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## Constitutional judgment 3-3-1-33-11

### JUDGMENT OF THE SUPREME COURT *EN BANC*

**No. of the case** 3-3-1-33-11

**Date of judgment** 22 November 2011

**Composition of court** Chairman Märt Rask, members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Jaak Luik, Ivo Pilving, Jüri Pöld, Harri Salmann and Tambet Tampuu

**Court Case** An action of OÜ Akos Apteek for ordering for compensation for loss of profit during the period of 21 December 2007 to 16 October 2009 from the Government of the Republic 684,780 kroons and fines for delay of 1,377 kroons; an action of Giromax OÜ for ordering for compensation for loss of profit during the period of 21 December 2007 to 16 October 2009 from the Government of the Republic 338,307 kroons and fines for delay of 4,928 kroons; an action of OÜ Raja Apteek for ordering for compensation for loss of profit during the period of 21 December 2007 to 16 October 2009 from the Government of the Republic 1,493,563 kroons and fines for delay of 18,536 kroons; an action of OÜ Karlova Apteek (being liquidated) for ordering from the Government of the Republic compensation for proprietary damage of 285,609 kroons.

**Contested judgment** The Tallinn Circuit Court ruling of 22 September 2010 in administrative matter no. 3-08-2267

**Basis of proceeding** An appeal against a court ruling of OÜ Akos Apteek

## Hearing

### DECISION

- 1. To declare the second sentence of § 91(1) of the Code of Administrative Court Procedure to be in contradiction with the Constitution and invalid in the part it does not enable to fully or partially exempt a company which does not meet the criteria specified in that provision from the payment of a state fee in an appeal procedure.**
- 2. To satisfy the appeal against a court ruling in part.**
- 3. To annul paragraph 1 of the decision of the Tallinn Circuit Court ruling of 22 September 2010 in administrative matter no. 3-08-2267 which dismissed the request of OÜ Akos Apteek for exemption from the payment of the state fee. To refer the matter in the annulled part to the same circuit court for a new hearing.**
- 4. To return the security.**

### FACTS AND COURSE OF PROCEEDINGS

**1.** OÜ Akos Apteek, Giromax OÜ, OÜ Raja Apteek and OÜ Karlova Apteek filed with the Tallinn Administrative Court actions for compensation for damage caused by the Government of the Republic in which they found that they have incurred damage in the form of loss of profit due to a legislation of general application – the Government of the Republic regulation no. 36 "Threshold values for mark-ups in wholesale and retail trade of medicinal products and the procedure for their implementation" and Annex no. 2 thereto "Threshold values for mark-ups valid in retail trade of medicinal products", which entered into force 1 March 2005. OÜ Akos Apteek claimed compensation of 684,780 kroons and fines for delay of 1,377 kroons. OÜ Akos Apteek paid on the filing of the action a state fee of 31,920 kroons and 78 cents.

**2.** The Tallinn Administrative Court dismissed by a judgment of 30 April 2010 the actions of OÜ Akos Apteek and the other persons who filed an action.

**3.** OÜ Akos Apteek and the other persons who filed an action submitted appeals to the Tallinn Circuit Court for the annulment of the administrative court judgment. OÜ Akos Apteek paid on the appeal a state fee of 250 kroons.

**4.** By a ruling of 9 June 2010, the Tallinn Circuit Court refused to proceed with the appeal of OÜ Akos Apteek and set a term of ten days for the elimination of the deficiencies in the appeal, i.e. for the payment of the state fee in the required amount. According to the ruling, OÜ Akos Apteek was required to pay an additional state fee of 34,057 kroons and 85 cents.

**5.** On 22 June 2010, OÜ Akos Apteek filed with the circuit court a request for not applying in the matter, due to unconstitutionality, § 91 of the Code of Administrative Court Procedure (CACP) and § 56(11) of the State Fees Act (SFA), for partially exempting OÜ Akos Apteek from the payment of the state fee, and for deeming the state fee subject to payment by OÜ Akos Apteek to be 250 kroons. According to the request, OÜ Akos Apteek was unable, due to its economic situation, to pay the state fee in the required amount. § 91 of the CACP and § 56(11) of the SFA are in contradiction with the Constitution because such regulatory framework allows to exempt from the payment of a state fee only those legal persons as regards to whom a bankruptcy has been declared by a court judgment. The appellant is not bankrupt. The lack of an option to be exempted from the payment of the state fee and the amount of the required fee has created a situation where OÜ Akos Apteek cannot exercise its right of appeal.

