Constitutional Court of Montenegro through its President Desanka Lopičić and judges – Milorag Gogić, dr Dragoljub Drašković, Miodrag Iličković, Mevlida Muratović, Hamdija Šarkinović and BudimirŠćepanović, based on the provisionsof Article 149, paragraph 1, line 1 of the Constitution of Montenegro, Article 32, paragraph 1 of the Law on the Constitutional Court of Montenegro (»Official Gazette of Montenegro«, No. 64/08, 46/13 and 51/13), at its session on 17 April 2014 with majority of votes handed down the following

**D E C I S I O N**

**I.** The provisions of articles 2 paragraph 2, 3 (paragraphs 1, 3 and 4) and 4 of the Law on Protection of the Interest of the State in Mining and Metallurgical Sector (’’Official Gazette of Montenegro’’, No. 58/13), **are not in compliance with the Constitution** and they shall become defunct on the day of the publishing of this decision.

**II.** The motion for the review of constitutionality of the provisions of Article 1, Article 2 paragraph 1 and Article 3 paragraph 2 of the same Law is **turned down**.

**III**. The Decision herein shall be published in the ’’Official Gazette of Montenegro’’.

**Statement of the reasons**

I.1. The procedure for reviewing constitutionality of the provisions from Article 1, Article 2 paragraph 1 and Article 3 paragraph 2 of the Law quoted above was initiated after the motions thereof were submitted by the Supreme Court of Montenegro and the Government of Montenegro respectively.

1.1. The motion of the Supreme Court of Montenegro stated the following: that the provision from Article 3, paragraph 4 of the Law is not in compliance with the Constitution of Montenegro because it conditions decisions of the court acting in its sole jurisdiction with the prior provision of the approval from the Parliament of Montenegro; that bankruptcy procedure is solely a matter of the court procedure because as regulated by the provision in Article 6 of the Bankruptcy Law, once bankruptcy is filed, the competent court conducts the procedure ex officio; that bankruptcy procedure is defined by law as imperative (Article 7, paragraph 1); that the Constitution prescribes that court decides independently about the issues within the remits of its competence and in compliance with the Constitution, law and ratified international treaties; that providing prior approval from any other administrative body before handing down ruling would represent an illicit interference with the process of administering justice whereby the constitutional principles of division of power and autonomy and independence of court.

1.2. The Government of Montenegro in its motion quoted that the provisions of articles 1, 2, 3 and 4 of the Law are not in compliance with the provisions from articles 11, 17, 19, 20, 58, 118 and 139 of the Constitution of Montenegro and that those provisions of the Law completely derogate the general aspects and principles of the Bankruptcy Law (’’Official Gazette of Montenegro’’, No. 1/11), which guarantee the protection of bankruptcy creditors, their equal treatment and equality within one payment line, economy of operation, exclusively judicial procedure of administering bankruptcy, its regulation (by law) in an imperative manner, preclusive effect of judgment, urgency of the procedure, two instance proceedings and transparency.

3. Parliament of Montenegro and the Government of Montenegro have not submitted their reactions to the arguments stated in the motion.

4. The contested provisions of the Law prescribe that:

„Article 1

This Law regulates the state interest of Montenegro *vis-a-vis* preservation of mining and metallurgical sector in the procedure of selling companies in the course of bankruptcy procedure.

Article 2

Companies in mining and metallurgy sector (hereinafter referred to as: the companies) perform activities that are important for Montenegro and its citizens therefore this law additionally regulates the conditions governing companies’ sale in the course of their bankruptcy procedures.

The companies that have filed for bankruptcy shall be sold by method of whole assets sale.

Article 3

The sale of companies, as legal persons that have filed for bankruptcy is conducted by call for bids after a public call.

Call for bids for sale is forwarded to potential bidders that meet required conditions and who have in preliminary procedure following the public call expressed their interest in becoming strategic investors.

