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JUDGMENT in the name of the Republic of Estonia

Case number 3-4-1-27-13

Date of judgment 16 December 2013

Formation Chairman: Priit Pikamäe; members: Ott Järvesaar, Jaak Luik, Ivo Pilving and Jüri Pöld

Case Request of the Chancellor of Justice for declaring in part unconstitutional and repealing in part § 1 of Government of the Republic Regulation No. 171 of 12 November 2009 “Rates of Water Abstraction Charge for Abstraction of Water from Water Bodies or Aquifer” and § 1 of Government of the Republic Regulation No. 172 of 12 November 2009 “Rates of Charge for Extraction of Mineral Resource Reserves Belonging to the State”.

Basis for procedure Request no. 11 of the Chancellor of Justice of 6 June 2013

Hearing Written proceedings

**OPERATIVE
PART**

- 1. To declare unconstitutional and repeal § 1 of Government of the Republic Regulation No. 171 of 12 November 2009 “Rates of Water Abstraction Charge for Abstraction of Water from Water Bodies or Aquifer” to the extent that it establishes higher rates of the water abstraction charge than the rates for the charge in force before 12 October 2012 in accordance with the same Regulation.**
- 2. To declare unconstitutional and repeal § 1 of Government of the Republic Regulation No. 172 of 12 November 2009 “Rates of Charge for Extraction of Mineral Resource Reserves Belonging to the State” to the extent that it establishes higher rates of the extraction charge than the rates for the charge in force before 12 October 2012 in accordance with the same Regulation.**

FACTS AND COURSE OF PROCEDURE

1. Subsection 1 of § 9 of the Environmental Charges Act (ECA) provides that the mineral resource extraction charge is paid for the extraction, use or rendering unusable of mineral resource reserves belonging to the state. Subsection 1 of § 10 of the ECA provides that generally the water abstraction charge is paid for the right to abstract water from a water body or aquifer pursuant to the procedure for water abstraction. Subsection 3 of § 9 and subsection 4 of § 10 of the ECA provide the minimum and maximum rates of the charges. The establishment of specific rates for the charges has been delegated, on the basis of subsection 2 of § 9 and subsection 3 of § 10 of the ECA, to the Government of the Republic. On the basis of these provisions, on 12 November 2009 the Government of the Republic (GR) adopted Regulation No. 171 “Rates of Water Abstraction Charge for Abstraction of Water from Water Bodies or Aquifer” (Water Abstraction Charge Regulation) and Regulation No. 172 “Rates of Charge for Extraction of Mineral Resource Reserves Belonging to the State” (Extraction Charge Regulation), which entered into force on 1 January 2010. The regulations provided for the years from 2010 to 2015 different rates of the water abstraction charge and the extraction charge in terms of years. The regulations were amended for the first time due to the introduction of the euro so that the charges were recalculated from Estonian kroons to euros without changing the rate.

2. The disputed regulations were amended by GR Regulation No. 83 of 4 October 2012 “Amendment of Government of the Republic Regulations Due to Changing Rates of Natural Resource Charges” (Amendment Regulation), which entered into force on 12 October 2012. The regulation amended rates of the water abstraction charge on water pumped out of quarries, water pumped out of mines and the abstraction of cooling water from any other water body than that belonging to the Tallinn water supply system as from 1 April 2013, as from 1 January 2014 and as from 1 January 2015 as well as extraction charges on all the mineral resources specified in § 1 of the Extraction Charge Regulation as from 1 April 2013, as from 1 January 2014 and as from 1 January 2015.

3. Prior to the amendments, according to the Extraction Charge Regulation, as from 2013 the rates of the charge for the extraction of all the mineral resources specified in the Regulation had to increase at most by about 5%, compared to the previous year, and in the event of five mineral resource classes the charge should only have increased in 2015. Following the amendment, as from 1 April 2013 the rates of the charge for the extraction of all the mineral resources will increase by 20% a year, except for technological dolomite and construction gravel, whose charge rates will increase as from 1 January 2015 by about 17% and 13%, compared to the previous year.

4. Prior to the amendments, as from 2013 the increase in the charge rates established on the basis of the Water Abstraction Charge Regulation was about 5% a year. The rate of charge for abstraction of cooling water from any other water body than that belonging to the Tallinn water supply system had to remain unchanged until 2015. Following the amendments, the rates of charge for the abstraction of cooling water from any other water body than that belonging to the Tallinn water supply system and for the water pumped out of quarries and mines will increase by about 20% a year as from 1 April 2013, except the rate of charge on water pumped out of quarries as from 1 April 2013, which increased, compared to the previous period, by 15% and the rate of charge on water pumped out of mines, which increased as from 1 April 2013 by 14%

and will increase as from 1 January 2015 by 18%, compared to the previous period.

5. The Association of Estonian Mining Companies, the Association of Construction Material Producers of Estonia, the Estonian Peat Association and the Federation of Estonian Chemical Industries addressed the Chancellor of Justice in order to have the constitutionality of the rates of mineral resource extraction charge and water abstraction charge reviewed as of 1 April 2013. To obtain information, the Chancellor of Justice addressed the Minister of the Environment and the Minister of Finance and received a reply from the Minister of the Environment on behalf of both of them.

