Constitutional judgment 3-4-1-1-12

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
on behalf of the Republic of Estonia

No. of the case	3-4-1-1-12
Date of judgment	27 March 2012
Composition of court	Chairman Märt Rask, members Lea Kivi, Lea Laarmaa, Ivo Pilving and Jüri Põld
Court Case	Verification of constitutionality of § 19(2)2) of the Anti-corruption Act.
Basis of proceeding	The Viru County Court judgment of 21 December 2011
Hearing	Written proceedings
DECISION	**To declare § 19(2)2) of the Anti-corruption Act to be in conflict with the Constitution and invalid.**

FACTS AND COURSE OF PROCEEDINGS

1. An official of the criminal bureau of the East Prefecture punished Peeter Tambu by a decision of 30 April 2010 in a misdemeanour matter on the basis of § 26^3 of the Anti-corruption Act (ACA) by a fine of 40 fine units. The punishment was imposed because P. Tambu, being an official within the meaning of § 4(1) of the ACA and belonging to the directing body of OÜ Ajam Arhitektid in addition to the position of chief architect (deputy director) of the Department of Architecture and City Planning of the Narva City Government, violated the requirements of restriction on employment and activity arising from § 19(2)2) of the ACA, thereby committing an offence qualified pursuant to § 26^3 of the ACA.

2. On 25 May 2010 P. Tambu's counsel filed with the Viru County Court an appeal against the decision of 30 April 2010 of the body conducting extra-judicial proceedings.

3. The Viru County Court annulled by a judgment of 21 December 2011 in misdemeanour matter no. 4-10-1555 the decision of the East Prefecture of 30 April 2010 and terminated the proceedings under § 29(1)1) of the Code of Misdemeanour Procedure (CMP). The court declared § 19(2)2) of the ACA to be unconstitutional to the extent it prohibits local government officials from being a member of the directing body of a company, the economic activities of which are not related to the professional activity of the official, and did not apply that provision. The court judgment reached the Supreme Court on 2 January 2012.

VIRU COUNTY COURT JUDGMENT

4. The Viru County Court found that P. Tambu was an official within the meaning of § 4(1) of the ACA and that he was a member of the management board of his company where he was a sole shareholder, but his activity as an official was not in any way related to his company. The court formed an opinion that the prohibition provided for in § 19(2)2) of the ACA and which extended to P. Tambu was not in conformity with the Constitution to the extent it prohibits local government officials from being a member of the directing body of a company, the economic activities of which are not related to the professional activity of the official. The court did not apply the said provision and terminated the misdemeanour proceedings with regard to P. Tambu under § 29(1)1) of the CMP due to the fact that the act in question does not contain the elements of a misdemeanour.

5. The court held that the prohibition provided for in § 19(2)2) of the ACA on being a member of the directing or supervisory body of a company infringes a person's right to freely choose his or her area of activity, profession and place of work guaranteed by § 29(1) of the Constitution because it excludes the possibility for a person to be a shareholder and a member of the management board of a company of some sort.

6. The aim of the prohibition is to decrease abstract risk of corruption. The court agreed with the opinion of the person who filed the appeal that P. Tambu working in the position of chief architect (deputy director) of the Department of Architecture and City Planning of the Narva City Government and at the same time belonging to the management board of a private limited company does not give rise to a specific nor abstract risk of corruption. The activity of P. Tambu in the said position does not in any way affect the economic interests of the company because the economic activity of the private limited company was not related to the city of Narva. Consequently, the established restriction was not a suitable measure in the given situation and it did not facilitate decrease in the risk of corruption.

7. Similarly to the Supreme Court *en banc* judgment of 25 January 2007 in matter no. 3-1-1-92-06, the court decided that the restriction provided for in § 19(2)2) of the ACA does not favour decrease in abstract risk of corruption to the extent it prohibits local government officials from being a member of the directing body of a company, the economic activities of which are not related to the professional activity of the official.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDING

Riigikogu

8.–9. [Not translated.]

Peeter Tambu

10. [Not translated.]

Police and Border Guard Board

11.-13. [Not translated.]

Chancellor of Justice

14. The prohibition established in § 19(2)2) of the ACA infringes a person's fundamental right, arising from § 29(1) of the Constitution, to freely choose his or her area of activity, profession and place of work. The provision as a whole is relevant, for which reason the verification of its constitutionality is permissible. § 3(2) of the ACA which provides for the prerequisites for the said prohibition is in conflict with the principle

of legal clarity provided for in § 13(2) of the Constitution. Consequently, § 4(1), the second sentence of § 12(9) and § 19(2) of the ACA are also in conflict with the principle of legal clarity.