[Paragraphs 6 and 7 not translated]

**8.** By the Tallinn Circuit Court ruling of 22 September 2010, the request of OÜ Akos Apteek for partial

exemption from the payment of the state fee was dismissed, it was refused to proceed with the action, and a term of fifteen days was set for the payment of the state fee in the required amount. The circuit court explained that if the appellant fails to pay the fee, the circuit court shall return the appeal without review under § 33(3)3) of the CACP.

[Paragraphs 8.1–8.3 not translated]

### **Proceedings in the Supreme Court**

**9.** In an appeal against a court ruling filed with the Supreme Court on 7 October 2010 OÜ Akos Apteek requested that the Supreme Court annul the Tallinn Circuit Court ruling of 22 September 2010 in the part it dismissed the request of OÜ Akos Apteek for partial exemption from the payment of the state fee, and render a new decision satisfying the request of OÜ Akos Apteek, not applying § 91(1) of the CACP and § 56(11) of the SFA, and declare these provisions to be in contradiction with the Constitution.

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**10.** The full panel of the Administrative Law Chamber of the Supreme Court referred the administrative matter by a ruling of 7 June 2011 under § 70(1<sup>1</sup>) of the CACP for review by the Supreme Court *en banc*. In the adjudication of the matter the Chamber had suspicions regarding the constitutionality of the regulatory framework of state fees arising from § 91(1) of the CACP and from § 56(11) and (18) of the SFA, valid from 1 January 2009 until 31 December 2010, in conjunction. [---]

[Paragraphs 10.1–15.2 not translated]

### **DISPUTABLE PROVISIONS**

**16.** Subsection (1) of § 91 "Release from payment of state fee or security" of the Code of Administrative Court Procedure (RT I 1999, 31, 425; RT I, 23.02.2011, 3):

"(1) If a court finds that a person is insolvent, the court may, at the request of the person, fully or partially release the person from payment of a state fee into the public revenues by a ruling. The insolvency of a company or non-profit association shall be certified by a bankruptcy order or a court ruling whereby the bankruptcy proceeding is terminated by abatement due to the fact that the assets of the debtor are insufficient to cover the costs of bankruptcy proceedings. Release from payment of state fee in a court of first instance shall not release a person from payment of state fee for an appeal filed against the decision of the court of first instance. An application for release from payment of state fee for an appeal filed pursuant to appellate procedure shall be filed with a circuit court together with the appeal."

**17.** Subsections (11) and (18) of § 56 "Review of statements of claim, petitions and appeals" of the State Fees Act (RT I 2006, 58, 439; RT I, 22.12.2010, 1):

"(11) If an action is filed with an administrative court for the compensation for damage or return of that which was received by way of unjust enrichment, a state fee of 5 per cent of the amount the payment of which is applied for or of the value of the property the return of which is applied for shall be paid but the amount payable shall not be less than 250 kroons and not more than the amount payable upon filing of an action with the same value of action in the course of a civil court proceeding."

"(18) Upon filing of an appeal against a judgment of an administrative court, a state fee shall be paid in the same amount as upon the initial filing of the action with the administrative court, taking into consideration the extent of the appeal."

### **OPINION OF THE SUPREME COURT *EN BANC***

**18.** The Supreme Court *en banc* finds the relevant provision (I) and thereafter assesses its constitutionality (II). Lastly, the Supreme Court *en banc* adjudicates the administrative matter (III).

## **I**

**19.** OÜ Akos Apteek filed with the administrative court an action for compensation for damage of 684,780

kroons and a fine for delay of 1,377 kroons. Upon filing the action with the administrative court, the state fee was paid in the required amount, i.e. 34,307 kroons and 85 cents. The administrative court dismissed the action of OÜ Akos Apteek by a judgment. OÜ Akos Apteek then filed an appeal against the judgment of the administrative court. OÜ Akos Apteek paid a state fee of 250 kroons. The circuit court refused to proceed with the appeal of OÜ Akos Apteek because an additional state fee of 34,057 kroons and 85 cents had to be paid (§ 84(1) of the CACP and § 56(11) and (18) of the SFA valid from 1 January 2009 until 31 December 2010).

OÜ Akos Apteek filed a request for partial exemption from the payment of the state fee (in the amount of 34,057 kroons and 85 cents). The circuit court dismissed the request of OÜ Akos Apteek for exemption from the payment of the state fee under the second sentence of § 91(1) of the CACP, for which reason OÜ Akos Apteek filed an appeal against the court ruling with the Supreme Court.