6. On 23 April 2013, the Chancellor of Justice submitted to the GR proposal no. 22 for bringing the Water Abstraction Charge Regulation and the Extraction Charge Regulation into compliance with the Constitution. On 9 May 2013, the GR decided not to amend the disputed regulations, of which the Minister of the Environment notified the Chancellor of Justice on 14 May 2013.

7. The Chancellor of Justice filed a request with the Supreme Court on 6 June 2013.

REQUEST OF CHANCELLOR OF JUSTICE

8. The Chancellor of Justice submits that § 1 of the Water Abstraction Charge Regulation, to the extent that it establishes rates of the water abstraction charge on water pumped out of quarries, water pumped out of mines and the abstraction of cooling water from any other water body than that belonging to the Tallinn water supply system as from 1 April 2013, as from 1 January 2014 and as from 1 January 2015, and § 1 of the Extraction Charge Regulation, to the extent that it establishes rates of the extraction charge as from 1 April 2013, as from 1 January 2014 and as from 1 January 2015 on all the mineral resources specified in the provision, are in conflict with the principle of legitimate expectation arising from § 10 of the Constitution.

9. The addressees of the provisions are holders of the extraction permit and the water abstraction permit who are obliged to pay the extraction charge and the water abstraction charge. They had legitimate expectation that the schedule for increase in the charge rates will not be changed.

10. The principle of legitimate expectation is not analogous to the requirement that prior to entry into force of new legislation persons must have reasonable time for examination thereof and for the reorganisation of their activities (the *vacatio legis* principle). According to the principle of legitimate expectation, the amendment of a certain legal provision may be inadmissible at all, regardless of the length of the period between the adoption and entry into force.

11. In order for legitimate expectation to apply, three criteria must have been fulfilled:

- 1) legitimate expectation arises in a situation where a careful and reasonable person has grounds to expect that the law in force will persist;
- 2) the legal provision to be amended must at least potentially affect the behaviour of the person;
- 3) only lawfully acquired legal positions are protected.

12. The principle of legitimate expectation is in force similarly in the event of acts of the Riigikogu as well as regulations of the GR. The Environmental Charges Act does not provide or restrict the opportunity of the GR to establish rates of natural resource charges prospectively for five years. The benefit protected by the principle of legitimate expectation is an opportunity of addressees of the legal provisions to rely on the persistence of legal positions arising from legal provisions in force and an opportunity to develop their own behaviour respectively. This is not only a principle that aggravates the exercise of state authority, but it helps the state, through binding itself, affect the behaviour of persons; for instance, motivate enterprises to invest. Generally, persons cannot rely on long-term persistence of the law in force. However, a legal instrument of general application may be formulated in manner based on which a reasonable person can conclude that the establisher of the provision has made a promise that can be relied on. One of the methods of legislative drafting by which the state authority can bind itself is to provide a term for how long a person holds a certain subjective right.

13. The disputed regulations do not grant persons a right; however, from the aspect of the principle of legitimate expectation, the situation is the same in the event of restricting rights – in both cases the situation of a person will deteriorate when the provided due date arrives. The protection zone of the principle of legitimate expectation also covers reasonable expectation of the stability of obligations imposed on a person.

14. In 2009, the GR established a legally clear increase in the disputed charge rates in the form of a table in terms of years until 2015. The established charge rates were in accordance with law. Careful and reasonable holders of the extraction permits and the water abstraction permits could presume at least until a reasonable period of time had lapsed from the last increase in the charge rates on 1 January 2015 that the charges would not increase earlier and at a higher rate than provided for in the regulations.

15. The fact that in 2007 the Estonian Institute for Sustainable Development suggested increasing extraction charges from 2010 to 2015 on average by 20-30% a year is not of much weight, since the basis for the interpretation of legal instruments is the text of the legal instrument. The purpose of providing charge rates prospectively for five years is also recorded in the explanatory memorandums on draft regulations.

16. Also, it arises from the draft “Concept of development of environmental charges for the years from 2010 to 2020” submitted by the Ministry of the Environment to the public legislative drafting portal in 2008 that the main increase in the rates of the extraction charge was planned to be 5% a year for the next 10 years, which had to eliminate the impact of inflation and indicate the valuation of mineral resources. It was emphasised in the concept that an increase in the environmental charges must be known for a sufficiently long period of time in advance. The fact that the GR took into account the concept when establishing the regulations is confirmed by a letter of the Minister of Finance in 2009 to the Association of Construction Material Producers of Estonia, where it was explained that the increases in the established rates of environmental charges correspond largely to those discussed when drawing up the concept of environmental charges.

17. The principle of legitimate expectation must be applied not only to the persons who have begun to exercise their rights. What is important is whether persons have made decisions, taking into account the consequence provided for in the legal instrument or whether the expectation for the persistence of legal provisions has at least the potential for affecting the decisions of persons. According to those who turned to the Chancellor of Justice with a request, the extraction of mineral resources is investment intensive, so that investment decisions and loan contracts are made with a perspective of 10-20 years. One of the factors in making investment decisions is the size of the charge rates. According to the applicants, the undertakings who are obliged to pay the extraction charge and the water abstraction charge have also concluded 1-3-year contracts, whose terms and conditions are based on old charge rates.