15. The prerequisite for the applicability of the prohibition provided for in § 19(2)2) of the ACA is the official position of a person. Official position is defined in § 3(2) of the ACA as follows: "Official position is the competence of an official arising from the office to adopt decisions binding to other persons, perform acts, participate in making decisions concerning privatisation, transfer or grant of use of municipal property and the obligation to fulfil his or her official duties honestly and lawfully."

16. Application of the provision containing the definition of official position has proved to be problematic in practice. The Anti-corruption Act does not elaborate the terms "decision" and "act" used in the definition, and it also does not refer to any other legislation in furnishing thereof. This gives rise to a question whether in furnishing thereof the Administrative Procedure Act should be proceeded from, based on which a decision or an act shall have, inter alia, effect outside administration (the answer to the question whether for obtaining a status of an official the competence to give service instructions or to make other decisions or perform acts with an effect within administration is sufficient depends on it). One may also pose a question whether the term "act" covers also procedural acts (e.g. the terms "act" and "procedural act" have different contents in the Administrative Procedure Act). The obligation, contained in the definition, to fulfil official duties honestly and lawfully is a universal obligation of a public authority. It cannot be used as a criterion for distinguishing between officials.

17. Confusion has been sowed by an interpretation of the definition of an official in the case-law of the Supreme Court which is questionable from the aspect of constitutionality. According to the Criminal Chamber of the Supreme Court judgment of 7 January 2010, an obligatory characteristic of the competence of an official is not final independent adoption of administrative, supervisory or management decisions, but it is enough if a person can direct, in substance, the process of making such a decision. At the same time, § 3(2) of the ACA clearly attributes to participation (i.e. to directing in substance the decision-making process) a meaning only in making decisions concerning privatisation, transfer or grant of use of municipal property. The interpretation of the Supreme Court is not in conformity with the general principle of penal law – *nullum crimen, nulla poena sine lege scripta, stricta, praevia* – arising from § 23(1) of the Constitution which gives rise to the requirement to proceed, in deciding on conviction, from a written, precisely defined (under the law in force at the time the act was committed) penal norm. Also, it does not guarantee to the restricted fundamental right as extensive protection as possible and it departs to an excessive extent from the wording of the norm, sacrificing legal clarity.

18. Regarding the substantive constitutionality of § 19(2)2) of the ACA the Chancellor of Justice notes that since the prohibition is not proportional, it is in conflict with § 29(1) of the Constitution.

19. The objective of the prohibition is to decrease abstract risk of corruption and to ensure illusory neutrality of performance of public duties. The prohibition is a suitable measure for achieving these objectives. The prohibition is also necessary. Although means for decreasing a specific risk of corruption infringe fundamental rights less, they are nevertheless not an alternative to measures aimed against abstract risk of corruption.

20. The prohibition is not moderate. The accompanying infringement of fundamental rights is intensive. However, there are cases in its scope of application when there is no connection between the activity arising from a person's official position and the activity of a member of the directing or supervisory body of a company. For evading restrictions on employment or activity it is possible to use persons under covert identity, for which reason the prohibition is not efficient for achieving its objective. Guarantee of illusory neutrality is all the more important when an official can distribute the most significant benefits through the use of his or her official position. But the prohibition in question extends only to regular officials, not to officials of special status listed in § 4(2) of the ACA. Besides, the Anti-corruption Act includes also procedural restrictions. Without a doubt, the prohibition can be deemed moderate only if the official position of an official gives rise to the competence to, inter alia, supervise on own initiative the activity of (the

directing or supervisory body of) a company.

Minister of Justice
21. [Not translated.]

National Audit Office
22.-25. [Not translated.]

Association of Estonian Cities
26. [Not translated.]

Association of Municipalities of Estonia
27. [Not translated.]

PROVISION DECLARED UNCONSTITUTIONAL IN THE VIRU COUNTY COURT
28. § 19(2)2) of the Anti-corruption Act provides: "Officials specified in subsection 4(1) of this Act shall not be a member of the directing or supervisory body of a company, except the representative of the state, a local government or legal person in public law of a company with the participation of the state, local government or legal person in public law."

OPINION OF THE CHAMBER
29. The focus of the court case is on the possibility for an official to be a member of the directing or supervisory body of a company. § 19(2)2) of the ACA prohibits such an activity. The Viru County Court declared the provision to be partly in conflict with a person's right, provided for in § 29(1) of the Constitution, to freely choose his or her area of activity, profession and place of work. First, the Chamber determines to which extent the constitutionality of § 19(2)2) of the ACA shall be assessed (I). Then the Chamber assesses whether the prohibition contained in that provision violates the fundamental right provided for in § 29(1) of the Constitution (II).

