Constitutional judgment 3-2-1-62-10

JUDGMENT
OF THE SUPREME COURT *EN BANC*

No. of the case	3-2-1-62-10
Date of judgment	12 April 2011
Composition of court	Chairman Märt Rask, members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Jaak Luik, Priit Pikamäe, Jüri Põld, Harri Salmann and Tambet Tampuu
Court Case	An action of AS WIPESTREX GRUPP against the Republic of Estonia for receipt of 31,500,000 kroons and a penalty for late payment.
Contested judgment	Tallinn Circuit Court ruling of 23 March 2010 in civil matter no. 2-09-42181
Appellant and type of appeal	An appeal against a court ruling of AS WIPESTREX GRUPP

Participants in proceedings and their representatives in the Supreme Court	The plaintiff AS WIPESTREX GRUPP (registry code 10490620), represented by sworn advocate Tarvo Lindma The defendant the Republic of Estonia (via the Ministry of the Environment), represented by sworn advocate Andres Suik The Riigikogu (via the Legal Affairs Committee and the Constitutional Committee) The Chancellor of Justice The Minister of Justice The Minister of Finance
Hearing	11 January 2011, written proceeding
DECISION	**1. To declare that § 56(1) and (19) of the State Fees Act (RT I 2006, 58, 439; 22.12.2010, 1) and the last sentence of Annex 1 thereto (in the wording in force from 1 January 2009 until 31 December 2010) in conjunction were in contradiction with the Constitution to the extent they prescribed an obligation to pay in case of a civil matter with the value exceeding 10,000,000 kroons a state fee of 3% of the value of the civil matter on an appeal but not more than 1,500,000 kroons.** **2. To declare the first sentence of § 183(1) of the Code of Civil Procedure to be in contradiction with the Constitution and invalid to the extent it precludes grant of procedural assistance in civil proceedings to Estonian legal persons in private law not meeting the criteria indicated in that provision for exemption in full or in part from payment of a state fee on an appeal.** **3. To annul the Tallinn Circuit Court ruling of 23 March 2010 in civil matter no. 2-09-42181 and to refer the matter to the same circuit court for adjudication of the request of AS WIPESTREX GRUPP for procedural assistance, and for deciding on acceptance of the appeal.** **4. To determine the state fee to be paid on the appeal of AS WIPESTREX GRUPP to be 19,173 euros and 49 cents (300,000 kroons).** **5. To satisfy in part the appeal against a court ruling.** **6. To return to OÜ Maria Mägi Law Firm (former business name OÜ Law Office Mägi Kraavi & Partnerid) (account no. 221039155226, Swedbank AS) the security in the amount of 400 kroons (25 euros and 56 cents) paid on behalf of AS WIPESTREX GRUPP on 5 April 2010.**

FACTS AND COURSE OF PROCEEDINGS

1. AS WIPESTREX GRUPP (the plaintiff) filed on 24 August 2009 with the Harju County Court an appeal against the Republic of Estonia (via the Ministry of the Environment) (the defendant) requesting to order from the defendant 31,500,000 kroons as a principal debt and 9,802,109 kroons and 59 cents as a penalty for late payment. The plaintiff also requested to order from the defendant a penalty for late payment in the rate provided in § 94(1) and § 113(1) of the Law of Obligations Act from 25 August 2009 until the performance of the obligation.

2. The defendant did not admit the appeal and requested dismissal thereof.

3. The Harju County Court dismissed the appeal by a judgment of 12 February 2010. The county court left

the plaintiff's and the defendant's procedural expenses to be borne by the plaintiff.

4. The plaintiff filed on 12 March 2010 an appeal against the county court judgment requesting to annul the county court judgment and to satisfy the action by a new judgment.

5. The plaintiff did not pay a state fee on the appeal, but filed a request with the circuit court on 12 March 2010 asking not to apply the Act because the state fee rate is unconstitutional. Alternatively, the plaintiff filed a request for procedural assistance and a request not to apply the Act because the restrictions on grant of procedural assistance are unconstitutional.

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The circuit court judgment and justifications
6. The Tallinn Circuit Court dismissed the requests of the plaintiff by its ruling of 23 March 2010 and required him to pay the state fee of 945,000 kroons within 30 days as of the entry into force of the circuit court ruling.
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Proceeding in the Supreme Court
7. In his appeal against a court ruling the plaintiff requests to annul the circuit court ruling and to render a new ruling accepting the appeal without claiming any further state fee. If the Supreme Court finds that payment of a state fee of 945,000 kroons on an appeal is constitutional, the plaintiff requests to be granted procedural assistance by way of exemption from payment of the state fee, not applying the restrictions on grant of procedural assistance arising from § 183 of the Code of Civil Procedure (CCP) due to contradiction with the Constitution.

8. The defendant requests to dismiss the appeal against a court ruling.

9. The composition of the Civil Chamber of the Supreme Court referred the matter by a ruling of 9 June 2010 to be adjudicated by the full composition of the Civil Chamber.

10. The full composition of the Civil Chamber referred the matter by a ruling of 19 October 2010 based on § 19(4)3) and the first sentence of § 690(1) of the CCP and the second sentence of § 3(3) of the Constitutional Review Court Procedure Act (CRCPA) to be reviewed by the Supreme Court *en banc*.

OPINIONS OF THE CIVIL CHAMBER UPON APPLICATION OF THE ACT AND RAISED ISSUES
11. The Civil Chamber found in its ruling of 19 October 2010 that the circuit court ruling can be contested in the part it dismissed the plaintiff's request for procedural assistance, and in the part it determined the value of the matter in the appeal procedure to be 31,500,000 kroons. The ruling cannot be contested in the part it required the plaintiff to pay a state fee of 945,000 kroons on the appeal. However, the appeal was reviewed in full because the Supreme Court *en banc* may find a possibility to verify the amount of the state fee to be paid.
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Above all, the constitutionality of § 183(1) of the CCP enabling grant of procedural assistance only to non-profit associations and foundations, and only if significant additional conditions have been met, shall be verified.