**20.** The first and second sentence of § 91(1) of the CACP provide: "If a court finds that a person is insolvent, the court may, at the request of the person, fully or partially release the person from payment of a state fee into the public revenues by a ruling. The insolvency of a company or non-profit association shall be certified by a bankruptcy order or a court ruling whereby the bankruptcy proceeding is terminated by abatement due to the fact that the assets of the debtor are insufficient to cover the costs of bankruptcy proceedings."

According to the case-law of the Administrative Law Chamber of the Supreme Court, pursuant to the second sentence of § 91(1) of the CACP, a company can certify its insolvency only by a bankruptcy order or a court ruling whereby the bankruptcy proceeding is terminated by abatement (the Administrative Law Chamber of the Supreme Court ruling of 8 March 2010 in court case no. 3-3-1-98-09, paragraph 9). Based on the case-law of the Administrative Law Chamber of the Supreme Court, there is no legal basis for satisfaction of a request of a company if the prerequisite provided for in the second sentence of § 91(1) of the CACP has not been fulfilled.

**21.** Since OÜ Akos Apteek does not meet the requirement provided for in the second sentence of § 91(1) of the CACP, i.e. no bankruptcy order or a court ruling whereby the bankruptcy proceeding is terminated by abatement has been made in respect of OÜ Akos Apteek, the circuit court had no basis for assessing whether the actual economic situation of OÜ Akos Apteek enables it to pay the state fee in the required amount or not, or decide on whether OÜ Akos Apteek should be exempted from the obligation to pay the state fee upon filing the appeal. Consequently, the second sentence of § 91(1) of the CACP constitutes a restricting legal provision. If the second sentence of § 91(1) of the CACP would not exist as it does, the circuit court could assess the actual economic situation of OÜ Akos Apteek and its ability to pay the state fee in the required amount, and then decide whether it should be exempted from the obligation to pay the state fee upon filing the appeal or not.

**22.** In keeping with the aforesaid, the Supreme Court *en banc* is of the opinion that the second sentence of § 91(1) of the CACP is the relevant provision in terms of the first sentence of § 14(2) of the Constitutional Review Court Procedure Act (CRCPA). Payment of a state fee in a constitutional amount may also not be economically possible for a company.

Therefore, it has to be verified whether it is constitutional to certify the insolvency of OÜ Akos Apteek for partial or full exemption from the payment of the state fee only by the evidence listed in the second sentence of § 91(1) of the CACP.

Based on the facts of the case, the Supreme Court *en banc* verifies the constitutionality of the second sentence of § 91(1) of the CACP only in the part it does not enable to fully or partially exempt a company which does not meet the criteria specified in that provision from the payment of a state fee in an appeal procedure.

**23.** Challenge of an administrative court judgment in a circuit court is exercise of the right provided for in § 24(5) of the Constitution to appeal to a higher court against a court judgment made with regard to the appellant. The right of appeal provided for in § 24(5) of the Constitution is a part of the fundamental right to judicial protection, the objective of which is to ensure verification of a court judgment to prevent errors and mistakes therein (see the Supreme Court *en banc* judgment of 14 April 2011 in court case no. 3-2-1-60-10, paragraph 45 and the case-law referred to therein). Based on its nature, the right of appeal extends also to legal persons under § 9(2) of the Constitution.

Infringement of a right is any adverse affect on the sphere of protection thereof (see e.g. the Constitutional Review Chamber of the Supreme Court judgment of 6 March 2002 in court case no. 3-4-1-1-02, paragraph 12). The Supreme Court *en banc* noted in its judgment of 14 April 2011 in court case no. 3-2-1-60-10 (paragraph 47) that the fundamental right provided for in § 24(5) of the Constitution is infringed by the lack of an option for partial or full exemption from the payment of a state fee. In this court case, the right of appeal is infringed by the second sentence of § 91(1) of the CACP, pursuant to which a company may certify its insolvency in administrative court procedure only by a bankruptcy order or a court ruling whereby the bankruptcy proceeding is terminated by abatement. The regulatory framework does not allow the circuit court to consider a company's actual economic ability to pay a state fee and based on that decide whether the company should be exempted from the obligation to pay a state fee on an appeal or not.

**24.** Since in the adoption of the second sentence of § 91(1) of the CACP the legislator has adhered to procedural, competence and formal requirements and the provision has legal clarity, the provision is formally constitutional.

**25.** To verify the material constitutionality of the second sentence of § 91(1) of the CACP, the permissible objectives of an infringement of the scope of protection of § 24(5) of the Constitution caused by the provision under verification shall be determined, and the proportionality, with respect to these objectives, of exclusion of exemption from the payment of a state fee on an appeal in court proceedings as a measure shall be assessed.