18. The new charge rates put holders of extraction permits and water abstraction permits in a worse situation compared to the old charge rates. The charge rates have increased extensively. Since 1 April 2013 the charge rates have increased, compared to those established earlier for 2013, by about 20%. By 2014, the rates of extraction charges will already be about 40% higher. By 2015, the charge rates will be even up to 60% higher than those planned. Although the rise in prices will allegedly increase the share of environmental charges in the sales prices of construction mineral resources on average by 2%, it cannot be agreed that therefore this is not an extensive rise in prices. If at first the prices had to increase within three years on two occasions by about 5%, then now the prices increase in the same period on three occasions by about 20%. Holders of permits cannot cover the increase in the charge rates in full by increasing prices. The demand will therefore probably decrease, incl. also in foreign markets. Also, undertakings are bound by contracts which have been concluded before amending the charge rates and which will be performed after 1 April 2013. Taking into account the case law, it is also not possible for them to rely on subsection 1 of § 97 of the Law of Obligations Act and demand amendment of the contract. Even if they can rely on that, the consequence could be that the other party to the contract either terminates the contract or withdraws from it. Also, the position in the event of public contracts is that amendments to tax laws are the tenderer’s business risk.

19. A situation, where charge rates are provided for in connection with specific dates, and a situation, where the size and the dates of the charge rates to be applied in the future are not provided, must be addressed differently when weighing the legitimate expectation of a person and the public interest. If there are no exceptional circumstances, whose emergence the Government could not take into account earlier, the Government will have no right to change the initial charge rates of the disputed regulations. This is a strict interpretation, but it is justified because upon establishing the provisions the establisher could weigh all the benefits and circumstances, incl. decide upon creating the provision whether to choose the manner that can be considered as making a promise for a certain period.

20. There are no exceptional circumstances that would justify the infringement of the principle of legitimate expectation. An exceptional circumstance could be the obligation arising from § 5 of the Constitution to use the natural wealth and resources of Estonia economically. In the meantime, no unexpected or unforecast changes have taken place in the Estonian economy or extraction volumes, from which it could arise that the old charge rates do not serve the purpose of exerting pressure on using natural wealth economically.

21. Contestation of amended regulations instead of the Amendment Regulation is justified by the fact that following the declaration of unconstitutionality and repeal of the provisions in the contested part thereof the charge rates applicable from 1 January 2013 would remain in effect. I.e. should the request be granted, the obligation to pay the water abstraction charge or the extraction charge would not extinguish.

OPINIONS OF OTHER PARTIES

22.–39. [Not translated.]

CONTESTED PROVISIONS

40. The contested part of § 1 of Government of the Republic Regulation No. 171 of 12 November 2009 “Rates of Water Abstraction Charge for Abstraction of Water from Water Bodies or Aquifer” (RT I 2009, 54, 365; RT I, 09.10.2012, 12):

The rates of water abstraction charge for abstraction of water from water bodies or aquifer are as follows:

Abstraction of water from water bodies or aquifer	Rates of water abstraction charge (euros/1000 m ³) as from					
	1.01.2011	1.01.2012	1.01.2013	1.04.2013	1.01.2014	1.01.2015
Water bodies:						
[---]	[---]	[---]	[---]	[---]	[---]	[---]
Abstraction of cooling water from water bodies belonging to Tallinn water supply system	[---]	[---]	[---]	[---]	[---]	[---]
[---]	[---]	[---]	[---]	[---]	[---]	[---]
Abstraction of cooling water from other water bodies	[---]	[---]	[---]	1.91	2.29	2.75
Aquifers:						
[---]	[---]	[---]	[---]	[---]	[---]	[---]
Water pumped out of quarries	[---]	[---]	[---]	19.39	23.27	27.92
Water pumped out of mines	[---]	[---]	[---]	54.06	64.87	76.69

41. The contested part of § 1 of Government of the Republic Regulation No. 172 of 12 November 2009 “Rates of Charge for Extraction of Mineral Resource Reserves Belonging to the State” (RT I 2009, 54, 366;

The rates of charge for extraction of mineral resource reserves belonging to the state are as follows:

