Constitutional judgment 3-4-1-42-13

JUDGMENT
in the name of the Republic of Estonia

Case number	3-4-1-42-13
Date of judgment	20 March 2014
Formation	Chairman: Priit Pikamäe; members: Eerik Kergandberg, Jaak Luik, Ivo Pilving and Jüri Põld
Case	Review of the constitutionality of § 25^1 of the Code of Criminal Procedure Implementation Act.
Basis of procedure	Request no. 12 of the Chancellor of Justice of 13 September 2013
Hearing	Written proceedings
OPERATIVE PART	**1. To declare subsection 2 of § 25^1 of the Code of Criminal Procedure Implementation Act unconstitutional and repeal it to the extent that it does not provide for any efficient supervision system of whether giving no notification of a covert surveillance operation carried out on the basis of an authorisation of covert surveillance that expired before 1 January 2013 continues to be justified.** **2. To postpone the entry into force of this judgment by six months.**

FACTS AND COURSE OF PROCEDURE

1. On 12 February 2003, the *Riigikogu* passed the Code of Criminal Procedure (CCP) and on 19 May 2004 it passed the Code of Criminal Procedure Implementation Act (CCPIA), which entered into force on 1 July 2004. As a result, the Code of Criminal Procedure and the Covert Surveillance Act (CSA) imposed on covert surveillance agencies and investigative bodies an obligation to immediately notify of a covert surveillance operation the person in respect of whom the operation was carried out and the person whose fundamental rights were infringed by the covert surveillance operation (the first sentence of subsection 1 of § 121 of the

CCP and the first sentence of subsection 1 of § 17 of the CSA).

2. Both acts set out the grounds of and procedure for postponing giving notification of covert surveillance operations until the respective ground ceases to exist. Giving notification of a covert surveillance operation could be postponed if this could harm the rights and freedoms of another person safeguarded by law (clause 1 of subsection 1 of § 121 of the CCP, clause 1 of subsection 1 of § 17 of the CSA), endanger the right of a person who has been recruited for covert surveillance to maintain the confidentiality of cooperation (clause 2 of subsection 1 of § 121 of the CCP, clause 2 of subsection 1 of § 17 of the CSA), endanger the life, health, honour, dignity and property of an employee of a covert surveillance agency, a person who has been recruited for covert surveillance or another person who has been engaged in covert surveillance and persons connected with them (clause 3 of subsection 1 of § 121 of the CCP, clause 3 of subsection 1 of § 17 of the CSA) and undermine criminal proceedings or induce a crime (clause 4 of subsection 1 of § 121 of the CCP) or compromise covert surveillance (clause 4 of subsection 1 of § 17 of the CSA). A decision to postpone giving notification of a covert surveillance operation had to be in writing and reasoned and it could be made by the head of a covert surveillance agency or an official authorised by the latter (subsection 1 of § 17 of the CSA) or a prosecutor (subsection 1 of § 121 of the CCP).

3. On 17 February 2011, the *Riigikogu* passed the Code of Criminal Procedure and Other Acts Amendment Act (286 SE, the 11th *Riigikogu*). This act provided for the repeal of the Covert Surveillance Act as of 1 January 2012 and the establishment of a new regulation on covert surveillance operations in the Code of Criminal Procedure. The act did not amend the substantial grounds of or procedure for postponing giving notification of a covert surveillance operation compared to those in force until then.

4. On 17 May 2011, the Chancellor of Justice filed with the *Riigikogu* his proposal no. 12, in which he submitted that clause 4 of the second sentence of subsection 1 of § 121 of the CCP and clause 4 of the second sentence of subsection 1 of § 17 of the CSA in conjunction with other provisions of Division 8 of Chapter 3 of the Code of Criminal Procedure that regulate the gathering of evidence by covert surveillance operations, the Covert Surveillance Act and § 36 of the Security Authorities Act (SAA) are in conflict with the second sentence of § 13, § 14, subsection 1 of § 15 and subsection 3 of § 44 of the Constitution in their combined effect to the extent that they do not provide for any efficient or systemic organisation of supervision over postponing giving notification of a covert surveillance operation and to the extent that allows giving a person no notification of a covert surveillance operation as a result of postponing giving notification. The Chancellor of Justice made a proposal to the *Riigikogu* for bringing the contested provisions into conformity with the Constitution. The Chancellor of Justice also asked to bring into conformity with the Constitution the new regulation of covert surveillance operations in the Code of Criminal Procedure that has been passed, but which has not yet entered into force (clauses 2 and 3 of subsection 2 of § 12615 of the CCP that had to enter into force on 1 January 2012).

5. At its session of 2 June 2011, the *Riigikogu* approved the Chancellor of Justice's proposal no. 12. Under § 152 of the *Riigikogu* Rules of Procedure and Internal Rules Act, the Vice-President of the *Riigikogu* assigned to the Legal Affairs Committee of the *Riigikogu* the task of initiating a draft to bring the Code of Criminal Procedure and the Covert Surveillance Act into conformity with the Constitution.

6. On 8 December 2011, the *Riigikogu* passed the Code of Criminal Procedure and Other Acts Amendment Act Amendment Act (123 SE, the 12th *Riigikogu*) with which it postponed the entry into force of the Code of Criminal Procedure and Other Acts Amendment Act that was passed on 17 February 2011 (see point 3 above) until 1 January 2013.

7. On 6 June 2012, the *Riigikogu* passed the Code of Criminal Procedure Amendment and Other Related Acts Amendment Act (175 SE, the 12th *Riigikogu*), which entered into force in part on 9 July 2012 and in part on 1 January 2013. This act repealed both the Code of Criminal Procedure and Other Acts Amendment Act (see point 3 above) as well as the Code of Criminal Procedure and Other Acts Amendment Act Amendment Act (see point 6). This act also established two new regulations about covert surveillance operations and giving notification thereof as well as postponing the giving of notification. From 9 July 2012

to 31 December 2012 this was governed by one regulation and as of 1 January 2013 by another one, which is currently in force.

8. Under the law in force, the conduct of covert surveillance operations is regulated by Chapter 3^1 of the Code of Criminal Procedure; the Covert Surveillance Act was repealed as of 1 January 2013. Giving notification of a covert surveillance operation is regulated in § 126^{13} of the CCP, the first subsection of which obliges a covert surveillance agency, upon expiry of the term of the authorisation of a covert surveillance operation, to give an immediate notification of the time and type of the covert surveillance operation to the person with respect to whom the covert surveillance operation was carried out and to the person the inviolability of whose privacy or family life was seriously infringed by the covert surveillance operation and who was identified in the course of the proceedings. The second subsection of § 126^{13} of the CCP allows giving a person no notification of a covert surveillance operation with the authorisation of the Prosecutor's Office if giving notification may significantly harm the criminal proceedings (clause 1 of subsection 2 of § 126^{13} of the CCP); significantly harm the rights and freedoms of another person which are guaranteed by law or jeopardise another person (clause 2 of subsection 2 of § 126^{13} of the CCP); jeopardise the confidentiality of the methods and tactics of a covert surveillance agency, the means used in carrying out the covert surveillance operation, or the confidentiality of a police agent, a dummy or a person who has been recruited for secret cooperation (clause 3 of subsection 2 of § 126^{13} of the CCP). A person need not be given any notification of a covert surveillance operation until the ground specified in subsection 2 of § 126^{13} of the CCP ceases to exist (the first sentence of subsection 3 of § 126^{13} of the CCP).