**26.** The Supreme Court *en banc* has repeatedly expressed an opinion that since § 24(5) of the Constitution contains a right of appeal with a simple legal reservation, it can be restricted on any reason which is in conformity with the Constitution (the Supreme Court *en banc* court cases no. 3-2-1-60-10, paragraph 52, and no. 3-2-1-62-10, paragraph 38). The Supreme Court *en banc* deemed the legitimate objectives of the requirement to pay a state fee on an appeal in civil court procedure to be participation of the participants in the proceeding in bearing the costs of administration of justice principle and procedural economy (the Supreme Court *en banc* court cases no. 3-2-1-60-10, paragraph 53; and no. 3-2-1-62-10, paragraph 45).

**26.1.** The Supreme Court *en banc* is of the opinion that in administrative court procedure a legitimate objective of state fees is also procedural economy in order to avoid also excessive and vexatious appeals since it may result in the court system's inability to offer effective legal protection within a reasonable time (see also the Constitutional Review Chamber of the Supreme Court judgment of 15 December 2009 in court case no. 3-4-1-25-09, paragraph 23). The option to fully or partially exempt a person from the payment of a state fee on an appeal favours in turn the right of appeal because the state has prescribed such an option to counterweight the infringement of the right of appeal arising from the establishment of state fees. The purpose of this measure is to guarantee to a person who is unable to pay a state fee access to judicial proceedings and thereby the option to protect his or her rights in judicial proceedings (see also the Supreme Court *en banc* judgment in court case no. 3-2-1-62-10, paragraph 54).

**26.2.** The Supreme Court *en banc* holds that procedural economy as a legal value of constitutional ranking (the Supreme Court *en banc* judgment of 17 March 2003 in court case no. 3-1-3-10-02, paragraph 9) is a legitimate objective of an infringement of § 24(5) of the Constitution. The infringement arising from the second sentence of § 91(1) of the CACP helps to guarantee procedural economy mostly through the fact that the number of court cases in appeal procedure and of requests for exemption from the payment of a state fee

is decreased. If the actual economic situation of a company has been ascertained in county court proceedings by a bankruptcy order or a court ruling whereby the bankruptcy proceeding is terminated by abatement, it facilitates the speedy adjudication of a request for exemption from the payment of a state fee.

**26.3.** The Supreme Court *en banc* is of the opinion that in the public interests of using the state budget funds economically, also the principle of partially bearing the costs of administration of justice in administrative matters can be deemed a constitutional value. However, when leaving the costs of administration of justice to be borne by the participants in the proceedings, it has to be taken into account that in addition to adjudication of the legal dispute, the administrative court system needs to carry out the principle of separation of powers and balance. Since the judicial power verifies also the activity of the executive and legislative authority of the state, participants in proceedings in administrative matters are not required to participate in bearing the costs incurred upon hearing a court case in full, but only in part. Therefore, the objective, pursuant to which in the case of appeals for compensation for damage in administrative matters a participant in the proceedings bears only in part the costs incurred by the state in administration of justice in his or her own court case, can be deemed legitimate.

**27.** The Supreme Court *en banc* holds that the option to exempt a company from the payment of a state fee in appeal procedure only if there is a bankruptcy order or a court ruling whereby the bankruptcy proceeding is terminated by abatement is an appropriate measure for the fulfilment of both the objective of procedural economy and partial bearing of the costs of administration of justice.

The option of a company to be exempted from the payment of a state fee in appeal procedure only in a situation where a bankruptcy order or a court ruling whereby the bankruptcy proceeding is terminated by abatement exists decreases the thoughtless filing of appeals, and in the case of lack of the option to be exempted from the payment of a state fee, the court system is probably more economical and efficient in adjudication of administrative matters. The circuit courts are not required to assess a company's actual economic ability to pay a state fee or based on that decide whether the company should be exempted from the obligation to pay a state fee on an appeal or not. Also, the measure provided for in the second sentence of § 91(1) of the CACP guarantees that companies participate in bearing the costs of administration of justice.

**28.** The Supreme Court *en banc* holds that the option to exempt a company from the payment of a state fee only if there is a bankruptcy order or a court ruling whereby the bankruptcy proceeding is terminated by abatement is also a necessary measure for the fulfilment of both the objective of procedural economy and partial bearing of the costs of administration of justice.

A measure burdening persons less but as efficient for the purposes of procedural economy and partial bearing of the costs of administration of justice would not be a possibility to extend the option of exemption from the payment of a state fee on an appeal to companies who do not meet the requirements provided for in the second sentence of § 91(1) of the CACP, because it would not guarantee procedural economy or partial bearing of procedural expenses as effectively as the currently valid provision.