Call for bids shall prescribe conditions for sale that a potential bidder has to meet and in particular the following, that the bidder thereof:

- operates in the mining-metallurgic sector;

operates a higher technological level of mining-metallurgical operation than the company that is given for sale;

- has good reputation and a clean track record when it comes to privatisation of companies;

- has submitted a short-term, mid-term and long-term plan for dynamic and long-term development.

A bankruptcy judge shall hand down a decision on selling company to a strategic investor and conclude sales agreement after it previously gets approval from the Parliament of Montenegro.

Article 4

If sales agreement is concluded in compliance with the procedure from Article 3 of this Law, the state can take the company over only with the approval of the Parliament of Montenegro provided beforehand.”

5. Having considered the contents of the contested provisions of the Law, the Constitutional Court found the provisions of Article 2 paragraph 2, Article 3 paragraphs 1, 3 and 4 and Article 4 of the Law are not in compliance with the Constitution, and that provisions of Article 1, Article 2 paragraph 1 and Article 3 paragraph 2 of the Law are not in compliance with the Constitution.

6. In deciding about this case, the following provisions of the following legislation were deemed relevant:

The Constitution:

’’Article 1 paragraph 2

Montenegro is a civic, democratic, ecological and state of social justice based on the rule of law.

Article 11, paragraphs 1, 2, 3, 4 and 6

The power shall be regulated following the principle of the division of powers into the legislative, executive and judicial.

The relationship between powers shall be based on balance and mutual control.

Constitutionality and legality shall be protected by the Constitutional Court.

Article 16, paragraphs 1 and 5

The law, in accordance with the Constitution, shall regulate:

1. the manner of exercise of human rights and liberties, when this is necessary for their

exercise;

5) other issues relevant for Montenegro’’.

Article 20

Everyone shall have the right to legal remedy against the decision ruling on the right or legally based interest thereof.

Article 32

Everyone shall have the right to fair and public trial within reasonable time before an independent and impartial court established by the law.

Article 58

Property rights shall be guaranteed.

No one shall be deprived of or restricted in property rights, unless when so required by the public interest, with rightful compensation.

Article 118, paragraphs 1 and 2

The court is autonomous and independent.

The court shall rule on the basis of the Constitution, laws and confirmed and published international agreements.

Article 145

The law shall be in conformity with the Constitution and confirmed international agreements, and other regulations shall be in conformity with the Constitution and the law.

Article149, paragraph 1, line 1

The Constitutional Court shall decide on the following: 1) Conformity of laws with the Constitution and confirmed and published international agreements.’’

European Convention of Human Right and Fundamental Freedoms:

Article 6, paragraph 1

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal (…).

7. The quoted provisions of the Constitution imply that Montenegro is a civic, democratic, ecological state and state of social justice based on the rule of law; that the power is regulated by the principle of division of powers into legislative, executive and judicial; that legislative power is delivered by the Parliament, executive by Government and judicial by court; that the power is limited by the Constitution and laws; that constitutionality and legality are protected by the Constitutional Court and that law has to be in compliance with the Constitution and ratified international agreements, and that other regulations shall be in compliance with the Constitution and the law. It ensues from the Constitution that the legislator is authorised to regulate the issues that are in the interest of Montenegro and the interests in mining and metallurgy sector included. The authority to regulate that issue in compliance with Article 16 paragraph 5 of the Constitution entails promulgation of laws that in general and abstract way determine rights and obligations regarding legal issues that are considered the issues of interest of Montenegro in the spirit of the Constitution. The focus is on passing objective legal norms with statutory power that by rule of *pro future* determine the contents and remits of power as of the moment law enters into force. The Constitutional Court found that the notion of "public-general interest" has to be extensively interpreted in the way that national legislator has a broad margin for the interpretation of this term as the expression of economic policy carried out by the state. However, this is not to say that the legislator, based on its margin of appreciation can pass laws of its own liking to the effect of the derogation of the principles determined by the Constitution and systemic laws in certain area. The Constitutional Court also found that the integrity of legal order entails mutual alignment of all legal regulations in Montenegro, which in principle excludes possibility to enact law that regulates one subject matter so as to change legal solutions in systemic laws that regulate that or some other subject matter.