9. Subsections 3 to 5 of § 126^{13} of the CCP laid down the procedure for supervision over postponing giving notification of a covert surveillance operation. The Prosecutor's Office is obliged to examine the ground for giving no notification upon completion of pre-litigation proceedings in a criminal case, but no later than one year after the expiry of the term of the authorisation of a covert surveillance operation (the second sentence of subsection 3 of § 126^{13} of the CCP). If the ground for giving no notification of a covert surveillance operation has not ceased to exist after one year has passed from the expiry of the term of the authorisation of the covert surveillance operation, the Prosecutor's Office will apply, no later than 15 days prior to the expiry of the term, for an authorisation of a preliminary investigation judge for extending the term for giving no notification. The preliminary investigation judge grants, by an order, an authorisation for giving the person no notification or refuses to grant such an authorisation. Upon giving a person no notification, the order must set out whether giving no notification is for an unspecified or specified term. In the event of giving no notification during a specified term, the term during which a person is not notified must be set out (subsection 4 of § 126^{13} of the CCP). If the ground for postponing giving notification of a covert surveillance operation has not ceased to exist upon expiry of the term of the authorisation of giving no notification granted by a preliminary investigation judge specified in subsection 4 of § 126^{13} of the CCP, the Prosecutor's Office will apply, no later than 15 days prior to the expiry of such term, for an authorisation from a preliminary investigation judge for extending the term for giving no notification. The preliminary investigation judge grants, by an order, an authorisation pursuant to the provisions of subsection 4 of § 126^{13} of the CCP (subsection 5 of § 126^{13} of the CCP). A person will be notified immediately of a covert surveillance operation upon expiry of the authorisation of giving no notification or refusal to grant authorisation for extending thereof (subsection 6 of § 126^{13} of the CCP).

10. The Code of Criminal Procedure Amendment and Other Related Acts Amendment Act (175 SE, the 12th *Riigikogu*), which was passed on 6 June 2012, also amended as of 1 January 2013 § 25^1 of the CCPIA "Validity of authorisations of a covert surveillance operation and authorisations of giving no notification of conduct of a covert surveillance operation". Under subsection 2 of § 25^1 of the CCPIA, the procedure for the exercise of supervision over postponing giving notification of a covert surveillance operation provided for in the second sentence of subsection 3 and in subsection 4 of § 126^{13} of the CCP does not apply to covert surveillance operations, the term of the authorisation of which expired before 1 January 2013.

11. On 24 January 2013, the Chancellor of Justice filed with the Supreme Court his request no. 10, in which he asked to repeal § 25^1 of the CCPIA in conjunction with the provisions of Chapter 31 of the CCP that regulate covert surveillance operations and with § 36 of the SAA to the extent according to which the

provisions of the second sentence of subsection 3 and subsection 4 of § $126^{1}3$ of the CCP are not applied and no efficient and systemic alternative supervision of postponing giving notification of a covert surveillance operation is established in respect of covert surveillance operations, the term of authorisation of which expired before 1 January 2013.

12. By its order of 10 May 2013 in case no. 3-4-1-3-13, the Constitutional Review Chamber of the Supreme Court refused to hear request no. 10 of the Chancellor of Justice of 24 January 2013. The Chamber held that the Chancellor of Justice had not made to the *Riigikogu* the proposal provided for in subsection 1 of § 142 of the Constitution and in § 17 of the Chancellor of Justice Act for bringing the provision contested in the request filed with the Supreme Court, i.e. § 25^{1} of the CCPIA, into conformity with the Constitution. On 17 May 2011, the Chancellor of Justice made a proposal to the *Riigikogu* for bringing the following into conformity with the Constitution: clause 4 of the second sentence of subsection 1 of § 121 of the CCP in force at that moment and clause 4 of the second sentence of subsection 1 of § 17 of the CSA as well as clauses 2 and 3 of subsection 2 of § 12615 of the CCP that were supposed to enter into force on 1 January 2012. The*Riigikogu* only passed the disputed provision, i.e. § 25^{1} of the CCPIA, on 6 June 2012 with the Code of Criminal Procedure Amendment and Other Related Acts Amendment Act.

13. On 17 June 2006, the Chancellor of Justice submitted to the *Riigikogu* his proposal no. 23, in which he asked to bring § 25^{1} of the CCPIA into conformity with the Constitution. At its session of 12 September 2013, the *Riigikogu* did not support the proposal made by the Chancellor of Justice.

14. On 13 September 2013, the Chancellor of Justice filed with the Supreme Court his request no. 12 for declaring § 25^{1} of the CCPIA in conjunction with the provisions of Chapter 31 of the Code of Criminal Procedure that regulate covert surveillance operations and with § 36 of the SAA unconstitutional and repeal it to the extent according to which the provisions of the second sentence of subsection 3 and subsection 4 of § 126^{13} of the CCP are not applied and no efficient and systemic alternative supervision of postponing giving notification of a covert surveillance operation is established in respect of covert surveillance operations the term of authorisation of which expired before 1 January 2013.

REQUEST OF CHANCELLOR OF JUSTICE

15. The Chancellor of Justice submits that both a covert surveillance operation as well as any further preservation, use and other processing (incl. archiving) of the received information infringes fundamental rights and that this is a continuing infringement. Thereby, there is no clarity in the field of preserving and archiving data obtained by a covert surveillance operation about how archiving will take place or whether it will be compatible with the regulation of state secrets.

16. Notifying a person of a covert surveillance operation carried out in respect of them is important because of the principle of human dignity (§ 10 of the Constitution) and giving notification makes it possible to use legal remedies (subsection 1 of § 15 of the Constitution). According to the Chancellor of Justice, the relevant provisions of the Constitution also include subsection 2 of § 13 of the Constitution (prohibition of arbitrary exercise of governmental authority) and § 14 of the Constitution (right to procedure and organisation).

17. Taking into account the discreet nature of a covert surveillance operation, the Chancellor of Justice interprets the protection zone of subsection 3 of § 44 of the Constitution more extensively and finds that it also includes giving notification of a covert surveillance operation, since it constitutes the prerequisite for accessing data that government agencies preserve about them. The Chancellor of Justice submits that the obligation to notify of a covert surveillance operation retrospectively is a requirement that arises from subsection 3 of § 44 in conjunction with subsection 2 of § 13, § 14 and subsection 1 of § 15 of the Constitution.