Procedural economy would not be guaranteed better also if it would be possible to pay a state fee in instalments or if the state fees were decreased because the number of court cases would not decrease the same.

**29.** The Supreme Court *en banc* is of the opinion that the second sentence of § 91(1) of the CACP as an infringement of the right of appeal is not a moderate measure for the fulfilment of the objective of procedural economy and partial bearing of the costs of administration of justice.

**29.1.** Due to what is provided for in the second sentence of § 91(1) of the CACP, a company who wishes to file an appeal but lacks the funds to pay the state fee cannot exercise its right arising from § 24(5) of the Constitution. This may be an insurmountable impediment to the exercise of the fundamental right.

In addition to a company's permanent insolvency, this may constitute a situation where the company's

solvency problems are temporary (compare to § 1(2) and (3) of the Bankruptcy Act). This means that the company's inability to incur expenses is temporary due to its economic situation. If a request for exemption from the payment of a state fee submitted by a temporarily insolvent company is not satisfied merely because there is no bankruptcy order or a court ruling whereby the bankruptcy proceeding is terminated by abatement, the procedural economy and partial bearing of the costs of administration of justice may be guaranteed, but the company's fundamental right to appeal at least once against a judgment rendered in respect of it will not be carried into effect. The purpose of a graduated judicial system is to guarantee that regardless of a possible error by a court of a lower instance, court cases would be adjudicated correctly and justly both procedurally and substantively. Thus, a situation where the regulatory framework does not allow to exempt a company from the payment of a state fee in an appeal procedure in no case other than if there is a bankruptcy order or a court ruling whereby the bankruptcy proceeding is terminated by abatement constitutes a very intensive infringement which may exclude the carrying into effect of the fundamental right of appeal for companies who are temporarily insolvent and not permanently as declared by a court ruling, and distort the nature of the fundamental right of appeal (prohibition in the second sentence of § 11(1) of the Constitution).

**29.2.** The circuit court has not established that the appeal in question constitutes an unfounded or vexatious appeal, and that proceeding with it would burden court procedure and endanger efficient legal protection within reasonable time. In such a situation, procedural economy or partial bearing of the costs of administration of justice cannot be deemed to be such values which outweigh a very intensive infringement of the right of appeal.

**29.3.** The legislator shall guarantee an actual option to exercise the right of appeal provided for in § 24(5) of the Constitution also for those companies who are unable to pay a state fee due to temporary insolvency.

OÜ Akos Apteek was required to pay a state fee of 35,307 kroons and 85 cents again in the appeal procedure. Based on the data of the Ministry of Justice regarding the year 2009, the average cost of administrative proceedings in the administrative court was 10,749 kroons and in the circuit court 12,296 kroons. If to consider the average cost of administrative proceedings in the administrative and the circuit court combined, the state fee paid on the action in the administrative court would cover the average cost of proceedings both in the administrative and the circuit court. The said circumstance decreases the significance of partial bearing of the costs of administration of justice as a legitimate objective compared to a company's fundamental right to appeal to a higher court against a judgment of a court of first instance.

The circuit court determined the state fee to be paid by OÜ Akos Apteek on the appeal based on the State Fees Act valid from 1 January 2009 until 31 December 2010 regarding which the Supreme Court *en banc* found in court case no. 3-2-1-62-10 (paragraph 48.3.) that these are extraordinary state fees on the scale of Europe. The provisions prescribing the obligation to pay a state fee and restricting grant of procedural assistance to legal persons in private law form a uniform regulatory framework (see the Supreme Court *en banc* judgment in court case no. 3-2-1-62-10, paragraph 57.2.). If the legislator decides to establish a system where state fees on appeals are rather high, an option to partially or fully exempt temporarily insolvent companies from the payment of a state fee on an appeal shall additionally be made available.

**30.** In keeping with the aforesaid, the Supreme Court *en banc* declares under § 15(1)2) of the CRCPA the second sentence of § 91(1) of the CACP to be unconstitutional and invalid in the part it does not enable to fully or partially exempt a company which does not meet the criteria specified in that provision from the payment of a state fee in an appeal procedure.

The Supreme Court *en banc* holds that since the infringement (the second sentence of § 91(1) of the CACP) of the right of appeal (§ 24(5) of the Constitution) is unconstitutional, it is not necessary to assess the constitutionality of infringements of other fundamental rights (see the Supreme Court *en banc* judgments in court cases no. 3-4-2-62-10, paragraphs 50 and 59, and no. 3-4-2-60-10, paragraph 63).