[---]
The Civil Chamber did not exclude that the constitutionality of the amount of the state fee to be paid could be verified, on an exceptional basis, together with the value of the civil matter, if the regulatory framework is possibly unconstitutional upon the provisions regarding value and fees in conjunction. Further, the lack of the right to appeal against a court ruling requiring payment of a fee may not be in conformity with the Constitution if it precludes the verification of the constitutionality of the fee in a proceeding other than

appeal against return of an appeal or non-refund of a fee. So, the Civil Chamber raised the issue whether upon adjudication of a matter, the constitutionality of those provisions that in conjunction prescribe that the plaintiff shall pay a state fee of 945,000 kroons on an appeal can be verified. In the opinion of the Chamber, such provisions are the first sentence of § 124(1), § 133(1) and § 137(1) of the CCP and § 56(1) and (19) of the State Fees Act (SFA) and Annex 1 thereto in conjunction. The obligation to pay a disproportionally high state fee may be an unjustified restriction upon exercise of the fundamental rights provided both in § 24(5) and § 15(1) of the Constitution.

12-18. [Not translated.]

PROVISIONS UNDER DISPUTE

19. Subsection 1 of § 183 "Restrictions upon grant of procedural assistance to legal persons and bankrupts" of the Code of Civil Procedure (RT I 2005, 26, 197; 30.12.2010, 2):
"(1) Of legal persons, only non-profit associations or foundations entered in the list of non-profit associations or foundations benefiting from income tax incentives or non-profit associations or foundations equal thereto who have a seat in Estonia or another Member State of the European Union have the right to apply for procedural assistance in order to achieve their objectives, provided that the applicants substantiate that they are applying for procedural assistance in the field of environmental or consumer protection or taking account of another predominant public interest in order to prevent possible damage to the rights protected by law of a large number of persons, provided that they cannot be presumed to cover the costs out of their assets or are able to pay for them only in part or in instalments. Other foreign legal persons shall be granted procedural assistance only on the basis of an international agreement."

20. Subsections 1 and 19 of § 56 "Review of statements of claim, petitions and appeals" of the State Fees Act (RT I 2006, 58, 439; 22.12.2010, 1):
"(1) Upon the filing of a statement of claim, a state fee shall be paid on the basis of the value of the action pursuant to Annex 1 to this Act or in a fixed amount.
[---]
(19) Upon filing of an appeal against a county court judgment in a civil matter, a state fee shall be paid in the same amount as upon the initial filing of the action or another petition with the county court, taking account of the extent of the appeal."
"Annex 1 to the State Fees Act
FULL STATE FEE RATES FOR FILING OF PETITIONS IN CIVIL PROCEEDINGS (IN KROONS)
[---]
If the value of a civil matter exceeds 10,000,000 kroons, the full rate of state fee is 3% of the value of the civil matter but not more than 1,500,000 kroons."

OPINION OF THE SUPREME COURT *EN BANC*

21. First, the Supreme Court *en banc* addresses the object of the appeal and determines the relevant provisions (I) and then the infringed fundamental right (II). Next, the Supreme Court *en banc* assesses the constitutionality of the state fee rate to be paid (III) and the constitutionality of not granting procedural assistance to legal persons in private law for payment of a state fee on an appeal (IV). Then the Supreme Court *en banc* adjudicates the appeal against a court ruling and gives instructions for adjudication of requests of legal persons in private law for procedural assistance (V).

I. Object of the appeal and relevant provisions

22. The plaintiff has requested to order from the defendant 31,500,000 kroons as a principal debt and additionally a penalty for late payment. The county court dismissed the action.

Then the plaintiff filed an appeal which he did not pay a state fee on, but requested to hear the appeal without payment of the fee, whereas not applying the regulatory framework prescribing the state fee or alternatively the regulatory framework not enabling procedural assistance to the plaintiff. The circuit court did not exempt the plaintiff from the obligation to pay the fee and did not grant him procedural assistance and required him to pay a state fee of 945,000 kroons on the appeal.

In the appeal against a court ruling filed with the Supreme Court the plaintiff requests to annul the circuit court judgment and to render a new ruling accepting the appeal without requiring any further state fee or granting him procedural assistance to that extent.

23. The circuit court ruling can be contested, based on the first sentence of § 191(1) of the CCP, in the part it dismissed the plaintiff's request for procedural assistance.

24. The law enables legal persons to receive procedural assistance in civil court proceedings only on exceptional bases. Thus, according to the first sentence of § 183(1) of the CCP, only non-profit associations or foundations entered in the list of non-profit associations or foundations benefiting from income tax incentives or non-profit associations or foundations equal thereto can request procedural assistance, provided that the applicants are applying for procedural assistance in the field of environmental or consumer protection or taking account of another predominant public interest in order to prevent possible damage to the rights protected by law of a large number of persons. Further, in order to grant procedural assistance, general prerequisites must also be fulfilled, among other the person shall suffer financial difficulties upon payment of procedural expenses (§ 181(1)1) and the first sentence of § 183(1) of the CCP) and the participation in the proceeding must likely be successful (§ 181(1)2) of the CCP). Pursuant to § 183(2) of the CCP, a bankrupt may receive procedural assistance to a limited extent.

In the opinion of the Supreme Court *en banc*, it is unambiguous that the law has not prescribed an option for a company that is not a bankrupt to receive procedural assistance, at least by means of exemption in part or in full from a state fee. Therefore, pursuant to law, the plaintiff cannot request exemption from payment of a state fee to be paid on an appeal. However, the Supreme Court *en banc* can verify the constitutionality of the refusal of the grant of procedural assistance to the plaintiff.