I

30. Pursuant to § 14(2) of the Constitutional Review Court Procedure Act, the Supreme Court may verify the constitutionality of only such a provision which is relevant to the adjudication of the matter (see the last relevant judgment of the Supreme Court of 31 January 2012 in constitutional review matter no. 3-4-1-24-11, paragraph 44).

31. The Viru County Court held that § 19(2)2) of the ACA is relevant only to the extent it prohibits local government officials from being a member of the directing body of a company, the economic activities of which are not related to the professional activity of the official. But the Chancellor of Justice is of the opinion that the provision as a whole should be declared relevant.

32. The Chamber finds that in order to ensure the efficiency of constitutional review, the entire § 19(2)2) of the ACA shall be deemed relevant. There is no reason to delimit the relevant norm by the facts of the main court case as narrowly as done by the Viru County Court. In assessing the constitutionality of the provision there is no substantial difference depending on whether the provision is applied with regard to state or local government officials. Second, asking about the justification of the prohibition is founded in addition to a membership of the directing body of a company also in case of a membership of the supervisory body of a company. Third, the main court case constitutes a situation where the activity of the official was related to his activity as a member of the directing body of a company (see below, paragraph 48). Relation to the professional activity of a person is an undefined legal definition. The use thereof in delimiting a prohibition sanctioned by penal law is problematic from the aspect of legal clarity. Therefore, it is not justified to assess the constitutionality of the prohibition only to the extent it concerns companies the economic activity of which is not related to the professional activity of a person.

33. § 19(2)2) of the ACA provides, as an exception, a permission to be the representative of the state, a local

government or legal person in public law of a company with the participation of the state, local government or legal person in public law. There is no reason to separate this exception from the rest of the provision in verification of constitutionality. If the prohibition were to remain valid, the existence of the exception would still be justified. However, if the prohibition is declared invalid, the activities enabled by the exception are in any case permitted also without explicitly providing for it.

34. In the current matter it is not necessary to deem relevant § 3(2), § 4(1), the second sentence of § 12(9) and § 19(2) of the ACA, referred to by the Chancellor of Justice, as a whole. The prohibition relevant to the main court case arises precisely from § 19(2)2) of the ACA. The provisions establishing the prerequisites for application of the prohibition need not be deemed separately relevant. Doubts regarding the constitutionality of § 12(9) and § 19(2) of the ACA as a whole could arise if § 3(2) of the ACA (definition of official position) and § 4(1) of the ACA (definition of an official) would be declared to be in conflict with the Constitution. However, there is no basis for that in this case (see below, paragraph 37).

II

35. The prohibition provided for in § 19(2)2) of the ACA on being a member of the directing or supervisory body of a company infringes the fundamental right provided for in § 29(1) of the Constitution. Pursuant to the first sentence of § 29(1) of the Constitution, an Estonian citizen has the right to freely choose his or her area of activity, profession and place of work. The second sentence of the same subsection prescribes that conditions and procedure for the exercise of this right may be provided by law. The fundamental right provided for in the first sentence of § 29(1) of the Constitution protects also the right to be engaged as a member of a body of a legal person. Whereas, it is not important whether a person only wishes to become a member of a body of a legal person or whether he or she has already become one. A person's right to freely choose his or her area of activity, profession and place of work includes also the employment or service relationship which has already been formed (see the Supreme Court *en banc* judgment of 25 January 2007 in matter no. 3-1-1-92-06, paragraph 24). Since the prohibition under dispute excludes the possibility for an official to be active in the directing or supervisory body of a company, it restricts the possibility for a person to freely choose his or her area of activity, profession and place of work.

36. Rights and freedoms, including the fundamental right provided for in § 29(1) of the Constitution, may be restricted only in accordance with the Constitution pursuant to the first sentence of § 11 of the Constitution.

37. The Chancellor of Justice finds that § 3(2) of the ACA which establishes the prerequisites for application of the prohibition and which contains the definition of an official is not in conformity with the principle of legal clarity arising from § 13(2) of the Constitution. In this case the Chamber has no doubts as to the legal clarity of the definition. The appellant in the main court case was in an official position within the meaning of § 3(2) of the ACA since, according to the Viru County Court judgment, he had the competence arising from his office to participate in adoption of decisions binding to other persons and to adopt such decisions himself. The appellant himself, the body conducting extra-judicial proceedings or the court did not encounter any difficulties in applying the definition of official position. Consequently, in this matter there is no need to assess the lack of legal clarity of § 3(2) of the ACA. This does not exclude the assessment of the legal clarity of the definition in another court case in which elements of the definition which seem unclear are applied.

