive toxic banking unscrupulous practices must not affect the existential, i.e., "socially secure" standing of the aggrieved population amounting to at least 16.000 borrowers *and their families*.

The banks, of course, were *ab initio* aware of the vulnerable position of those forced to take their loans denominated in Swiss francs in cases where these same citizens were unable to afford a even a slightly higher interest rate for the loans properly denominated in the Euro currency. In other words, the banks must have been aware of the vulnerable position of these borrowers, the mortgagees. Therefore the question arises as to whether offering of such impossible credits conditions to the vulnerable population had not entailed from the very beginning the deliberate speculation as to what is going to happen to these non-performing loans in case the value of the Swiss franc were to rise and make their repayments impossible.

There are two possibilities here. On the one hand the banks could have had no idea concerning the future insolvencies. This is highly improbable given the steady prognosis for the loans nominated in Swiss francs to rise in their cost. Such a hypothesis, at the very least, implies an appalling unwariness on the part of the bankers. This hypothesis is thus not to be taken seriously.

On the other hand, it is probable that the banks knew from the very beginning, as they ought to, that these loans are in case of the rise of the Swiss franc never going to be fully repaid –, in which case the receivables would thereafter be factored to a third-party, at a certain discount. If this were to be the case, the nonperforming loans would initially appear in the bank's balances as simulated, i.e., virtual assets, though it was obvious from the very beginning that these virtual assets are never going to be in fact endorsed. What kind of shady business speculations of the bankers concerning their corrupt private profit had been in the end phase of this conspiracy, we can easily imagine.

Obviously, we don't know specifically at this point as to what kind of mental reservations the bankers were harbouring at the time, i.e., both of the above hypotheses, and perhaps other possibilities, must be kept in mind. Of course, in terms of pure business perspective the factoring of the mortgages and non-performing loans may seem to be a rational business practice.

On the other hand, what might seem to be acceptable from the purely banks' profit-making perspective, without any other more sophisticated private law implications, constitutional law and the law deriving from the European Convention on Human Rights –, is criminally illegal and intolerable. Besides, it is becoming clear (see *infra*) that we are speaking of conspiracy to defraud. The question was (see *infra*) already raised by a member of Slovene National Assembly.

If additional proof is needed for the legal position we are taking here, it must be emphasized that the Slovenian bad banking practices were, in the European context, completely exceptional. To the best of our knowledge, no other European country has ever had recourse to these punishing loan sharking practices charging 8% on late payments, in which innumerable individuals were forced into indefensible precarious conditions –, and some directly to suicide.

For this reason, it is imperative that we exit from the mere profit-making banking perspective

on this urgent question and that we remedy, as soon as possible, before more lives are lost due to consequent suicides to speak only of this, the situation in constitutional and genuinely human rights terms.

That these appalling practices have not yet been corrected in the Slovenian domestic legal system, is largely attributable, as pointed out above, to the fact that these disputes were formalistically dealt with domestic *private law* courts, without any reference as we have already pointed out, to the constitutional, leave be to the case law all the European Court of Human Rights.

Whatever the legal approach to these existential questions for the mortgagees, we must take into account the completely unacceptable social, and ultimately also political, consequences for the aforementioned 16.000 borrowers and their families. It is completely uninteresting in this context that the banks' profit motives were unsatisfied and that it affected their balance sheets because the latter pale before the nasty consequences for the borrowers.

In the Summer of 2016, the NLB (Slovenian) bank preponderantly owned by the State of Slovenia – the managing director at the time being Mr Blaž Brodnjak – factored about 104 millions Euro, with a 80% discount, of the non-performing individual mortgages worth € 104 millions –, to the *Swiss firm DDM Holding*, established *ad hoc casu* on July 22, 2016. The latter has declared that it intends, during a period of 10 years, realize the double of its investment, presumably ca. € 40 millions.[65]

The NLB bank had been assisted in finding the buyers of non-performing debts by a Slovenian consulting firm named *PwC Management*. The middlemen in this business were the Slovenian firms *KF Finance* and *B2 Kapital*. In December 2015, the non-performing individual debtors of the NLB Bank were already subject to judicial auctions, i.e., of judicially executed bankruptcy proceedings.

The non-executed receivables were purchased by the *Swiss DDM Holding* and assisted by the Maribor firm *Prohit*, hiring to this purpose individual lawyers, notaries public, execution officials and even detectives. Their lawyer in Slovenia, Mr Gregor Lepoša, is representing the nominally Swiss DDM Holding. Obviously, a certain level of scrupulousness is necessary to engage in this dubitable business.

Other banks operating in Slovenia, such as the *Austrian Hypo Alpe Adria Bank*, etc. sold their € 168 million non-performing individual debts in Slovenia, Croatia, Serbia and Montenegro to a Norwegian financial firm *B2 Holding*, whereas the Slovenian firm *B2Kapital* purchased another € 110

[65] Factoring is a financial transaction and a type of debtor finance in which a business *sells* its accounts receivable (i.e., invoices) to a third party (called a factor) at a discount. A business will sometimes factor its receivable assets to meet its present and immediate cash needs. Forfaiting is a factoring arrangement used in international trade finance by exporters who wish to sell their receivables to a forfeiter. Factoring is commonly referred to as "accounts receivable factoring", "invoice factoring", and sometimes "accounts receivable financing". See, https://en.wikipedia.org/wiki/Factoring_(finance)

package of debts from *Unicredit Bank*. The greatest proportion of this business in Slovenia, to the best of our present knowledge has been managed by the *NLB* and by the *NKBM banks*.

Meanwhile, the issue has become political. Mr Janko Veber, MP, raised the issue in the National Assembly (*Državni zbor*), announcing the intent to file a criminal complaint given the probable cause to believe that there is a conspiracy to defraud the State of Slovenia (and others).[66] This conspiracy was allegedly amongst the individuals in the managing and supervisory boards of the NLB bank and the implicated private purchasers (the factors). Mr Veber maintained that the receivables (*terjatve*) were (1) subject to a reduced estimate, that (2) there has been no ranking of receivables concerning the probability of their debts being repaid and (3) offering favours to the preselected factors (buyers of receivables) within the conspiracy to cover up past criminal offences and to acquire illegal proceeds from these illicit transactions.

[66] Obviously, the State of Slovenia being the legitimate aggrieved party in this business derives from its preponderant ownership of the NLB previously capitalized with the taxpayers' moneys at least to the sum of one-and-a-half billion Euros.

Conclusion

It arises from the foregoing that the status of 16,000 deceived borrowers in Slovenia is unacceptable in moral, civil law, criminal law, constitutional law terms, as well as in terms of the European Convention on Human Rights.

Also from the significantly narrower point of view of the private law of obligations, since it this is a case of pseudo-aleatory legal transactions, the question of unjust enrichment of banks is beyond a shadow of a doubt. Since the latter, from the civil law perspective, obviously acted in bad faith, a criminal law issue of responsibility of the leading persons in banks is being raised as well (as in France) –, for conspiracy to defraud first the borrowers and in the last analysis the State of Slovenia.

However, the most important finding is that the Republic of Slovenia before the Constitutional Court has its last opportunity to resolve the problem – similarly to the Croatian Constitutional Court – within the domestic legal order and thus spare the country with one more massive pilot judgment before the ECtHR. In this case the burden of unfair conduct of banks would once again be placed upon the shoulders of the taxpayers – not to speak of the moral cost that shall once more be placed on the shoulders of the Republic of Slovenia before the ECtHR.