25. A prerequisite for a concrete norm control initiated by the court is the relevance of the provision submitted for verification (the first sentence of § 14(2) of the CRCPA). According to the case-law of the Supreme Court, relevant is a provision that is of decisive importance in adjudication of the matter (see, for example, the Supreme Court *en banc* judgment of 22 December 2000 in matter no. 3-4-1-10-00, para. 10). A provision is of decisive importance if in case of its unconstitutionality the court would decide differently than in case of its constitutionality (see, for example, the Supreme Court *en banc* judgment of 28 October 2002 in constitutional review matter no. 3-4-1-5-02, para. 15).

26. There is no provision that would explicitly forbid grant of procedural assistance precisely to public limited companies or companies in general. The Supreme Court *en banc* is of the opinion that the provision that prevents grant of procedural assistance to the plaintiff in the current proceeding is the first sentence of § 183(1) of the CCP since it prescribes that from legal persons, only non-profit associations and foundations meeting specific criteria are granted procedural assistance. In the opinion of the Supreme Court *en banc*, the object of verification need not include the second sentence of § 183(1) of the CCP restricting grant of procedural assistance to foreign legal persons, and § 183(2) of the CCP regulating grant of procedural assistance to bankrupts.

Since the dispute concerns not enabling procedural assistance for exemption from payment (including in part) of a state fee on an appeal, the verification of the constitutionality of the regulatory framework is limited thereto. The Supreme Court *en banc* is of the opinion that it is not reasonable to limit the object of verification to public limited companies or companies in general. If, pursuant to the Constitution, procedural assistance should be granted to companies who request it for achieving their financial goals in a civil court proceeding, it should also be extended to other legal persons in private law, such as non-profit associations (e.g. apartment associations) and foundations that do not meet the criteria in the first sentence of § 183(1) of the CCP. Thus, the Supreme Court *en banc* limits the object of verification to all Estonian legal persons in private law who do not meet the criteria listed in the first sentence of § 183(1) of the CCP.

27. The Supreme Court *en banc* concurs with the opinion of the Civil Chamber in its ruling of 19 October

2010 that the circuit court ruling cannot be contested in the part it required the plaintiff to pay a state fee of 945,000 kroons on the appeal. Pursuant to the first sentence of § 696(1) of the CCP, filing of an appeal against a circuit court ruling must be permitted by law, i.e. the law must include a specific provision that grants the right to file an appeal against a court ruling.

The law does not provide the right for a participant in a proceeding to file an appeal against a court ruling with which the court refuses to accept the request or the appeal and gives the participant a new term for payment of the state fee, i.e. a term for eliminating the omission (see the third sentence of § 147(1), § 340^1 of the CCP).

28. If the participant in the proceeding does not agree to the elimination of the omission and fails to pay the required state fee, the appeal shall not be accepted and shall be returned according to the first sentence of § 340^1(2) of the CCP (also the third sentence of § 147(1) and § 637(1)3)). The plaintiff can file an appeal against that court ruling based on the second sentence of § 340^1(2) of the CCP, and in case of an appeal, also based on § 638(9) of the CCP, upon adjudication of which the lawfulness of the ruling on elimination of omissions shall also be verified.

If a participant who is required to pay a state fee does not agree to the amount thereof but pays the fee in the interests of continuing with the proceeding, he or she can claim refund of the overpaid state fee on the basis of § 150(1)1) and (4) of the CCP. Upon refusal to refund, the applicant is entitled to file an appeal against the court ruling on the terms provided in § 150(8) of the CCP.

Participants can also file, on the terms provided in § 136(5) of the CCP, an appeal against a court ruling determining the value of the civil matter.

29. Based on the aforementioned (see paras 27 and 28 of the judgment), the plaintiff's appeal against a court ruling should, to the extent he requests annulment of the circuit court ruling in the part it requires payment of 945,000 kroons, not be reviewed based on § 682(1) and § 695 of the CCP (in conjunction). It is also confirmed by the case-law of the Civil Chamber of the Supreme Court (see, for example, the Supreme Court ruling of 14 April 2010 in civil matter no. 3-2-1-22-10, para. 8). The Supreme Court *en banc* finds that the lack of the right to file an appeal against a court ruling requiring payment of a state fee as elimination of an omission is not unconstitutional in itself.

The Supreme Court *en banc* is of the opinion that the plaintiff's appeal against a court ruling can nevertheless be reviewed in that part as well on an exceptional basis.

30. The legislator has prescribed that a participant in a proceeding has the right to appeal against a court ruling that refuses him or her procedural assistance, and the Supreme Court *en banc* can verify the constitutionality of the regulatory framework for procedural assistance (see paras 23 and 24 of the judgment).

The Supreme Court has, for the purposes of ensuring legal clarity, deemed relevant also those provisions which are closely related to the contested norm and may, when they remain in force, create ambiguity as to legal reality (see, for example, the Supreme Court judgment of 1 October 2007 in constitutional review matter no. 3-4-1-14-07, para. 12). Based on § 15(2) of the Constitution, every court must upon adjudication of a matter assess the constitutionality of the applicable law if there are suspicions about it (see also the Supreme Court *en banc*judgment of 8 June 2009 in constitutional review matter no. 3-4-1-7-08, para. 21). The objective of a concrete norm control is to serve, above all, the interests of a participant in a proceeding who holds fundamental rights (the Supreme Court ruling of 28 May 2008 in constitutional review matter no. 3-4-1-4-08, para. 15).