18. The Chancellor of Justice contests the systemic lack of supervision in combination with other procedural guarantees. The provisions that allow postponing giving notification of a covert surveillance operation in conjunction with other procedural guarantees do not sufficiently hedge the risk of arbitrary exercise of governmental authority in individual events. In this context the Chancellor of Justice does not consider

sufficient any vague or general intra-administrative (investigative body and the Prosecutor's Office) supervision or supervision exercised by the Security Authorities Surveillance Select Committee of the *Riigikogu*.

19. The Chancellor of Justice admits that the regulation that entered into force on 1 January 2013 does not need to extend in full to all earlier covert surveillance operations, but for instance, adding supplementary procedural guarantees could also be constitutional. In the opinion of the Chancellor of Justice, the substance of supervision could be differentiated according to the intensity of the infringement of the fundamental rights of a person, by establishing supplementary procedural guarantees or a supplementary organisation of supervision for an event where information has been gathered by covert surveillance operations that require authorisation from the court or where the discreet gathering of information can be regarded as intensive for any other reason. Also, the requirement for a supplementary authorisation (for instance, by the court) for continuing postponement of giving notification of a covert surveillance operation can be tied with the specification of time, which means that supplementary procedural guarantees apply when no notification has been given within the period of time to be spent, on average, on completing the procedure or referring to the court.

OPINIONS OF PARTIES

20. The Constitutional Committee and the Legal Affairs Committee of the *Riigikogu* submit that the contested provision is constitutional.

21. The Constitutional Committee submits that the supervision of giving no notification of covert surveillance operations carried out on the basis of an authorisation of a covert surveillance operation that expired before 1 January 2013 would be an unreasonably heavy administrative burden that outweighs the infringement of fundamental rights. From 2006 to 2012, 52 540 authorisations of a covert surveillance operation were issued; the supervision of giving notification of a covert surveillance operation is substantial and covers the review of both the authorisation of a covert surveillance operation as well as all collected materials. Furthermore, the Committee noted that obtaining information about covert surveillance operations has not been hindered in full, since persons can themselves address a security authority with a request for obtaining information about covert surveillance operations that have been carried out in respect of them.

22. The Legal Affairs Committee also notes that the manual review and calculation of terms of thousands of authorisations and files of covert surveillance plus the comparison of covert surveillance operations with criminal files would be very resource intensive. Judicial supervision of giving no notification of a covert surveillance operation would also require a new substantial review of the case, identification of persons concerned and provision of an assessment of whether giving no notification was justified or not. The Legal Affairs Committee submits that drawing a clear temporal line is also necessary in order to prevent procedural mess. Procedural steps taken in criminal proceedings are governed by the procedural law in force at the time the step is taken.

23. The Legal Affairs Committee is of an opinion that subsection 3 of § 44 of the Constitution does not impose on the state any active obligation to notify of the data preserved about a person and it would not be practical to establish separate agencies or positions that would start to engage actively in giving notification to persons about the covert surveillance operations carried out in respect of them. The interest of persons themselves should serve as a prerequisite for the state in providing information about a covert surveillance operation carried out in respect of the person. Otherwise, the administrative burden of the state and the person's own need would not be in proportion to each other. If a person addresses a covert surveillance agency and receives no information, it is possible for the person to have recourse to the court.

24. The Minister of Justice is of an opinion that the contested provision is constitutional since the established restrictions are necessary and proportional, taking into account, on the one hand, the interests of persons and, on the other hand, the potential increase in the work load of covert surveillance agencies, the Prosecutor's Office and courts as well as the limited resources of the state. The state has, besides the obligation to protect the rights and freedoms of persons as provided for in subsection 2 of § 13 and in § 14 of the Constitution,

also the obligation to ensure the functioning of law enforcement authorities and the Judiciary. An infringement of rights is diminished if the persons have an opportunity to address covert surveillance agencies with a request to access the data gathered about them.

25. The Minister of Justice points out that from 2006 to 2012 the court and the Prosecutor's Office issued 52 540 authorisations of covert surveillance. In addition, authorisations of covert surveillance were also issued in and outside criminal proceedings from 1994 to 2005. Since the Chancellor of Justice submits that all covert surveillance operations should be re-examined, this would concern all the covert surveillance operations carried out within more than 18 years. According to the calculations of the Minister of Justice, substantial review of one authorisation of a covert surveillance operation and materials collected by one covert surveillance operation would take, depending on the total volume of the material and the number of persons concerned, approximately 1 to 8 hours, on average 4 hours, which would make, when multiplied by the total number of authorisations of covert surveillance (in criminal proceedings from 2006 to 2012), in total 210 160 working hours and would take 119 years when recalculated into the working hours of an official. Thus, this is an extremely labour intensive task, which would constitute a significant increase in the work load of the Prosecutor's Office and the courts.

26. The Minister of the Interior submits that the contested provision is constitutional and, in respect of covert surveillance operations carried out before 1 January 2013, the protection of fundamental rights was and is sufficiently regulated.

27. The investigative body as well as the prosecutor directing criminal proceedings had statutory obligations regarding giving notification as well as postponing giving notification of covert surveillance operations carried out before 1 January 2013. Although before 1 January 2013 the law did not provide for any routine independent or impartial (judicial) supervision prior to giving notification to concerned persons, postponing giving notification to the persons whom the covert surveillance operations concerned was permitted only until the ground that caused the postponement ceased to exist. The only difference from the wording of the Criminal Code that entered into force on 1 January 2013 was that the act did not include an *expressis verbis* obligation to systemically examine the continuing existence of grounds for giving no notification. The fact that the obligation was not clearly expressed in law could not lead to such an interpretation of § 121 of the CCP, according to which the authorisation once granted by the prosecutor was in effect during an indefinite period of time and released an investigative body from its immediate notification obligation. The fact that the rules of procedure for examining the continuing existence of respective grounds had to be organised inside an investigative body or the Prosecutor's Office does not mean that there were no such rules or that no such supervision was exercised. Thus, according to the spirit of the law, a covert surveillance agency and the Prosecutor's Office who exercises supervision over postponing giving notification are obliged to assess these grounds periodically. The obligations imposed on the aforesaid institutions by law and the rights arising from law and allowing the active operation of persons safeguarded before 1 January 2013 today also safeguard in every respect the rights of persons to obtain information about the infringements committed in respect of them by a public authority.

28. The Prosecutor General was of an opinion that the contested provision and the system for giving notification of covert surveillance operations in force until 31 December 2013 are constitutional. The Prosecutor General did not agree with the opinion of the Chancellor of Justice that the supervision over giving no notification of covert surveillance operations performed by the Prosecutor's Office according to the regulation in force until 31 December 2012 was insufficient as the Prosecutor's Office was not an independent and impartial supervisory body. According to the Prosecutor General, subsection 3 of § 44 of the Constitution does not set out any fundamental right to require that the state would notify a person of a covert surveillance operation, but he admits that such an interpretation is not precluded in light of the development clause of the fundamental rights provided for in § 10 of the Constitution and the amendments to the law that entered into force on 1 January 2013.