8. By the contested provisions of the Law on Protection of the Interest of the State in Mining and Metallurgical Sector the legislator enshrined the interest of Montenegro in preserving mining-metallurgy sector in the procedure of selling companies through the bankruptcy procedure and it additionally regulated the conditions for sale of the companies through bankruptcy process i.e. the law prescribes that the companies in the mining-metallurgy sector do perform activities that are important for Montenegro and its citizens. When deciding about the arguments presented by the petitioners in this case, the Constitutional court gave consideration to the constitutional principle of the integrity of legal order as set forth in the provisions of Article 145 of the Constitution, given the fact that the legal regime governing bankruptcy procedure is regulated with the Bankruptcy Law[[1]](#footnote-2) and other laws (Article 7, paragraph 2 of the Bankruptcy law)[[2]](#footnote-3). To that end the Bankruptcy Law determines*: terms, manner of initiating and conducting bankruptcy (Article 1 paragraph 1), that bankruptcy is conducted by a competent court with jurisdiction in the territory where the bankruptcy debtor has the seat or residence (Article 14) and that the bodies of bankruptcy procedure are bankruptcy manager/agent and trustee board (Article 22) and other issues pertaining to the implementation of that law.*

9. In searching for answers to several contentious constitutional-legal issues that come up in relation to this case, the Constitutional Court found that it is primarily important to answer the key constitutional-legal question that was asked in the motions thereof: „Do the contested provisions infringe upon the principle of the division of power to legislative, executive and judicial and upon the principle of the rule of law as one of the highest values of the legal order?

9.1. The principle of the division of power from Article 11 of the Constitution, although itself not an independent constitutional value, is one of the elements of the rule of law since it prevents possible concentration of authorities and political power in (only) one body. General principle of the division of power is exercised, inter alia, through functional stability and permanency of division of powers among distinct branches of power – legislative, executive and judicial branch. Each branch of power respectively can operate only within the remits of legal functions and competencies vested in it by the Constitution. The constitutional division of competences between state authorities means inter alia that legislator is not allowed to infringe upon the constitutionally stipulated principles that can be neither expanded nor limited by laws i.e. the Parliament cannot violate the principle of functional permanency.The Constitution delineated statutory functions of state authorities (a branch of state power), but it nonetheless determined mutual relations and manners of establishing cooperation between holders of certain state functions, and it based its relations on “checks and balances” principle in such a way that each branch shall respect the limits that the Constitution set to each of those legal functions by exclusively operating within its respective remits. As found by the Constitutional Court, this means that the legislator cannot either by manner or result of the interpretation of its own functional competences or functional competence of other state authorities infringe upon constitutionally established functional division or constitutionally established remits of power in such way that it bestows on itself or on any other state authority those functional authorities that by virtue of Constitution they do not have or those powers that cannot be considered immanent to certain constitutional functions. That is why the permanency of function must not be violated by decisions of the legislator or laws passed by the Parliament of Montenegro.

9.2. The provisions of Article 118 paragraphs 1 and 2 of the Constitution of Montenegro prescribe the principles of judiciary stipulating that court is autonomous and independent and that it rules on the basis of Constitution, laws and ratified international agreements. The quoted constitutional guarantees are elements of independence of judiciary from other two (branches of) state powers and as long as they are in force, executive and legislative bodies have to refrain from any activity that can affect the independence of the court. That possibility cannot be prescribed by any law, and neither can this one. The independence of court entails that court is a discrete state body that is organized by special organizational rules. The autonomy and independence of court imply freedom of the court from any influence from outside i.e. free and independent administration of justice. That further implies that none other holder of state power can interfere with the work of the court. The Constitutional Court finds that when it comes to bankruptcy, this constitutional guarantee is in compliance with the provisions of Article 32 of the Constitution and Article 6 of the European Convention of Human Rights that guarantee the right to fair trial implying that independent and impartial court already established in accordance with the law[[3]](#footnote-4), in fair and transparent manner hears cases concerning rights and obligations of bankruptcy debtor and bankruptcy creditors and that the entire procedure before court be conducted in compliance with general rules of bankruptcy procedure.