To assess the constitutionality of the regulatory framework for exemption from payment of a state fee on an appeal by means of procedural assistance, there is inevitably the question whether the state fee, payment of which the procedural assistance is sought, is constitutional. It would be unreasonable to verify first with respect to the Constitution whether the plaintiff must receive procedural assistance for payment of 945,000

kroons, and then in a possible second proceeding whether claiming such a fee is constitutional at all, especially if the plaintiff has previously contested the constitutionality of the required fee. The Supreme Court *en banc* is of the opinion that the regulatory framework for the state fee to be paid on an appeal and the regulatory framework precluding procedural assistance for payment thereof are essentially inseparably connected. Therefore it is possible, on an exceptional basis, to verify the constitutionality of the claimed state fee rate on the plaintiff's appeal.

31. Since it is possible to verify the constitutionality of the claimed state fee rate, it is possible, on an exceptional basis, to adjudicate the plaintiff's appeal against the circuit court ruling in the part it required the plaintiff to pay a state fee of 945,000 kroons. Thus, the appealed circuit court ruling shall be reviewed in full. The Supreme Court *en banc* stresses that it acknowledges the right to appeal against a court ruling claiming a state fee only in a situation where refusal to grant procedural assistance has also been appealed and where both the refusal to grant procedural assistance and the fee rate to be paid may be unconstitutional.

The constitutionality of the amount of the state fee to be paid on an appeal can be verified by the circuit court itself by claiming the fee. In a regular appeal procedure, the constitutionality of a fee can be verified only by filing an appeal against return of an appeal or refusal to refund overpaid state fee (see para. 28 of the judgment).

32. The Supreme Court *en banc* concurs with the Civil Chamber ruling in the part it notes that pursuant to the first sentence of § 124(1) and § 137(1) of the CCP, the value of a matter in an appeal procedure is at least the amount of the principal claim of 31,500,000 kroons. Upon the filing of a statement of claim, a state fee, according to § 56(1) of the SFA, shall be paid on the basis of the value of the action pursuant to Annex 1 to the same Act or in a fixed amount.

According to Annex 1 to the State Fees Act, if the value of a civil matter exceeds 10,000,000 kroons, the full rate of state fee is 3% of the value of the civil matter but not more than 1,500,000 kroons. The value of the civil matter (the value of the action) in the county court was 31,500,000 kroons. Based on the referred provisions, a state fee of 945,000 kroons had to be paid on it in the county court. Pursuant to § 56(19) of the SFA, a state fee of 945,000 kroons has to be paid on the appeal as well.

Therefore, the plaintiff has to pay on the appeal a state fee of 945,000 kroons pursuant to the Act applicable at the time of the filing of the appeal, as was justly found by the circuit court.

33. Upon assessment of the constitutionality of the obligation to pay a state fee, relevant are the provisions from which arises for the plaintiff an obligation to pay a state fee of 945,000 kroons on an appeal. An obligation to pay a state fee does not arise, in itself, from the provisions regarding determination of the value of a matter because separately they do not prescribe an obligation to pay a fee or a fee rate, i.e. the Supreme Court *en banc* does not deem relevant the first sentence of § 124(1), § 133(1) or § 137(1) of the CCP. A specific fee on an appeal is not prescribed by § 139(2)3) or (3) of the CCP either. Within a concrete norm control, the Supreme Court *en banc* does not verify the constitutionality of state fees as a whole or the constitutionality of the amount of a state fee to be paid on a statement of claim in a county court.

The obligation to pay a specific state fee on an appeal depending on the value of the matter is prescribed by § 56(1) and (19) of the SFA and the last sentence of Annex 1 thereto. Those are the provisions the Chamber deems in conjunction relevant in the part they prescribed an obligation to pay in a civil matter with the value exceeding 10,000,000 kroons a state fee of 3% of the value of the matter on the appeal. The Supreme Court *en banc* does not deem it justified to verify only the constitutionality of payment of a fee of 945,000 kroons in case of a matter with the value of 31,500,000 kroons. It would be contrary to the efficiency principle of the constitutional review procedure because it would leave a possibility to contest the constitutionality of every fee amount covered by the last sentence of Annex 1 to the State Fees Act, which the Supreme Court *en banc* does not deem reasonable. The part of the last sentence of Annex 1 to the State Fees Act which limits the amount of a claimed state fee to 1,500,000 kroons does also not prevent verification.

34. Based on the aforementioned, the Supreme Court *en banc* deems relevant the first sentence of § 183(1) of the CCP to the extent it precludes grant of procedural assistance in civil court proceedings to Estonian legal persons in private law not meeting the terms of the provision concerning exemption in full or in part from payment of a state fee on an appeal, and as an inseparably related regulatory framework also § 56(1) and (19) of the SFA and the last sentence of Annex 1 thereto in conjunction to the extent they prescribe an obligation to pay in a civil matter with the value exceeding 10,000,000 kroons a state fee of 3% of the value of the matter on the appeal.

35. The Supreme Court *en banc* finds it possible to verify the constitutionality of the regulatory framework for grant of procedural assistance to the plaintiff without ascertaining the plaintiff's financial situation. It is also justified by the fact that due to the simultaneous verification of the constitutionality of the state fee to be paid, thefulfilment of prerequisites for exemption from which state fee the plaintiff should justify is unclear. Thus, the Supreme Court *en banc* adjudicates the issue whether the plaintiff should, in principle, have the option to request procedural assistance. By answering affirmatively, the Supreme Court *en banc* leaves the verification of the fulfilment of the prerequisites for grant of procedural assistance for the circuit court.