No.	Mineral resource class		Unit of measure	Rate of the extraction charge in euros as from					
				01.01. 2011	01.01. 2012	01.01. 2013	01.04. 2013	01.01. 2014	01.01. 2015
1.	Dolomite	Backfill	m ³	[---]	[---]	[---]	0.91	1.09	1.31
2.		Low-quality	m ³	[---]	[---]	[---]	1.2	1.44	1.73
3.		High-quality	m ³	[---]	[---]	[---]	2.2	2.64	3.17
4.		Technological	m ³	[---]	[---]	[---]	3.64	4.37	5.11
5.		Finishing dolomite	m ³	[---]	[---]	[---]	2.7	3.24	3.89
6.	Phosphatic rock		t	[---]	[---]	[---]	2.12	2.54	3.05
7.	Crystalline building stone		m ³	[---]	[---]	[---]	1.78	2.14	2.55
8.	Gravel	Backfill	m ³	[---]	[---]	[---]	0.68	0.82	0.98
9.		Construction gravel	m ³	[---]	[---]	[---]	2.35	2.82	3.19
10.	Sand	Backfill	m ³	[---]	[---]	[---]	0.36	0.43	0.52
11.		Construction sand	m ³	[---]	[---]	[---]	1.5	1.8	2.16
12.		Technological sand	m ³	[---]	[---]	[---]	1.87	2.24	2.69
13.	Limestone	Backfill	m ³	[---]	[---]	[---]	1	1.2	1.44
14.		Low-quality	m ³	[---]	[---]	[---]	1.36	1.63	1.96
15.		High-quality	m ³	[---]	[---]	[---]	2.2	2.64	3.17
16.		Technological	m ³	[---]	[---]	[---]	2.24	2.69	3.23
17.		Finishing limestone	m ³	[---]	[---]	[---]	2.96	3.55	4.26
18.	Oil shale		t	[---]	[---]	[---]	1.67	2	2.4
19.	Clay	Ceramic and ceramsite clay	m ³	[---]	[---]	[---]	0.71	0.85	1.02
20.		High-melting clay	m ³	[---]	[---]	[---]	1.3	1.56	1.87
21.		Cement clay	m ³	[---]	[---]	[---]	0.71	0.85	1.02
22.	Peat	Low-decomposition	t	[---]	[---]	[---]	1.68	2.02	2.42
23.		High-decomposition	t	[---]	[---]	[---]	1.38	1.66	1.99

OPINION OF CHAMBER

42. In the present case, first, the issue to be discussed is whether the amendment of the Water Abstraction Charge Regulation and the Extraction Charge Regulation infringed any of the fundamental rights of persons (I). Secondly, the legitimate purpose of the infringement must be found (II). Thereafter, the Chamber will assess the proportionality of the infringement in respect of the legitimate purpose (III). Finally, the Chamber will discuss the entry into force of the judgment and the situation following that (IV).

43. According to the Water Abstraction Charge Regulation and the Extraction Charge Regulation, as from 2010 to 2015 on 1 January each year new rates of charge for each mineral resource or water abstraction class would have entered into force pursuant to the respective cell in the table (which were, however, in some of the cases as high as the charge rates of the previous year).

44. The first sentence of § 31 of the Constitution provides the right to engage in entrepreneurial activity. Entrepreneurial activity means first and foremost earning revenue through independent economic activities. The state may not create any unreasoned obstacles to that and must ensure a legal environment for the functioning of free market (see the judgment of the Supreme Court *en banc* of 9 December 2013 in case no. 3-4-1-2-13, point 105). The law may establish conditions and procedures for the engagement in entrepreneurial activity (the second sentence of § 31 of the Constitution). Freedom of entrepreneurial activity does not grant a person the right to require the use of national treasures or state assets in the interests of their entrepreneurial activity. Despite that, the freedom of entrepreneurial activity is infringed by the situation where public authority makes conditions for the engagement in entrepreneurial activity more unfavourable compared to the legal framework in force earlier.

45. In addition to the freedom of entrepreneurial activity, in the present case the principle of legitimate expectation must also be taken into account.

46. Following § 10 of the Constitution, the Supreme Court developed the substance of the principle of legitimate expectation in its judgment of 30 September 1994 in case no. III-4/A-5/94. According to that, everybody has the right to act in reasonable expectation that the applicable law will remain in force. Everybody must be able to use the rights and freedoms granted to them by the law at least within the term provided for in the law. The amendment to be made in the law may not be perfidious towards the subjects of the law. The Constitutional Review Chamber of the Supreme Court noted in its judgment of 17 September 1999 in case no. 3-4-1-2-99 that the principle of legal certainty and legitimate expectation serves as a basis for everybody's reasonable expectation that this permitted by law is applied to persons who have started to realise their right (Part II).

47. The Supreme Court has also discussed the principle of legitimate expectation in several later decisions. The Court has held that in order for the principle of legitimate expectation to arise it is important that the person would have started to realise their rights (the judgment of the Constitutional Review Chamber of the Supreme Court of 30 September 1998 in case no. 3-4-1-6-98, Part II; the judgment of 17 March 1999 in case no. 3-4-1-2-99, Part II). The Supreme Court has also adopted the opinion that no legitimate expectation will arise for the persistence of a temporary legislation (the judgment of the Constitutional Review Chamber of the Supreme Court of 6 October 2000 in case no. 3-4-1-9-00, point 14; the judgment of 2 December 2004 in case no. 3-4-1-20-04, points 15-21). In the case where the determination of the purpose of use of the public land that was transferred to municipal ownership and the possession, use and disposal of the municipal ownership was restricted behindhand, the Court held that the principle of legitimate expectation was infringed, but the infringement was reasonable (the judgment of the Constitutional Review Chamber of the Supreme Court of 19 January 2010 in case no. 3-4-1-13-09, point 38). The Supreme Court has identified that the principle of legitimate expectation was violated by significant amendment to the conditions of registration of the respective area of activity in the register of economic activities prior to the expiry of the term for registration (the judgment of the Constitutional Review Chamber of the Supreme Court of 31 January 2012 in case no. 3-4-1-24-11, point 64).