10. European Court for Human Rights in the case *Stran Greek Refineries and Stratis Andreadis* versus *Greece[[4]](#footnote-5),*stressed the importance of the rule of law from the aspect of unlawful influence of legislator on the ruling of courts:

“49. (...)

The principle of the rule of law and the notion of fair trial enshrined in Article 6 (art. 6) preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute. The wording of paragraphs 1 and 2 of Article 12 taken together effectively excluded any meaningful examination of the case by the First Division of the Court of Cassation. Once the constitutionality of those paragraphs had been upheld by the Court of Cassation in plenary session, the First Division’s decision became inevitable.

50. In conclusion, the State infringed the applicants’ rights under Article 6 para. 1 (art. 6-1) by intervening in a manner which was decisive to ensure that the - imminent - outcome of proceedings in which it was a party was favourable to it. There has therefore been a violation of that Article .”

11. Contrary to the quoted constitutional and convention related principles, the contested provisions of Article 3, paragraph 4 and Article 4 of the Law, the legislator conditioned the administration of justice (on selling the company to the strategic investor and concluding sales agreement) in bankruptcy case with previous approval of the Parliament of Montenegro, and it conditioned the state that only with the previous approval of the Parliament of Montenegro it can take over a company unless the contract was concluded in a manner prescribed by the provision of Article 3 of the Law. By granting this power as stipulated in the contested provisions of Article 3, paragraph 4 and Article 4 of the Law to itself, the Parliament of Montenegro – the Constitutional Court found – constituted itself in the way contrary to the Constitution, as a new bankruptcy authority with unacceptable arbitrariness in the procedure thereof. Apart from that, in the provisions of Article 2 paragraph 2 and Article 3 paragraph 1 of the Law, the legislator deprived the authorities for bankruptcy procedure of the right to select the most appropriate model of sale as provided for in Article 134 paragraph 2 of the Bankruptcy Law[[5]](#footnote-6), and also it narrowed down the field of competence of the bankruptcy authorities otherwise granted to them by that Law. In order to have proportionality condition met by the state in certain measures, the measures have to be necessary in the manner that there are neither alternatives nor better options to them. In cases of transition of property from bankruptcy debtor to the state ownership it is necessary to previously meet the condition of fair balance and proportionality between the general interest of the state and the need to protect the rights of parties to the bankruptcy procedure. Also, from the aspect of the constitutional principles on equal status of all participants in the market and equality of all forms of ownership, it is not constitutionally acceptable to put state in less favourable position compared to other participants in the bankruptcy procedure in the manner prescribed in Article 4 of the Law. The Constitutional Court therefore found that the Parliament overstepped its competencies and violated the provisions of Article 11, paragraph 3, Article 32 of the Constitution and Article 6, paragraph 1 of the European Convention for Human Rights on the division of power and right to fair trial before independent and impartial tribunal established on the basis of law. At the same time, by such regulation the legislator has also infringed upon constitutional principle from Article 10, paragraph 2 of the Constitution, that everyone has to observe the Constitution and law, as well as the basic presumption of legal security and legality which, in compliance with the provision of Article 25, provision 3 of the Constitution, cannot be limited either in war or extraordinary situation.