II. The infringed fundamental right

36. Contestation of a county court judgment in a circuit court is exercise of the right comprised in § 24(5) of the Constitution to appeal to a higher court pursuant to the procedure provided by law against a court judgment made with regard to the appellant. The objective of § 24(5) of the Constitution is to ensure verification of court judgments to prevent errors and mistakes therein (see, for example, the Supreme Court judgment of 9 April 2008 in a constitutional review matter no. 3-4-1-20-07, para. 18).

Regarding personal scope of protection, the right to appeal under § 24(5) of the Constitution belongs to each and every person. Based on its essence, the right to appeal provided in § 24(5) of the Constitution extends, according to § 9(2) of the Constitution, also to legal persons, whereas forming a part of the principle of a state based on the rule of law.
The material scope of protection of § 24(5) of the Constitution includes, above all, the right to appeal to a higher court against a judgment of a court of first instance.

37. The Chancellor of Justice deems necessary, within the matter, the unambiguous opinion of the Supreme Court in determining the meaning of the part of the sentence "pursuant to the procedure provided by law" of § 24(5) of the Constitution. The Supreme Court *en banc* lacks a clear opinion on the reservation of § 24(5) of the Constitution. The Constitutional Review Chamber of the Supreme Court has earlier not expressed an opinion on it (for example, the Supreme Court judgment of 25 March 2004 in constitutional review matter no. 3-4-1-1-04, para. 21) or has found that § 24(5) of the Constitution is a fundamental right without a reservation by law, meaning that this fundamental right may be restricted for the protection of another right or value arising from the Constitution and the restriction has to be provided by law (see the Supreme Court judgment of 18 June 2010 in constitutional review matter no. 3-4-1-5-10, para. 21).

38. In the assessment of the Supreme Court *en banc*, § 24(5) of the Constitution nevertheless includes, by means of a simple reservation by law, the right to appeal.

The Constitution, by giving every person the right to appeal to a higher court pursuant to the procedure provided by law against a court judgment made with regard to the appellant, therefore prescribes that the right to appeal can be restricted by law. § 24(5) of the Constitution gives the legislator the possibility to set on the right to appeal pursuant to the procedure provided by law both procedural restrictions, such as an obligation to pay a state fee, time-limits on proceedings and a procedure for filing appeals, and material restrictions, precluding the possibility to appeal against certain type of (above all regulating) decisions for a reason in conformity with the Constitution. "Pursuant to the procedure provided by law" expressed in the provision cannot be distinguished in case of the right to appeal from "in case", "on the basis" etc. provided by law, and in the assessment of the Supreme Court *en banc*, the complex interpretation of § 24(5) of the Constitution offered by the Chancellor of Justice is neither convincing nor executable. From § 24(5) of the

Constitution does not arise the persons' right to appeal against each and every decision, and the legislator is competent, based on the essence of the judgment and reasonable justifications, to differentiate the right to appeal (see also the Supreme Court ruling of 3 July 2008 in constitutional review matter no. 3-4-1-10-08, para. 10).

39. An infringement of the scope of protection is any adverse affecting thereof (see, for example, the Supreme Court judgment of 6 March 2002 in constitutional review matter no. 3-4-1-1-02, para. 12). In case of the fundamental right provided in § 24(5) of the Constitution, the right to appeal is infringed, above all, by prescribing a high state fee on an appeal. Whereasprescribing procedural assistance for payment of a state fee expands the option to exercise the right to appeal, the fundamental right provided in § 24(5) of the Constitution is also infringed by the lack of the option to exempt in part or in full from payment of a state fee by means of procedural assistance.

III. The constitutionality of the state fee rate to be paid on appeals

40. On 1 January 2009 the state fees in civil court proceedings were substantially increased. If from 1 January 2007 until 31 December 2008 in case of a civil matter with the value up to 10,000,000 kroons the state fee upon filing an action and an appeal was 157,750 kroons, and in case of a civil matter with the value exceeding 11,500,000 kroons 1,5% of the value of the civil matter but not more than 750,000 kroons, then as of 1 January 2009 the state fees in case of a matter with the value of 10,000,000 kroons were almost twice as high, i.e. 300,000 kroons, and in case of a civil matter with the value exceeding 10,000,000 kroons 3% of the value of the matter but not more than 1,500,000 kroons. This means that the fees were doubled with respect to both the percentage and the sums. Lower fees were increased proportionally even more.

41. The provisions prescribing an obligation to pay in case of a civil matter with the value exceeding 10,000,000 kroons a state fee of 3% of the value of the matter on an appeal (hereinafter also the obligation to pay the state fee under dispute), i.e. § 56(1) and (19) of the SFA and Annex 1 thereto, are formally in conformity with the Constitution. The provisions have been adopted in the Riigikogu by the required majority of votes and they are understandable without suspicion.

42. The Supreme Court *en banc* also has no reason to doubt that the obligation to pay a state fee on an appeal is in itself in conformity with § 24(5) of the Constitution.

43. However, the material constitutionality of the obligation to pay a state fee on an appeal to the extent under dispute shall be verified. For that purpose, the permitted goals of the infringements of the scope of protection of § 24(5) of the Constitution have to be determined and the proportionality of the state fee as means with respect to these goals has to be assessed.

Conformity with the proportionality principle is verified by the court on three consecutive levels - first the suitability of the measures, then the necessity and, if necessary, also the proportionality in a narrower sense, i.e. the moderation (see more the Supreme Court judgment of 6 March 2002 in constitutional review matter no. 3-4-1-1-02, para. 15).

44. The Supreme Court *en banc* found above that § 24(5) of the Constitution includes a fundamental right with a simple reservation by law (see p. 38 of the judgment), i.e. it can be restricted by law for any reason that is not prohibited by the Constitution.