48. The Chamber stands by the opinions expressed in the present case law, but considers it necessary to specify the following. The case law of the Supreme Court has so far discussed the principle of legitimate expectation in the event of provisions laid down in the law. In the present case the provisions under dispute have been established by a regulation. According to the Chamber, the establishment of a provision with a regulation does not preclude the creation of legitimate expectation. Thus, in the present case the creation of legitimate expectation is in principle possible.

49. The issue in the case law of the Supreme Court discussing the principle of legitimate expectation has so far in most events concerned rights and freedoms and in one case an obligation (see the judgment in case no. 3-4-1-24-11 as referred to in point 47 above). The charge rates established by the Water Abstraction Charge Regulation and the Extraction Charge Regulation for each year are fixed-term legislation which have provided obligations. The Chamber holds that in the context of the principle of legitimate expectation obligations mean that a person will have a legitimate expectation that their obligations will not increase. From the point of view of the principle of legitimate expectation it is decisive whether a person can rely on the legislation so that it may not be made more unfavourable in respect of them. It is clear that as a result of an increase in charge rates the persons' situation will deteriorate. Thus, the creation of legitimate expectation is also not precluded due to the fact that the present case concerns an obligation.

50. The protection of legitimate expectation must ensure undistorted realisation of rights and freedoms (the second sentence of § 11 of the Constitution). Genuine exercise of rights and obligations is possible only if the person need not fear that the state will apply unforeseen unfavourable consequences. Thereby, the realisation of one's own rights, i.e. the exercise of the rights and freedoms granted to a person by law, requires acting on the basis of a legal provision, hoping that it will remain in force. It is possible to talk about the perfidiousness of the state if a person has with their activities fulfilled all the prerequisites, arising from which they have a right in the future to the application of legislation that is favourable to them. Each disappointment caused by amending legislation that is favourable to a person does not comprise infringement of legitimate expectation.

51. In the context of the principle of legitimate expectation, the Government of the Republic also discusses the *vacatio legis* principle. The *vacatio legis* principle is not a part of the principle of legitimate expectation, although both of them are a part of the principle of legal certainty. The requirement arising from the *vacatio legis* principle is that, prior to entry into force of amendments, persons concerned must have sufficient time for examining the new legislation and taking it into account in their activities. Sufficient *vacatio legis* does not preclude, in itself, infringement or breach of legitimate expectation. In the present case there is no dispute over whether *vacatio legis* was not sufficient. Therefore, the Chamber will not discuss *vacatio legis* further.

52. In order to identify whether in the present case undertakings' legitimate expectation has been created, at first an answer must be given to the question of whether the persons could expect that the established charge rates will persist.

53. The Chamber does not agree with the arguments of the Government of the Republic that, following various documents and surveys, the undertakings had to understand that the charge rates established by regulations indicate only an increase in the charge rates and, if necessary, the rates will be reassessed. In the present case the creation of legitimate expectation is not precluded by surveys or other non-binding documents (drawn up by persons in private law). It cannot be presumed that persons follow them in a situation where specific charge rates have been established by a legal instrument for a certain period of time. In addition, attention must be paid to the fact that four of the documents referred to by the Government of the Republic have been drawn up already before the adoption of the initial wording of the disputed regulations in 2009 ("Grounds of Ecological Tax Reform", "Analysis of Implementation of Mineral Resource Extraction Charge, New Trends and Proposal for Implementation of New Charge Rates from 2010 to 2015", "Overview of Major Water Management Problems" and "Concept of Environmental Charges from 2010 to 2020"). It can rather be concluded therefrom that the state took into account the surveys performed and, despite these, decided for the benefit of charge rates set out for a fixed period of time. The disputed regulations have also not set out the reservation of amendment of the charge rates. In the event of an administrative decision, the reservation of amendment is explicitly provided for in clause 4 of subsection 1 of § 53 of the Administrative Procedure Act. Although this provision does not apply to regulations, similar reservation of amendment may also be provided for in regulations. In light of the above, the Chamber holds that the persons could expect that the established charge rates remain in force.

54. Next, the Chamber will discuss the criterion for exercising rights. The Government of the Republic and the Minister of Justice state in respect thereof that since the provision regulating upcoming years had not entered into force yet, no legitimate expectation could also have arisen from these provisions. The Chamber does not agree with the position of the Government of the Republic or the Minister of Justice.

55. The principle of legitimate expectation also extends to an adopted and published legislation of no reservations, which is not yet applicable. The principle of legitimate expectation does not mean for the state authority only a restriction, but allows for binding itself so that persons are given a promise and certainty in respect of provisions that will enter into force in the future and the persons are thus directed to plan their activities in the long term, i.e. they are encouraged to invest. Such a regulation possibility must not be precluded and there is no need to consider the expectation, that the state will fulfil such a promise, unreasonable.