12. The principle of the rule of law as the utmost principle of the constitutional order in Montenegro is exercised through the implementation and protection of the principle of conformity of legal norms. That entails that law has to be in conformity with the Constitution and ratified international agreements and other laws with the Constitution and law. At that, the conformity thereof is assessed not only by formal-legal but also in material-legal terms and by its contents. Law has to be clear and precise in compliance with the specifics of the subject matter it regulates, which is meant to prevent any arbitrariness in interpreting and applying the law or eliminating uncertainty of the person concerned about legal norm and the effect of its application. In the legal order based on the rule of law have to be general and equal for all and legal consequences need to be certain for those they will be applied on.

13. In relation to that the European Court for Human Rights, deciding in the case *Sunday Times (No.1) versus United Kingdom[[6]](#footnote-7)* established for the first time the standard of legality that has to be met in order to have the term “law” in the phrase “prescribed by law” be considered true to its meaning:

"49. In the Court’s opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.”

13.1. In the case *Huvig versus France[[7]](#footnote-8),* the European Court took position that the term „law“ should be interpreted in its essence not the form:

“26. The expression "in accordance with the law", within the meaning of Article 8 § 2 (art. 8-2), requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law.”

13.2. The quoted positions of the European Curt for Human Rights entail that if any restricting measure of the state is to be considered „legal“ in the spirit of the European Convention of Human Rights it has to meet the standard of compliance with the law which requires that four conditions be met: legal basis in domestic law, quality of law, requirement of accessibility of the domestic law, requirements of predictability of domestic law and measure of legal protection in domestic law against arbitrary interferences.

13.3. The Constitutional Court considers as undisputable that the parties concerned with legal norm can neither understand their true and concrete rights and duties nor the effects of their behaviour unless the norm is clear and precise enough. Contrary to the quoted requirements of the European Court for Human Rights when it comes to the quality of law and the standard of lawfulness, the contested provisions of Article 2, paragraph 2 and Article 3 paragraph 1 and 3 of the Law, as per finding of the Constitutional Court, contain a series of ambiguities and imprecise provisions combined with internal collusion. Namely, the contents of the provisions from Article 2 paragraph 2 and Article 3 paragraphs 1 and 3 of the Law the following is not clear as for:

- whether companies (in mining and metallurgical sector) are to be sold following the method of selling the whole property (Article 2 paragraph 2) or selling legal entity (Article 3 paragraph 1 and 3 of the Law), or if on the basis of contested provisions of the Law it is possible to use both methods;

- whether the selling of companies as legal entities (Article 3 of the Law) would be in conflict with the provision of Article 142 paragraph 1 of the Bankruptcy Law[[8]](#footnote-9), without the approval of the bankruptcy board of trustees;

- whether the contested provisions of Article 3 paragraph 1 of the Law eliminate possibility of selling company by means of public auctioning as prescribed in Article 134 paragraph 3 of the Bankruptcy Law[[9]](#footnote-10);

- which criteria apply to assessing compliance with the conditions from contested provisions of Article 3 paragraph 3 lines2, 3 and 4 of the Law – “operates a higher technological level of mining-metallurgical operation than the company that is given for sale” - “has good reputation and has a clean track record when it comes to privatisation of companies” and - “ (…), dynamic and long-term plan is provided by potential bidder”;

- which body is to assess if the selling terms from contested provisions of Article 3 paragraph 3 lines 2, 3 and 4 have been met – bankruptcy judge who decides about selling the property of bankruptcy debtor (property or legal person) or the Parliament of Montenegro which gives approval of the selling;

- who are parties to the contract and what is the subject of contract in the meaning of the contested provisions of Article 4 of the Law if the state takes over a company having in mind the fact that Bankruptcy Law stipulates the “selling” of company as legal entity and not company “takeover”.

13.4. The Constitutional Court has found that the contested provisions of Article 2 paragraph 2 and Article 3 paragraphs 1 and 3 of the Law do not meet the standard of “in accordance with the law” in line with the positions of the European Court for Human Rights. The Constitutional Court finds that the law lends itself to ambiguous end result of its provisions’ application and therefore cannot be considered the law based on the rule of law and neither it can be considered the law that establishes the legal certainty or predictability. Therefore, the contested provisions of Article 2 paragraph 2 and Article 3 paragraphs 1 and 3 of the Law contravene with the principle of the rule of law as the supreme principle of the constitutional order (Article 10 paragraph 2 and Article 145 of the Constitution).