### III

**31.** First, the Supreme Court *en banc* deems it necessary to analyse in the context of § 91(1) of the CACP on which grounds and pursuant to which procedure the circuit court is required to assess, in the new hearing of the matter, the request of the company for exemption from the payment of the state fee on the appeal.

**32.** § 91(1) of the CACP provides that if a court finds that a person is insolvent, the court may, at the request of the person, fully or partially release the person from payment of a state fee into the public revenues by a ruling.

**32.1.** The Administrative Law Chamber of the Supreme Court has noted in its case-law about the interpretation of § 91(1) of the CACP that if it appears from a request, a notice of economic situation and other evidence submitted by the person who filed an action that upon filing of the action (or if a request for exemption from the payment of the state fee is submitted after the filing of the action, then upon filing of the said request) it was in fact impossible for the person to pay the state fee, he or she shall be, in general, partially or fully exempted from the payment of the state fee. The request may be dismissed only if the right which is wished to be protected by the action cannot be deemed significant for the person who filed the action or if the action has no perspective (the Administrative Law Chamber of the Supreme Court ruling of 4 October 2010 in court case no. 3-3-1-64-40, paragraph 7; ruling of 22 June 2010 in court case no. 3-3-1-20-10, paragraph 15).

**32.2.** The Supreme Court *en banc* has noted in a civil matter about a criterion for granting procedural assistance to a legal person in private law that if the legal person in private law is able to cover the state fee out of assets which can be sold without any major difficulties, grant of procedural assistance shall be refused and a term shall be set for the payment of the state fee. The term shall take into account the market situation at the time of the adjudication of the request for procedural assistance, i.e. a sufficient term shall be given for selling a thing (the Supreme Court *en banc* judgment in court case no. 3-2-1-62-10, paragraph 62.2).

Procedural assistance may be requested only if it cannot be presumed that the state fee would be borne by persons having financial interest with respect to the thing, such as the members or shareholders of the legal person (the Supreme Court *en banc* judgment in court case no. 3-2-1-62-10, paragraph 62.2.).

**32.3.** The Supreme Court *en banc* noted in court case 3-2-1-62-10 (paragraph 62.3) the following: "In assessing the financial situation of a legal person in private law it is necessary to consider financial consequences for a person of not granting procedural assistance. Creation of a normal enterprise environment means, among other, that a legal person does not have to consider, due to the obligation to pay a state fee, the risk of insolvency when protecting its rights in court. This means that in assessing the financial situation of a legal person, in addition to the funds on its bank account or other assets which can be sold without difficulties, its obligations before third persons also have to be considered. The same applies to a legal person's ability to take a loan for payment of a state fee, i.e. if due to taking a loan the company's credit eligibility for organising everyday economic activities by means of a loan decreases substantially or ceases to exist, the person's ability to take a loan for payment of the state fee cannot be referred to upon deciding on grant of procedural assistance. Establishment of an obligation to pay a state fee for the benefit of judicial proceedings cannot, at least in general, result in termination of the legal person which in turn would result in increase of unemployment and other negative economic consequences.

In assessing the financial situation of the person requesting procedural assistance, it is possible to rely on an annual report pursuant to § 185(4) of the Code of Civil Procedure. If necessary, it is also possible to rely on other relevant accounting documents which confirm the legal person's financial situation as at the time of filing of the request for procedural assistance. The person requesting procedural assistance shall submit the relevant documents."



The Supreme Court *en banc* finds that the opinions expressed in the Supreme Court *en banc* judgment referred to above in adjudication of a civil matter are applicable, in the most part, also in administrative court procedure. In adjudicating a request for exemption from the payment of a state fee on an appeal, the circuit court shall, first and foremost, weigh the economic consequences of dismissing the request towards the appellant. The obligation to pay a state fee cannot result for a company in such an economic situation where it is probably necessary to file a bankruptcy petition. Also, payment of a state fee cannot excessively harm the company's freedom of enterprise.

**32.4.** The circuit court noted that if a company is temporarily insolvent, it can be presumed that its shareholders or members of the management board participate in the bearing of the procedural expenses. At the same time, the circuit court has not justified why such a presumption can be relied on nor has required relevant evidence from the members of the management board and the shareholders of OÜ Akos Apteek.

**33.** Since the Supreme Court *en banc* itself does not collect or examine evidence, the Supreme Court *en banc* cannot satisfy itself a request for exemption from the payment of a state fee. Consequently, the appeal against a court ruling of OÜ Akos Apteek shall be satisfied in part. The Supreme Court *en banc* annuls the Tallinn Circuit Court ruling in the part the request of OÜ Akos Apteek for exemption from the payment of the state fee was dismissed, and refers the matter in that part for a new hearing in the circuit court. In the new hearing of the request the circuit court shall consider the principles expressed above.