56. The Government of the Republic points out that the present case concerns an investment-intensive field, which means that companies plan their activities, incl. expenses, well in advance. Under the second sentence of subsection 7 of § 9 of the Water Act, a water abstraction permit is issued for a period of up to five years. Section 37 of the Earth's Crust Act allows for the issuing of an extraction permit for up to thirty years in the event of most of the mineral resource classes related to the dispute and for up to fifteen years in the event of some mineral resource classes. If the mineral resource reserve is not exhausted within this period of time and the extraction of the remaining reserves on the basis of another extraction permit is not economically justified, the permit may also be issued for a period that is up to five years longer. Subsection 1 of § 38 of the Earth's Crust Act allows for extending an issued permit by up to 10 years. Water abstraction permits and extraction permits must be published in the *Ametlikud Teadaanded*. It appears therefrom that it is not uncommon in practice that an extraction permit has been issued for ten or fifteen years (fixed term) or until the 2020s and 2030s (by fixing the date). In the event of water abstraction permits it is possible to notice, *inter alia*, the issue of until 2018 or for 5 years. Thus, there are undertakings to whom water abstraction permits and extraction permits, which extend to the effective period of the disputed provisions, have been issued.

57. The Constitutional Review Chamber of the Supreme Court held in its judgment of 31 January 2012 in case no. 3-4-1-24-11 that persons had legitimate expectation for the persistence of the provisions until the end of their registration (points 51-52). The legitimate expectation of the addressee of the extraction permit or water abstraction permit for the persistence of the charge rates arising from the initial provisions of the legal act emerged at the moment it was signed into law, by trusting the initial provisions, to organise its economic activities, particularly to make investments according to calculations based on the charge rates. The Chamber presumes in the context of the abstract constitutional review that there were also undertakings that trusted that the rates will remain in effect among the persons who had been issued extraction permits and water abstraction permits prior to increasing the more favourable charge rates and for the effective period of the rates. However, as from 9 October 2012, when amendments to the regulations were published, the persons had to be aware of the entry into force of the new charge rates. Investments made following this date did not any more give rise to legitimate expectation for the persistence of the effective charge rates.

58. Following the aforesaid, the Chamber holds that the increase in the contested charge rates infringed the freedom of entrepreneurial activity in conjunction with the principle of legitimate expectation.

II

59. Next, the Chamber will examine the justifiability of the infringement. To this end, it is necessary to find the legitimate purpose of the infringement and to assess the proportionality of the infringement in respect of the purpose.

60. On the basis of the second sentence of § 31 of the Constitution, the conditions and procedure for the exercise of freedom of entrepreneurial activity may be established by law. This is a fundamental right of

simple reservation of law, which may be restricted for any reason that is not unconstitutional.

61. However, it must thereby be taken into account that the freedom of entrepreneurial activity is infringed in conjunction with the principle of legitimate expectation. It is generally inadmissible to increase obligations with a genuine legal instrument of retroactive force, which means that no legal consequences may be established on actions already performed in the past. Retroactive force is non-genuine if it concerns an activity that has started, but not yet ended by the time of the adoption of a legal instrument, to be more exact, if it establishes prospectively legal consequences on an activity that has started in the past. In this case charge rates were increased only prospectively. However, it has a non-genuine retroactive force as it concerns an activity of undertakings that was planned earlier and has already been started as well as the investments made. Non-genuine retroactive force is admissible if the public interest in the amendment of the legislation overrides the legitimate expectation of persons.

62. According to the Government of the Republic, the increase in the charge rates was caused by public interest in using natural wealth economically and earning fair revenue on state assets. The Minister of Justice points out that higher charge rates ensure economical use of natural wealth through compensation for harm within the meaning of § 53 of the Constitution.

63. § 5 of the Constitution provides that the natural wealth and resources of Estonia are national riches which must be used economically. Under § 53 of the Constitution, everyone has a duty to preserve the human and natural environment and to compensate for harm that they have caused to the environment. Since environmental principles arise from the Constitution, the Chamber holds that freedom of entrepreneurial activity in conjunction with the principle of legitimate expectation can therefore be infringed constitutionally. The purpose of obtaining revenue with environmental charges to the state is also in agreement with the Constitution.

64. The Chamber holds that in this case the legitimate purpose is to make undertakings use natural resources economically and to increase the state budget revenue. These objectives also cover the objective of the state to receive a charge for the use of natural resources. If an undertaking is permitted to use national riches in their entrepreneurial activity, the undertaking will gain economic benefit on the account of the national riches. Following §§ 5 and 53 of the Constitution, the state is entitled and obliged to level such a benefit by requesting a fair charge payable to the state.

III

65. Next, the Chamber will assess the proportionality of the infringement in respect of the legitimate purpose. This means the assessment of the appropriateness, necessity and reasonableness of the infringement.

66. The Chamber holds that increasing the disputed charge rates is an appropriate and necessary measure to make undertakings use natural resources economically and to increase the state budget revenue.

67. Higher rates of the water abstraction charge and the extraction charge motivate undertakings to use water and mineral resources more efficiently. Even if the use of water and mineral resources is not reduced, more money than before will be received owing to the higher charge rates. To achieve these objectives, the Chamber does not see any equally efficient measures, which infringe the freedom of entrepreneurial activity and legitimate expectation less.