**II.**The Constitutional Court established that the legal solutions prescribed in the contested provisions of Article 1, Article 2 paragraph 1 and Article 3 paragraph 2 of the Law were made within constitutionally-legally accepted limits and remits of the legislator to regulate the issues of interest for Montenegro and the proposal to review their constitutionality was refused.

14. The Constitutional Court did not weigh the claims that were listed in the motion on infringement of the right to legal remedy and the right to property from Articles 20 and 58 of the Constitution having in mind the fact that they, as found by the Constitutional Court, cannot be relevant for deciding otherwise in this case.

15. Having analysed other arguments listed in the motions, the Constitutional Court stated that these refer to mutual contradiction among the provisions of the contested law and its discrepancy vis-a-vis other laws (Bankruptcy Law), for the judicial review of which the Constitutional Court is not competent as set forth in the provisions of Article 149 of the Constitution. Namely, the quoted provision of Article 145 of the Constitution entails that the legal order is based on the hierarchy of legal acts stemming from the Constitution as the act of ultimate legal force. In line with the principle of consistence of legal regulations, the supremacy of the Constitution and ratified international agreements vis-a-vis law; and the supremacy of the Constitution and laws vis-a-vis other regulations. This principle enables integrity and effectiveness of legal system and represents one of the crucial elements for exercising rule of law. In compliance with the above quoted there is no possibility for Constitutional court to assess the consistence of provisions of different laws or mutual conformity of the provisions of the same law as these are not the acts of the same legal power passed by the same promulgator.

16. On the basis of the reasons set forth hereinabove the Court decided as given in the dictum.

III.The decision on publishing this Decision herein is based on the provisions of Article 151 paragraph 2, Article 152 paragraph 1 of the Constitution of Montenegro and Article 34 paragraph 1 of the Law on Constitutional Court of Montenegro.

U-I br. 6/14 i 9/14 PRESIDENT

17 April 2014 CONSTITUTIONAL COURT OF MONTENEGRO

P o d g o r i c a DesankaLopičić,s.r.

1. ’’Official Gazette of Montenegro’’, No. 1/11 [↑](#footnote-ref-2)
2. “The issues that are not regulated by this Law shall be governed, where appropriate, by the provisions regulating civil procedure and mediation procedure. [↑](#footnote-ref-3)
3. “Commercial Court hears cases at first instance:2) disputes relating to compulsory settlement, bankruptcy and liquidation of commercial entities, regardless of the capacity of the other party or the time when the dispute was initiated, unless otherwise provided by law; (Article20 paragraph 2 line 2 of the Law on Courts) ("Official Gazette of the Republic of Montenegro", No. 5/02 and 49/04 and "Official Gazette of Montenegro", No. 22/08, 39/11, 46/13 and 48/13). [↑](#footnote-ref-4)
4. Judgments dated 19 April 1994, Application No. 13427/87. [↑](#footnote-ref-5)
5. (2) Bankruptcy administrator has to assess if the sale of insolvent (legal person) debtor or the entire property of insolvent debtor is appropriate as opposed to selling property in parts and to inform the bankruptcy board of trustees about that. [↑](#footnote-ref-6)
6. Judgment dated 26 April 1979, application No. 6538/74. [↑](#footnote-ref-7)
7. Judgment dated 24 April 1990, application No. 1110/84. [↑](#footnote-ref-8)
8. “The subject of sale can be bankruptcy debtor as a legal entity provided it is approved by the board of trustees.” [↑](#footnote-ref-9)
9. “(3) Selling of property is made by public auction, collecting bids or direct negotiation in compliance with this Law.” [↑](#footnote-ref-10)