CONTESTED PROVISION

29. Section 25^1 of the Code of Criminal Procedure:

"§ 25^1. Duration of authorisations of a covert surveillance operation and authorisations of giving no notification of conduct of a covert surveillance operation
(1) The authorisations of a covert surveillance operation issued until 31 December 2012 are valid in respect of the persons set out therein until the expiry of the term set out therein.
(2) The provisions of the second sentence of subsection 3 and subsection 4 of § 126^{13} of the Code of Criminal Procedure do not apply to covert surveillance operations the term of the authorisation of which expires before 1 January 2013."

OPINION OF CHAMBER

30. The Chancellor of Justice submits that there is no efficient or systemic supervision over giving no notification of a covert surveillance operation carried out on the basis of an authorisation of covert surveillance that expired before 1 January 2013.

31. First, the Chamber will specify the object of the dispute (I). Thereafter, the Chamber will point out the provisions of the Constitution that are essential for adjudicating the case and describe the general constitutional requirements for the regulation of covert surveillance operations (II). Finally, the Chamber will explain what kind of supervision extends, after 1 January 2013, to postponing giving notification of a covert surveillance operation carried out on the basis of an authorisation of covert surveillance that expired before 1 January 2013 and provide an assessment of the compliance thereof with the requirements of the Constitution (III).

I

32. The Chancellor of Justice asks the Supreme Court to declare § 25^1 of the CCPIA unconstitutional and repeal it to the extent that the provisions of the second sentence of subsection 3 and subsection 4 of § 126^{13} of the CCP are not applied and no alternative efficient or systemic supervision over postponing giving notification of a covert surveillance operation is established in respect of covert surveillance operations whose authorisation term expired before 1 January 2013.

33. According to the Chamber, only the second subsection of § 25^1 of the CCPIA concerns supervision over postponing giving notification of a covert surveillance operation, while the first subsection of the section regulates the duration of the authorisations of a covert surveillance operation after 1 January 2013. Based on the aforesaid and the arguments of the Chancellor of Justice, the Chamber interprets the request of the Chancellor of Justice so that the contested provision is not § 25^1 of the CCPIA as a whole, but only subsection 2 thereof.

34. In addition, when adjudicating the case, it is important to find out to which extent the Chancellor of Justice contests the regulation for postponing giving notification of a covert surveillance operation.

35. According to the Chancellor of Justice, § 25^1 of the CCPIA is unconstitutional in conjunction with the provisions of Chapter 31 of the Code of Criminal Procedure that regulate covert surveillance operations. The Chancellor of Justice emphasises that his opinions and conclusions about the unconstitutionality of the contested provision are based on an analysis that did not cover all the grounds and purposes of covert surveillance, but focussed in the first place on the covert surveillance operations carried out for gathering evidence in criminal proceedings. In respect of covert surveillance outside criminal proceedings, the Chancellor of Justice focussed on covert surveillance operations carried out for preventing and combating a criminal offence (point 3 of the request of the Chancellor of Justice).

36. The regulation of covert surveillance was significantly amended by *the Code of Criminal Procedure Amendment and Other Related Acts Amendment Act* (draft 175 SE of the *Riigikogu*, the 12th *Riigikogu*; passed as an act on 6 June 2012; published RT I, 29.06.2012, 2), which entered into force on 1 January 2013. Before 1 January 2013 the Code of Criminal Procedure regulated only covert surveillance operations for the gathering of evidence in criminal proceedings (Division 8 "Gathering of Evidence by Covert Surveillance

Operations” of Chapter 3 “Proof”), covert surveillance outside criminal proceedings was provided for in the Covert Surveillance Act and the Security Authorities Act. The aforesaid act, which entered into force on 1 January 2013, repealed both Division 8 of Chapter 3 of the Code of Criminal Procedure as well as the Covert Surveillance Act and established a new full regulation of covert surveillance operations in Chapter 3^1 “Covert Surveillance Operations” of the Code of Criminal Procedure. Subsection 1 of § 126^2 of the CCP permits the execution of covert surveillance operations on the following grounds: the need to gather information about the preparation of a criminal offence for the purpose of detection and prevention thereof (clause 1), for the execution of an order on declaring a person wanted (clause 2), the need to gather information in confiscation proceedings (clause 3) and the need to gather information in criminal proceedings about a criminal offence (clause 4). The Security Authorities Act regulated and regulates the gathering of information for ensuring national security and constitutional order (subsection 1 of § 1 of the SAA).

37. According to the Chamber, the Chancellor of Justice thus contests the regulation of supervision over giving no notification of a covert surveillance operation to the extent that concerns the grounds for carrying out covert surveillance operations provided for in clauses 1 (the need to gather information about the preparation of a criminal offence for the purpose of detection and prevention thereof) and 4 (the need to gather information in criminal proceedings about a criminal offence) of subsection 1 of § 126^2 of the CCP. The Chamber follows the request of the Chancellor of Justice and assesses the constitutionality of the regulation of supervision over giving no notification of a covert surveillance operation only from the aspect of the grounds for carrying out covert surveillance operations provided for in clauses 1 and 4 of subsection 1 of § 126^2 of the CCP. That set out in this judgment cannot be extended equally to other grounds of covert surveillance operations or to the gathering of information for ensuring national security and constitutional order on the basis of the Security Authorities Act.

II

38. Next, the Chamber will examine the constitutional requirements for the regulation of covert surveillance. According to the Chancellor of Justice, the lack of any supervisory mechanism over postponing giving notification of a covert surveillance operation violates the prohibition of arbitrary exercise of governmental authority (subsection 2 of § 13 of the Constitution) and infringes the fundamental rights safeguarded in § 14, subsection 1 of § 15 and subsection 3 of § 44 of the Constitution.

39. By covert surveillance operations, the state processes personal data, doing so mostly in secret from the data subject, i.e. by hiding from the person both the fact of processing data as well as the substance thereof (see subsection 1 of § 126^1 of the CCP). Under Chapter 3^1 “Covert Surveillance Operations” of the CCP in force, covert surveillance agencies are permitted to carry out the following covert surveillance operations: discreet surveillance of persons, things or areas, discreet collection of comparative samples and conduct of initial examinations, discreet examination and replacement of things (§ 126^5 of the CCP), discreet examination of postal items (§ 126^6 of the CCP), wire-tapping or secret observation of information (§ 126^7 of the CCP), staging of a criminal offence (§ 126^8 of the CCP) and use of police agents (§ $126^9$of the CCP). Fundamental rights are infringed not only by the gathering of personal data by a covert surveillance operation, but also by any further processing of the gathered data, incl. by the use and preservation of the data.