The security shall be returned (§ 90(2) of the CACP).

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**A dissenting opinion of the justice of the Supreme Court Tambet Tampuu on the Supreme Court *en banc* judgment in court case no. 3-3-1-33-11. The justice of the Supreme Court Peeter Jerofejev has concurred with paragraphs 1, 2, 4, 5 and 6 of the dissenting opinion.**

**1.** I do not agree with the decision of the Supreme Court *en banc* judgment because the provision declared unconstitutional by the Supreme Court *en banc* judgment was not, in my opinion, the relevant provision in this case pursuant to the first sentence of § 14(2) of the Constitutional Review Court Procedure Act (CRCPA).

OÜ Akos Apteek (the person who filed the action) could have requested verification of the constitutionality of the state fee required from it upon the filing of the appeal only if it would have needed state procedural assistance for the payment of the state fee. The circuit court established that the person who filed the action lacked such a need (see paragraph 8.2 of the Supreme Court *en banc* judgment). The Supreme Court *en banc* did not form a contrary opinion. Consequently, in this case the right of appeal of the person who filed the action arising from § 24(5) of the Constitution was not violated and the circuit court could not have exempted the person who filed the action from the payment of the state fee even in the case the restriction stemming from the second sentence of § 91(1) of the Code of Administrative Court Procedure (CACP) would not have existed.

**2.** The Constitutional Review Chamber of the Supreme Court has held in paragraph 52 of its judgment of 19 April 2011 in court case no. 3-4-1-13-10 that since the amount of a state fee and procedural assistance form a whole dependent on one another, the prohibition to exempt companies from the payment of a state fee will start to hinder recourse to the courts when the state fees are high. I find that the reference in paragraph 29.3 of the Supreme Court *en banc* judgment to paragraph 48.3 of the Supreme Court *en banc* judgment of 12 April 2011 in court case no. 3-2-1-62-10 is not correct because that court case concerned the amount of state fees required on monetary claims in civil matters. I do not concur with the opinion stated in paragraph 29.3 of the current judgment that in assessing the constitutionality of the restriction in question it is important whether and how much the required state fee exceeds the average cost of proceedings in administrative matters. It might be relevant to compare the amount of the state fee required from the person who filed the action to the cost of the proceedings in the current administrative matter. In assessing the amount of state

fees, the Supreme Court has in its earlier case-law compared the state fees in different countries (see the Supreme Court *en banc* judgment of 12 April 2011 in court case no. 3-2-1-62-10, paragraph 48.3).

3. § 91 of the CACP does not prescribe an option to request payment of a state fee in instalments by way of procedural assistance. Pursuant to the principle of comprehensive adjudication of a matter, the Supreme Court *en banc* should have formed an opinion on the issue whether the person who filed the action could have requested the application of 181(3<sup>1</sup>) of the Code of Civil Procedure (CCP) based on § 5 and § 94 of the CACP. This provision would allow a person who is not entitled to state procedural assistance on the grounds of his or her economic situation to request also in administrative court proceedings payment of a state fee in instalments if him or her having recourse to the courts would be unreasonably hindered (see on the application of § 181(3<sup>1</sup>) of the CCP the Supreme Court ruling of 9 November 2010 in civil matter no. 3 2 1 95 10, paragraph 9; ruling of 21 December 2010 in civil matter no. 3 2 1 147 10, paragraph 10; judgment of 31 March 2011 in constitutional review matter no. 3-4-1-19-10, paragraphs 35–39). In the case the person who filed the action would have had such an option, the Supreme Court *en banc* should have taken that into account in assessing the constitutionality of the second sentence of § 91(1) of the CACP. Since, pursuant to what the circuit court established, the person who filed the action encountered only temporary insolvency problems (see paragraph 8.2 of the Supreme Court *en banc* judgment) and the Supreme Court *en banc* did not form a contrary opinion, the option to apply § 181(31) of the CCP would probably have eliminated the violation of the fundamental right of the person who filed the action arising from § 24(5) of the Constitution.

4. In paragraph 26.3 of its judgment the Supreme Court *en banc* has formed an opinion that in the interests of using the state budget funds economically taking account of public interests, also the principle of partial bearing of the costs of administration of justice in administrative matters can be deemed a constitutional value. The Supreme Court *en banc* has noted in paragraph 27 of the judgment that the option to exempt a company from the payment of a state fee in appeal procedure only if there is a bankruptcy order or a court ruling whereby the bankruptcy proceeding is terminated by abatement is an appropriate measure for the fulfilment of both procedural economy and the objective of partial bearing of the costs of administration of justice. Based on the abovementioned, the Supreme Court *en banc* has deemed these objectives also in administrative matters as legitimate objectives of the restrictions on exemption from the payment of a state fee on an appeal.