68. To assess the reasonableness of the infringement, the extent and intensity of interference in the fundamental right on one hand and the importance of the purpose on the other must be weighed (see the judgment of the Constitutional Review Chamber of the Supreme Court of 6 March 2002 in case no. 3-4-1-1-02, point 15). In the present case, in order to justify the infringement it must be analysed whether the purpose of making undertakings use natural resources economically and increasing state budget revenue overrides the infringement of the freedom of entrepreneurial activity in conjunction with the principle of

legitimate expectation.

69. The principle of legitimate expectation is restricted by the principle of democracy. Political bodies based either directly or indirectly on the mandate of people are, in principle, entitled to update their previous choices, unless this causes excessive harm to the persons who trusted the legislation in force. Thereby, legitimate expectation can arise in the event of both fixed-term as well as termless legislation. However, fixed-term and termless legislation should still be understood differently when assessing the reasonableness of the infringement of legitimate expectation. In the event of rights granted and obligations restricted for a fixed term, the legitimate expectation of persons is more protected than in the event of termless legislation. The purposes of amending fixed-term legislation in a more unfavourable direction for a person must be more overriding than those of amending termless legislation.

70. The present case concerns fixed-term legislation. The Chamber holds that in the event of the legislation that had to apply on 1 January 2015 this also had to be understood so that it will be applied at least until the end of 2015. Taking into account the fact that the charge rates were provided for in terms of years and each column of the table corresponded to one year, a reasonable and careful person could understand that the charge rate of 2015 has been provided in the table for the whole year. The explanatory memorandum on the draft Extraction Charge Regulation has also noted: “The purpose of the draft is to establish the rates of charge for extraction of mineral resource reserves belonging to the state for years 2010-2015 [---].” The memorandum on the draft Water Abstraction Charge Regulation stated: “The draft Regulation establishes the rates of water abstraction charge for the years 2010-2015 (included). [---] rates of charge for abstraction of water from surface water or aquifers in the period from 1 January 2010 to 31 December 2015.”

71. The intensity of the infringement is characterised by the extent to which the amendment affects persons. The charge rates were increased in the event of water abstraction charges as well as mineral resource charges as from 1 April 2013 on average by about 20%, as from 1 January 2014 on average by about 40% and as from 1 January 2015 on average by approx. 60% compared to the charge rates established for the same time earlier. At the same time the share of extraction charges in operating charges is low and thus the impact on sales revenue is not big.

72. The Chamber held in point 64 that increasing state budget revenue can also be considered a legitimate purpose of the infringement. The accrual of state budget revenue is undoubtedly important as the ability of the state to perform its obligations depends on that. The competence of the court in assessing fiscal policy decisions in the constitutional review procedure is generally restricted. Considering that the state has many different possibilities for ensuring budget revenue and that the present issue concerns legitimate expectation arising from fixed-term legislation and that there are no extraordinary circumstances (an extensive economic crisis that has arrived unexpectedly, etc.), the position to be taken in this case is that the fiscal interest of the state alone does not override the infringement of the principle of legitimate expectation.

73. The purpose of making undertakings use natural resources economically arises from the environmental purposes provided for in the Constitution. Environmental protection is certainly an overriding purpose. The fact that the environmental charges of the oil shale sector do not cover all the caused environmental damage and that this has been the policy of the state for a long time is also referred to by the National Audit Office of Estonia (report to the *Riigikogu* “Overview of the use and preservation of state assets in 2012-2013”, Tallinn 2013, p. 46). On the other hand, freedom of entrepreneurial activity and the principle of legitimate expectation are also important. The principle of legitimate expectation is an important component of the principle of the state based on the rule of law. Therefore, it is not possible to take the position that the environmental purpose is, in itself, already so overriding that the principle of legitimate expectation should always make way to it.

74. Thus, the environmental need and the fiscal interest of the state contrast with the legitimate expectation of undertakings. The extraction of mineral resources is an investment-intensive field, which is also one of the reasons why extraction permits and water abstraction permits are issued for a long time. During the long-term period of validity of permits, the final expenses of undertakings depend on very many variables.

Thereby, possible extensive change in circumstances in the distant future is an inevitable risk. The environmental charges payable in the first years or an amendment thereof may form a small part thereof. What is important, however, is that the near future can be forecast better. If any fixed-term legislation has been established by this time, then the persistence thereof is an important criterion for undertakings when planning their activities. The charge rates increased by the Amendment Regulation influenced the expenses of undertakings for about the three nearest years. Considering the investment intensity of the field and the long-term nature of the investments, 2-3 years is a short term. The shorter the term of a fixed-term legislation, the more overriding the justifications for the infringement of the principle of legitimate expectation must be.

75. The Government of the Republic justifies increasing the charge rates generally by four arguments: 1) the Government of the Republic has a constant obligation to follow the principles established in the ECA; 2) deterioration in the condition of mineral resource reserves must be prevented – the extraction volume is restricted by extraction permits, extraction charges contribute to economical use; 3) when the charge rates were established in 2009, there was an economic crisis and it was complicated to forecast the future; 4) in 2012, the Government of the Republic reassessed important aspects of the social and economic situation and the increase in the use of natural resources and resource efficiency; resource efficiency gained significant weight.