40. Depending on the substance of the specific covert surveillance operation, such an activity by the state may infringe different rights and freedoms safeguarded in the Constitution. The aforesaid covert surveillance operations infringe particularly the inviolability of privacy and family life safeguarded in subsection 1 of § 26 of the Constitution, which protects, as a general provision, the privacy overall, but the infringement may also concern the fundamental rights that protect specific aspects of privacy. Here, the relevant fundamental rights may include the inviolability of a dwelling and the lawfully occupied premises and workplace safeguarded in subsection 1 of § 33 of the Constitution, the confidentiality of messages safeguarded in subsection 1 of § 43 of the Constitution, the freedom of conscience, freedom of religion and freedom of

thought safeguarded in § 40 of the Constitution, the prohibition of gathering information about the beliefs of persons provided for in § 42 of the Constitution as well as the general fundamental right of freedom safeguarded in subsection 1 of § 19 of the Constitution.

41. The first sentence of subsection 1 of § 3 of the Constitution requires that the entire governmental authority must be exercised pursuant to the Constitution and laws which are in conformity therewith. This provision of the Constitution expresses parliamentary reservation, i.e. the principle of importance, according to which the Legislature is obliged to provide all the issues that are important from the point of view of fundamental rights. The Supreme Court has held that "what the Legislature is justified or obliged to do under the Constitution cannot be delegated to the Executive, not even temporarily and under the condition of supervision by the Judiciary" (case law of the Supreme Court as of judgment III-4/A-1/94 of the Constitutional Review Chamber of 12 January 1994). It follows from the principle of importance that the more intensive the infringement of fundamental rights, the more detailed the provision conferring power to the Executive and the more accurate the rules of procedure must be.

42. Section 11 of the Constitution, according to which rights and freedoms may be restricted only in conformity with the Constitution, must also be taken into account in the event of infringements of fundamental rights. Such restrictions must be necessary in democratic society and must not distort the nature of the restricted rights and freedoms. Every infringement of a fundamental right must comply with all the provisions of the Constitution and be in conformity with the Constitution both formally as well as in the substantial sense (see the judgment of the Constitutional Review Chamber of the Supreme Court of 13 June 2005 in case no. 3-4-1-5-05, point 7). Substantive conformity with the Constitution means that the legislation infringing a fundamental right has been enacted to achieve an aim permissible by the Constitution, and constitutes a proportional measure for the achievement of the aim (see the judgment of the Constitutional Review Chamber of the Supreme Court of 26 March 2009 in case no. 3-4-1-16-08, point 28).

43. Section 14 of the Constitution provides that it is the duty of the Legislature, the Executive, the Judiciary, and local authorities, to safeguard rights and freedoms. Section 14 of the Constitution safeguards the general fundamental right to organisation and procedure – the fundamental procedural right whose purpose is to open way to the exercise of a person's fundamental rights. The Supreme Court has held that "under § 14 of the Constitution the state is obliged to establish proper procedures for the protection of fundamental rights. [---] This means,*inter alia*, that the state must establish a procedure to guarantee efficient protection of persons' rights" (the judgment of the Constitutional Review Chamber of the Supreme Court of 14 April 2003 in case no. 3-4-1-4-03, point 16).

44. Section 14 of the Constitution includes the subjective right of a person to require and the objective obligation of the state, particularly the Legislature, to establish the provisions that would safeguard, with sufficient probability and to a sufficient extent, the realisation and protection of fundamental rights (see the judgment of the Constitutional Review Chamber of the Supreme Court of 17 February 2003 in case no. 3-4-1-1-03, point 12; the judgment of the Supreme Court *en banc* of 31 May 2011 in case no. 3-3-1-85-10, point 75). The general fundamental right to organisation and procedure also covers the right to positive activities of the state, the infringement of which lies in the inactivity of the state as the addressee of the fundamental right.

45. In brief, it can be said that various covert surveillance operations may infringe fundamental rights with different intensity. The fact that covert surveillance operations are mostly carried out undisclosed from the data subject increases the intensity of the infringement of fundamental rights that the covert surveillance operation involves. The possibility of intensive infringement of fundamental rights calls for higher constitutional requirements for the regulation of covert surveillance. The European Court of Human Rights (hereinafter ECtHR) has held that in a situation where the executive power is exercised in secret, abuse is potentially so easy and could have such harmful consequences for democratic society as a whole (the judgment of the ECtHR of 6 September 1978 in the case of *Klass v. Germany*, no. 5029/71, point 56; and the judgment of 18 May 2010 in the case of *Kennedy v. the United Kingdom*, no. 26839/05, point 167).

46. When reviewing the constitutionality of a special operative surveillance measure – discreet surveillance (at present the covert surveillance operation provided for in § 126^5 of the CCP) – in 1994, the Constitutional Review Chamber of the Supreme Court noted that the Legislature itself must establish the specific events for the use of special measures and possible restrictions of rights related to the use of such measures as well as a detailed procedure for discreet surveillance. The Chamber held that "the valid normative framework for the implementation of special operative surveillance measures is insufficient from the aspect of universal protection of fundamental rights and freedoms, and hides in itself the danger of arbitrariness, distortions and unconstitutional restrictions of the exercise of fundamental rights and freedoms" (judgment III-4/A-1/94 of the Constitutional Review Chamber of the Supreme Court of 12 January 1994).

47. To guarantee the constitutionality of covert surveillance, an act regulating covert surveillance must first set out clear grounds and rules of procedure for carrying out covert surveillance operations, which is a prerequisite for the review of the legality of covert surveillance. The supervisory system of covert surveillance activities may be structured differently in terms of institutions as well as time. The supervisory system consists of a preliminary, i.e. ex-ante, supervision (which mostly means granting an authorisation for a covert surveillance operation), supervision during the operation and a follow-up, i.e. ex-post, supervision. In terms of institutions, the supervision of covert surveillance has been divided particularly into judicial, intra-administrative and parliamentary supervision.

48. An important part of the ex-post supervision system of covert surveillance is judicial ex-post supervision, which is initiated by a person whose rights the covert surveillance operation infringes. Everyone's right of recourse to the court in the event of violation of rights and freedoms is also ensured by the first sentence of subsection 1 of § 15 of the Constitution. Thus, the first sentence of subsection 1 of § 15 of the Constitution grants everybody the fundamental right to judicial protection without gaps, which is infringed when the person cannot protect their rights in court (see as of the order of the Supreme Court *en banc* of 22 December 2000 in case no. 3-3-1-38-00, point 15).