38. Pursuant to the second sentence of § 11 of the Constitution, restrictions on fundamental rights must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted. The Supreme Court deems as necessary in a democratic society the restrictions which are proportional regarding the objective sought to be achieved with these restrictions, i.e. they are suitable, necessary and proportional (about verification of proportionality see the Supreme Court *en banc* judgment of 17 March 2003 in matter no. 3-1-3-10-02, paragraph 30).

39. The prohibition imposed on officials on being a member of directing and supervisory bodies of companies has been established with the aim to avoid corruption. § 2(2) of the ACA attributes such an aim also to restrictions on employment and activities established in Chapter 3 of the Anti-corruption Act. These

restrictions include also the prohibition on being a member of the directing or supervisory body of a company. Since the prohibition established in § 19(2)2) of the ACA does not presume that a specific risk of corruption is to be ascertained in every single case, it shall be deemed that the objective of the provision is decrease in general, i.e. abstract risk of corruption. The Supreme Court *en banc* has deemed avoidance of corruption, including decrease in abstract risk of corruption to be a justification, accepted in a state based on the rule of law, for restriction on the fundamental right provided for in § 29(1) of the Constitution (the Supreme Court *en banc* judgment of 25 January 2007 in matter no. 3-1-1-92-06, paragraph 28).

40. The prohibition under dispute is suitable for decrease in abstract risk of corruption. The Supreme Court *en banc* has explained that abstract risk of corruption is at issue in a situation where with regard to a person a characteristic or relationship can be observed which may, based on general experience, give rise to the person's wish to follow, in his activity as a whole or in making a single decision, criteria which do not fully comply with the lawful interests of the person's employer or mandator (the Supreme Court *en banc* judgment of 25 January 2007 in matter no. 3-1-1-92-06, paragraph 33). An official's activity in the directing or supervisory body of a company can be deemed such a relationship giving rise to abstract risk of corruption. In such a situation a person may develop a wish to follow, in his activity as an official, criteria which rather comply with the interests of the company which he directs or supervises. The prohibition on membership of the directing or supervisory body of a company decreases the said risk.

41. The prohibition in question is also necessary for avoidance of abstract risk of corruption. In principle, the prohibition could be replaced by an obligation to notify of one's activity, to request permission therefore, and to disclose one's interests and permission. A similar procedure has been prescribed, for example, in § 19(3) of the ACA for operating as an undertaking, being a partner of a general partnership or general partner of a limited partnership. According to the said provision, an official may operate as an undertaking, be a partner of a general partnership or general partner of a limited partnership only with the permission of the person or agency who has appointed or elected him or her to office or hired under an employment contract if such activity does not hinder the performance of duties of employment or damage the reputation of the position or office. Everyone has the right to obtain information from the official who has appointed or elected an official to office or hired him or her under an employment contract concerning this permission. An obligation to request for permission would enable an official to participate in directing or supervising a company, but would nevertheless maintain the control over his activity. The obligation to obtain permission as provided for in § 19(3) of the ACA is not as efficient, compared to a prohibition, with a view to decrease in abstract risk of corruption. The restriction in that case is more lenient for persons but abstract risk of corruption is greater than in a situation where persons would not at all be able to participate in directing or supervising companies. Unlike the prohibition, the permission system is not automatically applicable but requires from a public authority making of decisions. Hence, application of an obligation to obtain permission is also more costly compared to application of the prohibition and it involves the risk of mistakes.

42. In the opinion of the Chamber, the procedural restrictions provided for in Chapter 4 of the Anti-corruption Act

cannot be deemed to be measures restricting the right to choose one's area of activity, profession and place of work less and at the same time as effective. These restrictions do not help to decrease abstract risk of corruption but a specific risk of corruption accompanying specific acts. Replacement of the prohibition under dispute with procedural restrictions would mean that abstract risk of corruption accompanying participation in directing and supervisory bodies of companies could not be prevented by any measure any more. The prohibition under dispute established for decrease in abstract risk of corruption, however, facilitates at the same time prevention of a specific risk of corruption. If it is prohibited to be a member of the directing or supervisory body of a company, it is more complicated to get caught up in, for example, a situation of conflict of interest described in § 25(1)3) or 4) of the ACA.

43. The prohibition contained in § 19(2)2) of the ACA is not moderate.

44. Avoidance of corruption if extremely important for both the state and the society as a whole. Corruption

harms the honest and lawful functioning of the authority of the state, causes inequality and distortion of competition, increases the expenses of both the private and public sector, and gives rise to inefficiency.