76. According to the Chamber, the constant obligation of the Government of the Republic to follow the ECA and prevent deterioration in the condition of mineral resource reserves are such circumstances that the Government of the Republic knew and had to take into account when establishing the charges in 2009. The obligation to take into account the principles provided in the ECA was the same as during the establishment of the Water Abstraction Charge Regulation and the Extraction Charge Regulation. The condition of mineral resource reserves has not deteriorated sharply in the meantime, which is also confirmed by the Government of the Republic (see point 27 above). As the current charge rates remained within the range established by law, there was also no urgent need for increasing the charges in order to receive a fair charge for the use of the natural resource.

77. Economic downturn in the second half of 2009 is a fact of common knowledge. Thereby, it is also generally known that, due to the cyclical nature of the economic development, economic downturn is presumably followed by economic growth, whose intensity or time of arrival cannot be forecast exactly. It is always complicated and seldom accurate to forecast economic development in the medium term and in the long term. Although many developments may generally be foreseeable, it is important from the point of view of legitimate expectation whether there have been any unlikely developments in economy which need not have been taken into account when establishing the regulation and arising from which the current choices need to be adjusted. The parties to the proceedings have not pointed out whether any unlikely developments have taken place after 2009.

78. The “Environmental charge impact assessment” referred to by the Government of the Republic (see point 28 above), which was based on the 2000-2010 environmental use approach, also indicates significantly changed circumstances, but discusses largely the data that could be used already in 2009. The parties to the proceedings have not pointed out and the court is not aware of any circumstances on the basis of which significantly different positions would have been reached if a similar assessment had been made in 2009, on the basis of data of 2000-2008, than the position that was reached by also taking into account the two following years. The Government of the Republic could also have commissioned such an assessment before establishing the charge rates in 2009. The completion of an assessment is, in itself, not to be considered a significant change in the environmental or economic situation.

79. When reassessing the circumstances, the Government of the Republic also refers to the Flagship Initiative of the European Union “A resource-efficient Europe 2020”. This is a strategic document, not a regulation or a directive, which would impose on the state a direct obligation to establish environmental charges in a certain amount or to implement a certain environmental charge policy and which could separately or in conjunction with other circumstances discussed above justify the infringement of legitimate

expectation of persons.

80. The only change compared to 2009 was thus the fact that in 2012 the Government of the Republic decided to give different weight to different aspects of environmental protection. Considering that, as regards the field of regulation, the charge rates had been established for a short period and in agreement in law and that in the meantime no circumstances have changed unexpectedly or extensively, the Chamber finds that the purpose of making undertakings use natural resources economically and increasing state budget revenue does not override the infringement of the freedom of entrepreneurial activity in conjunction with the principle of legitimate expectation.

81. The Chancellor of Justice requested that the charge rates be declared unconstitutional and repealed so that the charge rates established as from 1 January 2013 would remain in force. However, these are lower than the charge rates that had to apply on 1 January 2014 and on 1 January 2015 on the basis of the wordings that were in force earlier (except the charge for abstraction of cooling water from other water bodies than those belonging to the Tallinn water supply system, where the charge rate would have remained the same, and the charge rates of dolomite and limestone backfill and peat, where in 2014 the charge rates would have remained at the level of 2013). The freedom of entrepreneurial activity in conjunction with legitimate expectation is not violated by the establishment of new regulations in itself, but by the establishment of higher charge rates. Therefore, the charge rates must be declared unconstitutional and repealed only to the extent that they exceed the current charge rates.

82. Following the aforesaid, the court declares in conflict with §§ 10 and 31 of the Constitution and repeals § 1 of the Water Abstraction Charge Regulation to the extent that it establishes higher rates of the water abstraction charge than the respective rates of charge in force before 12 October 2012 in accordance with the same Regulation, by relying on clause 2 of subsection 1 of § 15 of the Judicial Constitutional Review Procedure Act. Likewise, § 1 of the Extraction Charge Regulation must be declared unconstitutional and repealed to the extent that it establishes higher rates of extraction charges than the respective rates of charge in force before 12 October 2012 in accordance with the same Regulation. Thus, the charge rates applicable from 1 January 2013 remain in force for 2013. From 1 January 2014 and from 1 January 2015 the charge rates apply to the extent established by previous wordings of the Regulations.

IV

83. Judgments of the Constitutional Review Chamber of the Supreme Court are of retroactive force (see the judgment of the Supreme Court *en banc* of 10 March 2008 in case no. 3-3-2-1-07, points 19-20). This means that charges declared and paid directly on the basis of the Regulations have been paid, within the part that has been declared unconstitutional, in excess of the amount payable within the meaning of clause 1 of § 44 of the ECA. These must be refunded in accordance with the procedure laid down in Chapter 6 of the ECA. Regardless of this judgment, it is not possible to require a refund of the charges paid on the basis of a valid administrative decision without repealing or amending the administrative decision (§ 60 of the Administrative Procedure Act).

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