49. Due to the discreet nature of covert surveillance, persons are not aware of the infringement of their fundamental rights. If a covert surveillance operation results in obtaining evidence in a criminal case and the criminal case reaches the court, a person will become aware of the covert surveillance operation carried out in respect of them when examining the criminal file. In judicial proceedings, a person can apply for the review of legality of covert surveillance operations and if evidence has been obtained by violating the provisions that regulate covert surveillance, the court will not take into account such evidence when adjudicating the case (subsection 4 of § 126^1 of the CCP). At the same time, information obtained by a covert surveillance operation carried out before criminal proceedings for preventing and combating a criminal offence (clause 1 of subsection 1 of § 126^2 of the CCP) and for ascertaining the truth in criminal proceedings (clause 4 of subsection 1 of § 126^2 of the CCP) need not become evidence in the criminal file. This may for instance be so for the reason that the Prosecutor's Office does not consider it necessary or possible to use information obtained by a covert surveillance operation as evidence in a criminal case (subsection 2 of § 223 of the CCP). In addition to that, not all criminal proceedings, in which covert surveillance operations are carried out, reach the court. Also, the persons who are not parties to criminal proceedings, but whose fundamental rights were also affected by a covert surveillance operation do not or need not become aware of the covert surveillance operation when a criminal case reaches the court. In a situation where a person is not aware of a covert surveillance operation that infringes their fundamental rights, the possibility of exercising the fundamental right of recourse to the court for protecting their rights is practically precluded.

50. Under the first sentence of subsection 3 of § 44 of the Constitution, pursuant to a procedure provided by law, any citizen of Estonia is entitled to access information about themselves held by government agencies and local authorities and in government and local authority archives. The Chamber agrees with the opinion of the Chancellor of Justice that the first sentence of subsection 3 of § 44 of the Constitution serves as the basis for everyone's right to obtain information about a covert surveillance operation carried out in respect of them, since such a notification provides persons with conditions for accessing data that government

agencies preserve about them.

51. The Chamber notes that, on the one hand, subsection 3 of § 44 of the Constitution sets out the obligation of public authority to provide persons with information of whether and which data has been gathered about them and to enable persons to access the data. The infringement of this fundamental right lies in the refusal of the public authority to notify persons of whether any data has been gathered about them or in the refusal to introduce to persons the data gathered about them. This is the protective (negative) aspect of the fundamental right safeguarded in subsection 3 of § 44 of the Constitution.

52. On the other hand, the first sentence of subsection 3 of § 44 of the Constitution provides that the holder of the fundamental right can use this fundamental right "pursuant to the procedure provided by law". This means, on the one hand, the right and, on the other, the obligation of the Legislature to develop a procedure and rules for the exercise of this fundamental right, thereby taking into account the general fundamental right to procedure and organisation safeguarded in § 14 of the Constitution. Thus, subsection 3 of § 44 of the Constitution also includes the performance (positive) aspect, binding the entire public authority, but particularly the Legislature, by the positive obligation to draft legislation in such a manner that the holder of a fundamental right could exercise their right to access the data gathered about them.

53. Above all, subsection 3 of § 44 of the Constitution provides for the obligation of the public authority to establish a procedure and rules that would enable a data subject to access the data gathered about them if the person is aware of the fact that data has been gathered about them. In a situation where a person does not know whether any data has been gathered about them, subsection 3 of § 44 of the Constitution also covers the obligation of the public authority to develop procedure and order so that the person could find out whether any data has been gathered about them and ultimately they have the right to access data concerning them.

54. The obligation to notify a person of a covert surveillance operation and to introduce data gathered about the person does not serve only the curiosity of the data subject, but is necessary for the protection of their fundamental rights. After giving notification of a covert surveillance operation, the person must have at their disposal legal remedies for the protection of their rights (the first sentence of subsection 1 of § 15 of the Constitution). The obligation to notify of a covert surveillance operation may also be of preventive impact on the Executive. The knowledge, that in the future a data subject must be notified of a covert surveillance operation, may restrict the unauthorised covert surveillance of the Executive.

55. The second sentence of subsection 3 of § 44 of the Constitution says that, pursuant to law, the right safeguarded in the first sentence of subsection 3 of § 44 of the Constitution may be restricted to protect the rights and freedoms of others, to protect the confidentiality of a child's filiation, and in the interests of preventing a criminal offence, apprehending the offender, or ascertaining the truth in a criminal case. Thus, the fundamental right safeguarded in subsection 3 of § 44 of the Constitution has been qualified with the reservation of law. The Legislature may establish grounds for giving no notification of a covert surveillance operation if this is justified by the reasons set out in the second sentence of subsection 3 of § 44 of the Constitution. Following from the requirement for the proportionality of an infringement of fundamental rights (§ 11 of the Constitution), giving notification of a covert surveillance operation may, however, be postponed only until the reasons set out in the reservation of law are weightier than the infringement of fundamental rights that the covert surveillance operation entailed. Thereby, it must be distinguished whether the reasons set out in the reservation of law justify giving a person no notification of the fact of carrying out a covert surveillance operation or whether it is possible to notify the person but give them no notification of the information gathered by the covert surveillance operation.

56. The ECtHR has also held that an activity or a threat for the ascertaining of which the covert surveillance is carried out may last for years and giving retrospective notification of a covert surveillance operation to the person in respect of whom the secret gathering of personal data has been completed may jeopardise the more long-term objective of the covert surveillance procedure and disclose the work methods of the covert surveillance agency and the persons recruited for secret cooperation. However, as soon as notification can be

made without jeopardising the purpose of the surveillance after its termination, information should be provided to the persons concerned, since notification is an important measure to prevent any unjustified use of covert surveillance operations (the judgment of the ECtHR of 28 June 2007 in the case of *the Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00, points 90-91).

57. The Chamber holds that in a situation where giving the data subject notification of a covert surveillance operation is not possible for the reasons set out in the second sentence of subsection 3 of § 44 of the Constitution, the first sentence of subsection 1 of § 3 of the Constitution and § 14 of the Constitution set out the requirement that the law should provide an efficient supervisory system that would ensure the compliance of the infringement of fundamental rights with the Constitution. Fundamental rights are infringed as a result of carrying out a covert surveillance operation, processing (incl. preserving) data obtained by a covert surveillance operation as well as giving no notification of a covert surveillance operation. In light of the aforesaid, it is a must to ensure, on the one hand, supervision of the compliance with law and justification of a covert surveillance operation and, on the other, supervision of whether giving no notification of a covert surveillance operation is (or continues to be) justified. In a situation, where the continuing justification for giving no notification of a covert surveillance operation depends on the reasons set out in the second sentence of subsection 3 of § 44 of the Constitution, the supervision system must ensure that the person will be notified of the covert surveillance operation after the reasons for giving no notification cease to exist. An efficient supervision system can particularly consist in providing an intra-Executive and judicial supervision procedure and different procedural guarantees.

III

58. The Chancellor of Justice submits that the contested provision is unconstitutional to the extent that it does not provide for any efficient or systemic supervision to be exercised by an independent and impartial supervisor in respect of giving notification of a covert surveillance operation in the event of covert surveillance procedures that were completed before 1 January 2013.