According to § 4(1) of the SFA, a state fee is established based on the costs related to the performance of the act (cost principle). Therefore, the primary objective of a state fee is compensation in full or in part by a party of the act for expenses of a public-law act performed by the state (see also the Supreme Court *en banc* judgment of 22 December 2000 in matter no. 3-4-1-10-00, para. 24).

From § 4(2) of the SFA arises also the option to establish a state fee based on the purpose of an act, the benefits received as a result of the act, or material public interest and on different basis than the cost principle. It appears from the materials regarding the establishment of the regulatory framework for state

fees and the participants in the proceeding have pointed out the procedural economy as an additional objective of the regulatory framework for state fees. The European Court of Human Rights (ECHR) has similarly defined the objective of state fees as protection of the other party's legitimate interests against possible non-refundable legal costs and protection of the court system against burdensome appeals (*FC Mretebi v Georgia*, request no. 38736/04, para. 48). In the second reading of the draft legislation 194 SE, the speaker representing the Legal Affairs Committee of the Riigikogu justified the general 2,5 times increase of state fees by unreasonably low state fee rates up to then and by the need to change the civil court procedure to a so-called cost-oriented procedure, also by the need to avoid excessive and vexatious appeals and to find additional funds to the state budget (XI Riigikogu shorthand notes, 3 December 2008).

45. In the opinion of the Supreme Court *en banc*, permissible according to the Constitution can be deemed the objective that in an action, at least in case of monetary disputes, the state costs on administration of justice shall be borne on the account of the fees paid by the participants in the proceeding (participation of the participants in bearing the legal costs principle), i.e. other taxpayers need not finance that proceeding, at least in general. However, this principle cannot be extended in a way that the participants as a whole should similarly finance also the court proceedings where public interests are at stake, e.g. disputes regarding children and family, disputes with the state or, for example, offence proceedings.

The legitimate objective of state fees is for the purposes of the Constitution also procedural economy in order to avoid unfounded, vexatious and other similar appeals since it may result in the court system's inability to offer effective legal protection within a reasonable time (see also the Supreme Court judgment of 15 December 2009 in constitutional review matter no. 3-4-1-25-09, para. 23).

Legitimate cannot be deemed the possible objective of court fees to earn extra income for the state and to finance from it other expenses of the state if the fee is higher than is necessary for ensuring the bearing of the legal costs by the participants and procedural economy. It would be contrary to the essence of the fee arising from § 113 of the Constitution.

46. In the assessment of the Supreme Court *en banc*, the obligation to pay the state fee under dispute is a suitable measure for ensuring the participation of the participants in bearing the legal costs as well as for achieving procedural economy.

Establishing a requirement to pay in a civil matter with the value exceeding 10,000,000 kroons a state fee of 3% of the value of the matter on an appeal undoubtedly serves the interests of procedural economy because such a high financial restriction on having recourse to the courts may prevent thoughtlessly filed appeals, and in case of extensive restrictions on procedural rights it is likely that the court system upon adjudicating civil matters is more economical and faster.

Also, payment of a state fee in such an amount on an appeal obviously ensures participation of the participants in bearing the legal costs in an action in a civil matter.

47. In the opinion of the Supreme Court *en banc*, the obligation to pay the state fee under dispute is also a necessary measure for ensuring the participation of the participants in bearing the legal costs as well as for achieving procedural economy.

A less burdensome on persons but as effective measure for the same purposes would not be, in the assessment of the Supreme Court *en banc*, increase in the number of judges or the possibility to expand the state's assistance in bearing procedural expenses.

In 2008 in county courts the average duration of adjudicated proceedings in civil matters was 236 days, in 2009 it was 189 days and during the first half of 2010 it was 180 days, of which the Minister of Justice concluded that the fees have fulfilled their objective of procedural economy. The current statistics regarding recourse to the courts does not enable, in the assessment of the Supreme Court *en banc*, to claim with certainty that a substantial procedural economy has followed in practice the increase of state fees. It cannot

be claimed based on the current information (procedural statistics regarding the period from 2007 until the end of the first half of 2010 available on the website of the Ministry of Justice) that the number of persons having recourse to the courts or the percentage of appeals has decreased substantially. At the same time there is no separate statistics regarding appealed civil matters with the value of the action exceeding 10,000,000 kroons. The Supreme Court *en banc* concedes that due to the economic recession, the number of legal disputes referred to the courts has increased by leaps and especially making it to the second instance might have been hindered due to the high fees, i.e. without the increase of the fees, the number of cases would probably have been higher. At the same time, the workload of the courts has probably increased significantly due to adjudication of various requests for procedural assistance and appeals filed against them, also due to contestation of ordering procedural expenses (including fees) from the other party.

48. In the assessment of the Supreme Court *en banc*, the obligation to pay the state fee under dispute cannot be deemed a moderate measure for complying with the participation of the participants in bearing the legal costs principle as well as for achieving procedural economy.

48.1. The Supreme Court *en banc* is of the opinion that the need to ensure the right to appeal outweighs procedural economy and the participation of the participants in bearing the legal costs, if saving in procedural economy and the participation of the participants in bearing the legal costs is achieved in a way that a person lacks effective means to protect his or her fundamental rights in court. The Chancellor of Justice has correctly found that if the objective is to avoid excessive and vexatious or obviously unfounded appeals, the legislator should not, by establishing fees, create a situation where filing of suspicious or disputable appeals is also precluded. Having recourse to the courts cannot be ensured only in matters with a perspective of definite success. Every measure infringing the fundamental right to appeal therefore needs a reasonable and significant justification.