I hold that the obligation to pay state fees contains the objective of partial bearing of the costs of administration of justice. Also, the objective of procedural economy is served by the obligation to pay state fees and not by the institute of exemption from the payment thereof. Therefore it is doubtful whether the aforesaid objectives can be the legitimate objectives of not granting state procedural assistance. However, the Supreme Court *en banc* has stated that the legitimate objective of the institute of partial or full exemption from the payment of a state fee on an appeal in administrative matters is to guarantee to a person who is unable to pay the state fee access to judicial proceedings and thereby protect his or her rights in judicial proceedings (see paragraph 26.1 of the judgment). The Supreme Court *en banc* has not formed an opinion whether the measures taken for the achievement of this objective (together with the restrictions on exemption from the payment of state fees) are appropriate, necessary and moderate.

I find that in the interests of using the state budget funds economically it is justified (legitimate) to restrict in administrative court procedure grant of state procedural assistance, first and foremost, in order to save state budget funds in a situation where a person encountering temporary economic difficulties and having recourse to the courts would receive funds to pay the state fee from other persons (see also the Supreme Court *en banc* judgment of 12 April 2011 in court case no. 3-2-1-62-10, paragraph 62.2). The Code of Administrative Court Procedure does not contain a provision similar to § 190(2) of the CCP, pursuant to which the party against whom a decision is made shall bear the procedural expenses thereof to the full extent also if the party is released from payment of legal costs or the party has been granted procedural assistance for bearing the procedural expenses. Therefore, grant of procedural assistance in administrative court procedure means the state's gift to the recipient of the procedural assistance if the latter loses the court action. In the interests of the objective of using the state budget funds economically the Supreme Court *en banc* should have considered the abovementioned legal situation in assessing the constitutionality of the

second sentence of § 91(1) of the CACP.

**5.** I find that in paragraph 1 of the decision of its judgment the Supreme Court *en banc* declared the second sentence of § 91(1) of the CACP unconstitutional and invalid in the part exceeding relevance. Based on the first sentence of § 14(2) of the CRCPA, the Supreme Court *en banc* should have declared that provision unconstitutional and invalid only in the part it does not enable, in matters of compensation for damage in appeal procedure, to fully or partially exempt a company which does not meet the criteria specified in that provision from the payment of a state fee. Since in other types of matters of administrative court procedure the state fees are not unreasonable, the Supreme Court *en banc* lacked the basis for declaring the second sentence of § 91(1) of the CACP unconstitutional and invalid to such a great extent.

**6.** I also do not agree with paragraph 32.4 of the judgment, according to which the circuit court should have justified why it can be presumed that the shareholders or members of the management board of the person who filed the action could participate in bearing the costs of court proceedings. I find that a company requesting state procedural assistance shall prove that its shareholders or other persons having financial interest in the company's activity cannot support it financially for the payment of the state fee. The Supreme Court *en banc* has proceeded from a similar principle in its earlier case-law (see the Supreme Court *en banc* judgment of 12 April 2011 in court case no. 3-2-1-62-10, paragraph 62.2) and the Civil Chamber of the Supreme Court in its case-law in applying § 183(2) of the CCP which enables grant of procedural assistance to bankrupt persons (see the Supreme Court judgment of 9 April 2008 in civil matter no. 3 2 1 18 08, paragraph 17). Since the person who filed the action did not present any statements or evidence indicating that it cannot get the money to pay for the state fee from its shareholders or other interested persons, the circuit court was under no obligation to provide further justifications regarding the abovementioned presumption.

The Supreme Court *en banc* also reprimanded the circuit court for not requiring from the members of the management board and shareholders of the person who filed the action evidence to refute the abovementioned presumption (see paragraph 32.4 of the judgment). I do not agree with the majority of the Supreme Court *en banc* also in this matter. I am of the opinion that the circuit court could only give the person who filed the action an opportunity to present evidence. In the case the circuit court gives, in the new hearing of the matter, to the person who filed the action an opportunity to present evidence or request from the circuit court assistance in obtaining the evidence and the person who filed the action fails to present evidence or is unable to refute the aforesaid presumption with the evidence, the circuit court shall proceed from the fact that the person who filed the action can get the money to pay for the state fee from its shareholders or other interested persons.

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