59. To adjudicate the case, it is first necessary to explain which regulation applies to giving no notification of a covert surveillance operation carried out on the basis of an authorisation of covert surveillance that expired before 1 January 2013 after the said date.

60. As of 1 July 2004, the Code of Criminal Procedure and the Covert Surveillance Act imposed an obligation to immediately notify of a covert surveillance operation the person whose rights were infringed by the covert surveillance operation (the first sentence of subsection 1 of § 121 of the CCP, the first sentence of subsection 1 of § 17 of the CSA). No notification had to be given on the grounds provided for in law (the second sentence of subsection 1 of § 121 of the CCP, the second sentence of subsection 1 of § 17 of the CSA). According to the *Code of Criminal Procedure Amendment and Other Related Acts Amendment Act*, as of 1 January 2013 subsection 1 of § 126^{13} of the CCP sets out an obligation to give a person immediate notification of a covert surveillance operation and subsection 2 sets out the grounds for giving no notification. The grounds for postponing giving notification of a covert surveillance operation provided for in subsection 1 of § 121 of the CCP and in subsection 1 of § 17 of the CSA as well as in subsection 2 of § 126^{13} of the CCP express the permitted purposes of the infringement set out in the second sentence of subsection 3 of § 44 of the Constitution.

61. The regulation in force before 1 January 2013 (the second sentence of subsection 1 of § 121 of the CCP and the second sentence of subsection 1 of § 17 of the CSA) permitted giving a person no notification of a covert surveillance operation until the ground for giving no notification of a covert surveillance operation ceases to exist. Thus, a decision (authorisation) to give no notification of a covert surveillance operation made on the basis of an authorisation of covert surveillance valid until 1 January 2013 could only be conditional. According to the Chamber, a conditional authorisation for giving no notification requires periodic assessment of whether the ground for giving no notification continues to exist and the person whose rights the covert surveillance operation infringed are notified of the covert surveillance operation

immediately after the ground for giving no notification ceases to exist. Such an interpretation is in line with the requirement for the proportionality of the infringement of fundamental rights that follows from § 11 of the Constitution. The need to keep a covert surveillance operation secret generally decreases over time, due to which the infringement of the fundamental rights of a person that the preservation and other processing of information obtained by a covert surveillance operation entails may outweigh it at a certain moment in time. The Chamber is of this opinion despite the fact that neither the Code of Criminal Procedure nor the Covert Surveillance Act provided whether and how the continuing existence of the ground for giving no notification has to be assessed. At the same time, the law did not provide any possibility for giving no notification of a covert surveillance operation without a term.

62. A similar regulation is also in force after 1 January 2013 to a covert surveillance operation carried out on the basis of an authorisation of covert surveillance that expired before 1 January 2013. It follows from the transitional provision, § 25^1 of the CCPIA, first of all that the (conditional) authorisations of giving no notification of a covert surveillance operation issued before 1 January 2013 (on the basis of subsection 1 of § 121 of the CCP and subsection 1 of § 17 of the CSA) remained in effect after the entry into force of the new regulation. This may be concluded from the title of § 25^1 of the CCPIA "Validity of authorisations of a covert surveillance operation and authorisations of giving no notification of conduct of a covert surveillance operation" and from the fact that the section does not say anything about the expiry of the authorisations.

63. In addition to that, subsection 2 of § 25^1 of the CCPIA reads that covert surveillance operations carried out on the basis of authorisations of covert surveillance that expired before 1 January 2013 are not governed only by the procedure for supervision over giving no notification of a covert surveillance operation as provided for in the second sentence of subsection 3 and in subsection 4 of § 126^{13} of the CCP. Therefore, the principle to be followed in other respects is the one expressed in subsection 2 of § 3 of the CCP, according to which in criminal proceedings the criminal procedural law in force at the time of taking a procedural step shall be applied. Thus, if after 1 January 2013 a decision must be made on whether or not to give notification of a covert surveillance operation or if it must be assessed whether giving no notification of a covert surveillance operation continues to be justified, § 126^{13} of the CCP must also be followed in the event of covert surveillance operations carried out on the basis of an authorisation of covert surveillance that expired before 1 January 2013.

64. The first sentence of subsection 3 of § 126^{13} of the CCP in force provides, like the earlier regulation, that a person need not be given notification of a covert surveillance operation until the ground for giving no notification ceases to exist (conditional authorisation of giving no notification). Under the second and the third sentence of subsection 4 of § 126^{13} of the CCP, the court may decide that no notification is given of a covert surveillance operation without a term, but this provision is not applied, following subsection 2 of § 25^1 of the CCPIA, to covert surveillance operations, the authorisation of which expired before 1 January 2013.

65. The Chamber held above that the regulation that sets out a conditional authorisation for giving no notification of a covert surveillance operation requires periodic assessment of whether the ground for giving no notification has not ceased to exist. Next, the Chamber will explain who is, as of 1 January 2013, competent to assess whether giving no notification of a covert surveillance operation carried out on the basis of an authorisation of covert surveillance valid until that date continues to be justified.

66. The second sentence of subsection 3 of § 126^{13} of the CCP in force provides that the Prosecutor's Office will examine the existence of the ground for giving no notification upon completion of pre-litigation proceedings in a criminal case, but no later than one year after the expiry of the term of the authorisation of a covert surveillance operation. Under subsection 4 of § 126^{13} of the CCP, if the ground for giving no notification of a covert surveillance operation has not ceased to exist after one year has passed from the expiry of the term of the authorisation of the covert surveillance operation, the Prosecutor's Office applies, no later than 15 days prior to the expiry of the term, for an authorisation by a preliminary investigation judge for extending the term for giving no notification. The preliminary investigation judge grants, by an order, an authorisation for giving the person no notification or refuses to grant such an authorisation. Upon giving a person no notification, the order shall set out whether giving no notification is for an unspecified or specified

term. In the event of giving no notification during a specified term, the term during which a person is not notified shall be set out. Thus, the second sentence of subsection 3 and subsection 4 of § 126^{13} of the CCP impose on the Prosecutor's Office a specific supervision obligation of whether giving no notification of a covert surveillance operation continues to be justified, which is supplemented by judicial supervision, the application of which is precluded by subsection 2 of § 25^{1} of the CCPIA in the event of examining whether giving no notification of a covert surveillance operation carried out on the basis of an authorisation of covert surveillance that expired before 1 January 2013 is justified.