48.2. From the aspect of significance and reasonableness it cannot be concluded that the bigger the appellant's claim and the expected gain upon satisfaction of the action are, the bigger the costs, based on the value of the action, of hearing such a claim are, as claims the Minister of Justice. The state fee in case of smaller claims is proportionally higher than in case of bigger claims, but presumably the state fee in matters with higher value of the action covers sufficiently, and maybe even exceeds, the actual resource costs of the disputes [---]
In a situation where the state has prescribed the obligation to pay in case of a civil matter with the value exceeding 10,000,000 kroons a state fee of 3% of the value of the matter on an appeal, such an obligation may mean that a person lacks an actual possibility to protect his or her significant fundamental rights in court, i.e. the essence of the right to appeal has been damaged. The non-moderation of an infringement of the right to appeal is substantially increased by the fact that in order to file an appeal, the fee already paid upon filing of the action has to be paid again in the same amount [---], i.e. that for referring the matter to the appeal court (in case of dismissal of the action) the plaintiff actually has to pay a state fee total of 6% of the value of the matter on the action.

48.3. Regarding the reasonableness and significance, also the conditions in the society, i.e. the economic space where the legal regulatory framework applies, have to be assessed. Concerning the Estonian state fee rates it is important to note that at least in case of financial claims, legal costs, including fees, in Estonia are proportionally the highest compared to other European Union Member States, forming ca. 12,3% of the claim compared to, for example, France's 2,7%, Finland's 3,06%, Lithuania's 6% or Latvia's 6,4% of the claim (The World Bank's report*Doing Business 2011*, based on countries' reports; http://www.doingbusiness.org/ [1]). The legislator has also not pointed out a reasonable and significant justification for establishing extraordinary state fees on the scale of Europe. Also the Legal Affairs Committee of the Riigikogu finds that the current state fee rates, especially in civil court proceedings, need thorough analysis and definitely adjustment, admitting that in many cases the state fee to be paid may be, due to its amount, a disproportionate restriction upon exercise of the fundamental rights provided in § 24(5) and § 15(1) of the Constitution. The Minister of Justice found similarly that the amount of a state fee cannot have a deadening nature.
The state fee rate to be paid on the appeal in this matter can be deemed, in the assessment of the Supreme

Court *en banc*, in this region and in this economic situation such which shall be deemed non-moderate restriction on the right to appeal.

48.4. Since the fee on appeals in actions in civil matters is the same as the fee paid in the court of first instance, the Supreme Court *en banc*can, upon weighing the moderation of the infringement of the right to appeal, take into account the case-law of the ECHR upon application of the ECHRFF [European Convention for the Protection of Human Rights and Fundamental Freedoms] regarding access to the court.

The ECHR has explained that restrictions on recourse to the courts that are purely of monetary nature and do not concern the substance or the expected success of the action or the appeal shall receive special attention in the interests of justice (*Paykar Yev Haghtanak LTD v Armenia*, request no. 21638/03, para. 45). Although the ECHR has found in several decisions that the obligation to pay a state fee according to the extent of the claim is not in itself contrary to Article 6(1) of the ECHRFF, the reasonableness of such a state fee (whether the specific state fee amount has substantially damaged the right of recourse to the courts or not) shall be assessed in the light of the circumstances of each matter, keeping in mind the ability of the person having recourse to the courts to pay the state fee and the stage of the proceeding in which the payment of the state fee is required (*Kreuz v Poland*, request no. 28249/95, para. 60; *Teltronic-Catv v Poland*, request no. 48140/99, para. 48;*FC Mretebi v Georgia*, request no. 38736/04, para. 41; *Weissmann and others v Rumenia* , request no. 63945/00, para. 37, and others). Also, the ECHR has pointed out in its case-law that a too high fee required for filing an action may indirectly force the plaintiff to waive his or her action and thereby deprive the plaintiff of the right to a fair administration of justice (*Weissmann and others v Rumenia*, paras 39-40). The ECHR has said that the argument that legal persons should have the means to pay state fees is purely hypothetical (*Paykar Yev Haghtanak Ltd v Armenia*, para. 49).

49. Based on the aforementioned, § 56(1) and (19) of the SFA and the last sentence of Annex 1 thereto in conjunction were unconstitutional and are not applicable in the part they prescribe that in case of a civil matter with the value exceeding 10,000,000 kroons a state fee of 3% of the value of the matter on the appeal but not more than 1,500,000 kroons has to be paid.

In the current matter it is not possible to declare the unconstitutional provisions invalid because as of 1 January 2011 a new State Fees Act (RT I 2010, 21, 107) has entered into force.

50. Based on the identification of a disproportionate infringement of the right to appeal, the Supreme Court *en banc* does not deem it necessary to address possible infringements of other fundamental rights, such as the right to enterprise (§ 31 of the Constitution) or the right to property (§ 32 of the Constitution).

51. To assess the constitutionality of the regulatory framework for procedural assistance and to adjudicate the filed appeal against a court ruling, the amount of the state fee that the plaintiff has to pay on his claim has to be determined (see also, for example, the Supreme Court *en banc* judgment of 2 June 2008 in constitutional review matter no. 3-4-1-19-07, para. 32; the Supreme Court *en banc* judgment of 14 April 2009 in administrative matter no. 3-3-1-59-07, paras 43-45). Whereas the court has, within the hearing of the specific matter, including upon assessment of admissibility of the filed appeal, extensive means to verify the constitutionality of the relevant procedural provisions, to eliminate all unconstitutional procedural restrictions and to guarantee to persons an effective judicial legal protection (see also the Supreme Court ruling of 11 November 2010 in constitutional review matter no. 3-4-1-14-10, para. 12).
The Supreme Court *en banc* determines that the state fee which the plaintiff shall pay on the appeal is 19,173 euros and 49 cents (300,000 kroons). Such an amount corresponds to the last line of the table in Annex 1 to the SFA, i.e. it is the maximum fee according to the table and the closest regulatory framework to the last sentence of Annex 1 to the SFA. Whereas the Supreme Court *en banc* takes into consideration that the plaintiff has already paid a state fee of 945,000 kroons on the action and presumably such a fee covers, pursuant to § 4(1) of the SFA, expenses accompanying the making of the judgment (state fee cost-orientation principle) and ensures compliance with the procedural economy principle.