45. Measures of prevention of corruption have different effect on the actual avoidance of an act of corruption. The procedural restrictions provided for in Chapter 4 of the Anti-corruption Act are directly aimed at prevention of an act of corruption. The connection between restrictions on activities and employment and avoidance of an act of corruption is more indirect. The said restrictions aim more at avoiding formation of relationships involving a risk of corruption, i.e. at decreasing abstract risk of corruption. Decreasing a specific risk in relationships involving a risk of corruption is more important than decreasing abstract risk of corruption. Corruption causes damage, above all, due to acts of corruption. Such damage is not caused by different relationships involving a risk of corruption in an abstract manner.

46. If the prohibition in question would not exist, the procedural restrictions included in Chapter 4 of the Anti-corruption Act would extend to officials. Thus, pursuant to § 24(1) of the ACA, an official shall not engage in self-dealing, or conclude transactions of similar nature or involving a conflict of interest. He or she shall not authorise persons subordinate to him or her to perform such transactions instead of him or her. According to § 24(2) of the ACA, prohibited transactions include possible transactions with a company, the directing or supervisory body of which the person is a member. Pursuant to § 25(2) and (3) of the ACA, an official has the obligation not to participate in making such decisions which significantly influence the economic interests of the official, his or her close relatives or close relatives by marriage or legal persons related to him or her. True, these restrictions do not decrease abstract risk of corruption. However, in case of efficient application and supervision, they may, in principle, suffice in order to avoid specific acts of corruption.

47. The prohibition under dispute is not an efficient measure for avoidance of corruption in every situation. Namely, its effect can be easily evaded by appointing, in one's place, persons under covert identity to directing and supervisory bodies.

48. The prohibition provided for in § 19(2)2) of the ACA is too extensive.
True, in the opinion of the Chamber, the situation adjudicated in the main court case involved an abstract risk of corruption. The company's area of activity (architectural design) and the area in which the person was engaged as an official (chief architect of the city) coincided. Although the company did not operate in the local government unit where the official was employed, it cannot be excluded, for example, that a competitor of the company directed by the official has contacts in the field of planning with the said local government unit. The official may so have an opportunity to make decisions unfavourable for the competitor.

However, many cases when the person is not able to take any specific steps favouring the company fall within the scope of application of the prohibition. This would be the case if the person's official duties and the company's activity would not overlap in any way.

49. The Chamber deems it necessary to note that the prohibition does not restrict to a very significant extent a person's right to freely choose his or her area of activity, profession and place of work. This right protects, inter alia, everyone's right to earn a living. Officials, however, have been guaranteed an income. Operating as a member of the directing or supervisory body of a company in addition to being employed as an official is generally in fact restricted by the time remaining after performance of duties. By becoming an official voluntarily, a person must consider restrictions accompanying the service. These restrictions are chosen by the person himself or herself; whereas, exercising the same freedom to choose his or her area of activity, profession and place of work.

Neither the prohibition under dispute nor the Anti-corruption Act restrict an official's right to be a shareholder of a company. Therefore, an official can participate in making decisions concerning the company through the general meeting. Under the conditions specified in § 19(3) of the ACA, a person has the right to operate as an undertaking, be a partner of a general partnership or general partner of a limited partnership. Consequently, only a small part of activities protected by the fundamental right are excluded.

50. In keeping with the aforesaid, the prohibition for avoiding abstract risk of corruption may be moderate in case of some groups of officials or institutions. Avoidance of formation of relationships involving a risk of corruption and guarantee of illusory neutrality may, in case of these groups, outweigh the restriction set for rights of persons. Distinguishing these cases means decisions containing complicated and political choices, which the liability of persons under the penal law additionally depends on. If necessary and possible, these choices shall be made by the legislator.

51. In conclusion, the Chamber finds that the right of officials to be a member of the directing or supervisory body of a company outweighs the gain from decrease in abstract risk of corruption. Therefore, the prohibition provided for in § 19(2)2) of the ACA is not moderate, and therefore also not proportional. In other words, the prohibition is not necessary in a democratic society for the purposes of § 11 of the Constitution. The prohibition violates the fundamental right provided for in § 29(1) of the Constitution and shall be declared invalid.

52. Such a decision does not mean that conformity with the Constitution exists only if no restrictions on belonging to directing or supervisory bodies of companies have been imposed on any official. If need be, the Riigikogu may, taking account of the fundamental rights provided for in § 29(1) and § 31 of the Constitution, establish other measures in order to decrease abstract risk of corruption accompanying the activity of officials in directing and supervisory bodies of companies (e.g. the obligation of an official to disclose interests, notify of his or her activity the person with the right to appoint to office and the possibility to prohibit such activity under specific conditions).