67. Until 31 December 2012, the obligation to notify of a covert surveillance operation carried out both in as well as outside criminal proceedings was with the body which carried out covert surveillance operations or with the investigative body which requested carrying out the covert surveillance operation (the first sentence of subsection 1 of § 121 of the CCP and the second sentence of subsection 1 of § 17 of the CSA). The difference lay in the fact that in criminal proceedings the prosecutor gave the covert surveillance agency the authorisation for giving no notification of a covert surveillance operation (the second sentence of subsection 1 of § 121 of the CCP) while in the event of covert surveillance outside criminal proceedings the issue of giving no notification was decided by the head of the covert surveillance agency or an official authorised by the latter (the second sentence of subsection 1 of § 17 of the CSA). An authorisation granted by the prosecutor for giving no notification of a covert surveillance operation can be seen as an important procedural guarantee, but this is so only in the event of giving no notification for the first time. The fact that in the event of a covert surveillance operation carried out in criminal proceedings the prosecutor granted an authorisation for giving no notification of the covert surveillance operation does not call for the obligation of the Prosecutor's Office to examine later whether giving no notification continues to be justified. Therefore, the Chamber agrees with the opinion of the Chancellor of Justice that in the event of giving no notification of a covert surveillance operation carried out on the basis of an authorisation of covert surveillance that expired before 1 January 2013 the covert surveillance agency itself has the obligation to verify whether giving no notification continues to be justified.

68. Although the explanatory memorandum of the draft Code *of Criminal Procedure Amendment and Other Related Acts Amendment Act*(175 SE, the 12th *Riigikogu*) emphasises that the general supervision by the Prosecutor's Office is also in force when giving no notification in the event of authorisations of a covert surveillance operation that expired before 1 January 2013, the act has not imposed any such obligation or supervision procedure on the Prosecutor's Office. According to the Chamber, the law does not provide whether and how the Prosecutor's Office exercises general supervision over whether giving no notification of a covert surveillance operation continuous to be justified. As regards the supervision by the Prosecutor's Office, subsection 1 of § 126^{15} of the CCP provides only that the Prosecutor's Office exercises supervision over the compliance of a covert surveillance operation with the authorisation granted for carrying out the covert surveillance operation provided for in § 126^{4} of the CCP. The explanatory memorandum of the draft Code of Criminal Procedure Amendment and Other Related Acts Amendment Act also refers to circumstances that actually hinder or even preclude the supervision by the Procurator's Office.

69. As a possible part of the supervision mechanism over giving no notification of covert surveillance operations, the Chancellor of Justice has also assessed the efficiency and systematics of the supervision exercised by the Parliament and a relevant ministry. Following from § 36 of the SAA, the Security Authorities Surveillance Select Committee of the *Riigikogu* is also competent to deal with single covert surveillance cases (examine files, review complaints). At the same time subsection 2 of § 126^{15} of the CCP provides that the Select Committee exercises supervision over the activities of covert surveillance agencies and that a covert surveillance agency submits to the Committee, through a relevant ministry, a written report about carrying out covert surveillance operations at least once every three months. Subsection 3 of § $126^{15}$of the CCP obliges the Ministry of Justice to disclose once a year on its website the number of persons who were notified of covert surveillance operations last year as well as the number of the persons in the event of whom giving notification has been postponed on the basis of subsection 4 of § 126^{13} of the CCP.

70. The Chamber holds that the regulation described above does not ensure efficient or independent supervision over whether postponing giving notification of a covert surveillance operation is justified. The

Chamber agrees with the opinion of the Chancellor of Justice that there is no possibility of judicial supervision over whether giving no notification of a covert surveillance operation carried out on the basis of an authorisation of covert surveillance that expired before 1 January 2013 continues to be justified. Intra-administrative supervision and parliamentary supervision over whether giving no notification continues to be justified has been provided for unclearly and, from the point of view of protection of fundamental rights, it cannot be considered efficient or independent. In the event of a covert surveillance operation carried out in criminal proceedings, the procedural guarantee is the authorisation of the Prosecutor's Office for giving no notification of the operation, but the law has not provided for any rules of procedure for how a covert surveillance agency should assess whether giving no notification continues to be justified or how the Prosecutor's Office should exercise supervision thereover. According to the Chamber, such a solution is not in compliance with the principle of parliamentary reservation provided for in subsection 1 of § 3 of the Constitution and infringes unconstitutionally the fundamental right to procedure and organisation safeguarded in § 14 of the Constitution, the fundamental right of recourse to the court safeguarded in the first sentence of subsection 1 of § 15 of the Constitution and the fundamental right safeguarded in subsection 3 of § 44 of the Constitution.

71. As a justification for why the regulation of supervision in force as of 1 January 2013 was not extended to giving no notification of covert surveillance operations carried out on the basis of an authorisation of covert surveillance that expired before 1 January 2013, the *Riigikogu*, the Minister of Justice as well as the Minister of the Interior pointed out the argument of expediency. The Minister of Justice, for instance, submits that the retrospective imposition of a supervision obligation would increase the work load of bodies who conduct proceedings and would consume so many resources that this would jeopardise the ability of the state to perform the obligation arising from subsection 2 of § 13 of the Constitution to protect the rights and obligations of persons. Thereby, the Minister of Justice revealed the calculations of how many authorisations of covert surveillance have been issued before 1 January 2013 and of how much time and money it would approximately take to review the files.

72. The Code of Criminal Procedure that took effect from 1 July 2004 established an obligation to immediately notify of a covert surveillance operation the person whose rights were infringed by the covert surveillance operation. According to the Chamber, it is not proper, following almost a ten-year-period when such an obligation was in force, to preclude supervision over giving no notification of a covert surveillance operation only for the reason that supervision spends too excessively the economic resources of the state. If the state had sufficient resources to carry out covert surveillance operations, the state should also have provided sufficient means in order to ensure the guarantee of the performance of the notification obligation arising from law.

73. Following the above and relying on clause 2 of subsection 1 of § 15 of the JCRPA, the Chamber declares subsection 2 of § 25^1 of the CCPIA unconstitutional and repeals it to the extent that it does not establish any efficient supervision system of whether giving no notification of a covert surveillance operation carried out on the basis of an authorisation of covert surveillance that expired before 1 January 2013 continues to be justified.

74. The Legislature must consider how to eliminate conflict with the Constitution. This does not necessarily need to mean the application of the supervision proceedings provided for in § 126^{13} of the CCP in force to all covert surveillance operations carried out on the basis of an authorisation of covert surveillance that expired before 1 January 2013. The Legislature has several different possibilities for establishing a constitutional regulation. Thereby, it must be taken into account that the more intensively a covert surveillance operation interferes with fundamental rights, the more efficient the procedural guarantees that ensure the performance of the notification obligation must be. Also, the time that has passed from carrying out a covert surveillance operation may be taken into account when establishing the regulation of supervision over giving notification of the covert surveillance operation. The Chamber believes that it is important to establish independent supervision over the performance of the obligation to give immediate notification of a covert surveillance operation provided for in the Code of Criminal Procedure that entered into force from 1 July 2004. Following the above and based on subsection 3 of § 58 of the JCRPA, the

Chamber postpones the entry into force of the judgment by six months in order to give the Legislature time for passing legislation that is in compliance with the Constitution.

The judgment includes a dissenting opinion of Justice Jüri Põld, which has not been translated.