IV. The constitutionality of not granting procedural assistance to legal persons in private law for payment of a state fee on an appeal
52.

The Supreme Court *en banc* found above (see para. 51 of the judgment) that the plaintiff shall pay on his appeal a state fee of 19,173 euros and 49 cents (300,000 kroons). Regardless that such a state fee is constitutional in the objective sense, payment thereof by the plaintiff may not be financially possible in the subjective sense. Thus, it shall be verified whether not granting procedural assistance to the plaintiff for exemption in part or in full from payment of the state fee is constitutional.

53. The Supreme Court *en banc* has no reason to doubt that the first sentence of § 183(1) of the CCP precluding grant of procedural assistance is formally constitutional. The provision has been adopted in the Riigikogu by the required majority of votes and it is understandable without suspicion.

54. The Supreme Court *en banc* found above that § 24(5) of the Constitution includes a fundamental right with a simple reservation by law (see para. 38 of the judgment), i.e. it can be restricted by law for any reason that is not prohibited by the Constitution.

The Supreme Court *en banc* also found that the lawful objectives of claiming a state fee on an appeal are participation of the participants in bearing the legal costs principle and procedural economy (see para. 45 of the judgment). Grant of procedural assistance favours the right to appeal since the state has prescribed such an option for counterbalancing an infringement of the right to appeal due to establishment of state fees. Its purpose is to give, above all, to needy persons access to judicial proceedings and to protect their rights thereby. Lack of an option to grant procedural assistance has, in the opinion of the Supreme Court *en banc*, basically the same objective as the obligation to pay a state fee on an appeal – to ensure economical use of state budget funds considering public interests, i.e. the participation of the participants in bearing the legal costs and procedural economy. In the assessment of the Supreme Court *en banc*, these objectives are lawful considering the aforementioned (see para. 45 of the judgment).

55. The Supreme Court *en banc* is of the opinion that the regulatory framework precluding grant of procedural assistance to Estonian legal persons in private law for exemption in part or in full from payment of a state fee on an appeal in a civil court proceeding is a suitable measure for ensuring the participation of the participants in bearing the legal costs as well as for achieving procedural economy.

The impossibility of Estonian legal persons in private law to receive procedural assistance for exemption from payment of a state fee on an appeal definitely reduces thoughtlessly filed appeals, and in case of extensive restrictions on procedural rights it is likely that the court system upon adjudicating civil matters is more economical and faster. The obligation to pay a state fee on an appeal also ensures the participation of the participants in bearing the legal costs.

56. The Supreme Court *en banc* is of the opinion that the regulatory framework precluding grant of procedural assistance to Estonian legal persons in private law for exemption in part or in full from payment of a state fee on an appeal in a civil court proceeding is also a necessary measure for achieving procedural economy. However, the preclusion of grant of procedural assistance for achieving the participation of the participants in bearing the legal costs is not a necessary measure for participation of the participants in bearing the legal costs principle because the same result can be achieved by enabling payment of a state fee in instalments which would be less burdensome on persons.

57. The Supreme Court *en banc* is of the opinion that the regulatory framework precluding grant of procedural assistance to Estonian legal persons in private law for exemption in part or in full from payment of a state fee on an appeal in a civil court proceeding cannot be deemed a moderate measure for achieving procedural economy.

57.1. If to assess the constitutionality of preclusion of grant of procedural assistance to legal persons in private law for executing their economic interests separately from the state fee rates, a conclusion can be made that preclusion of grant of procedural assistance for payment of a state fee on an appeal is a moderate infringement of the right to appeal. In principle, it can be concurred with the opinion of the Minister of Justice that at least companies being subjects of law is related to the existence of sufficient assets, and

therefore in legal order the existence of a company is acknowledged only if it is capable of achieving its objectives and performing its duties on its own, for which reason the legal person shall, in certain sense, assume by its activities an economic risk that shall be borne only by the legal person, including in judicial proceedings. Also, it can be concurred, in principle, with the Legal Affairs Committee of the Riigikogu, in whose opinion the restriction without the discretion of the court provided in § 183(1) of the CCP is necessary due to the limitedness of resources which forces the legislator to make choices and does not enable grant of procedural assistance to every person.

Therefore, the Supreme Court *en banc* admits that the state is not obligated to grant procedural assistance to legal persons in private law engaged in economic activities for having recourse to the courts.

57.2. At the same time, 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. The legislator shall ensure also to legal persons in private law the actual possibility for exercising the right to appeal provided in § 24(5) of the Constitution.

It is the legislator's decision whether to establish a system where state fees on appeals are relatively high (and yet constitutional) and legal persons in private law have the possibility to receive procedural assistance, or to establish a system where there are no or relatively low state fees on appeals and legal persons in private law are denied procedural assistance or it is granted on limited occasions. In the last case the procedural economy would be greater than in the first case thanks to the lack of verification of the legal persons' financial situation.

57.3. Also in case of legal persons in private law (including companies) the actual inability to exercise the right to appeal shall be considered decisive in case of very high state fees. Although companies being subjects of law is related to the existence of sufficient funds (foundation and capital requirements, regulatory framework for bankruptcy), upon assessment of their possibilities to appeal it shall be taken into account that companies' normal operation and economic activities are distorted if in order to protect their rights in court they have to, prior to hearing on the merits, sell a lot of assets, take a big loan or risk having economic difficulties.

The ECHR has also formed an opinion, pursuant to which an argument that a company should have funds to pay state fees is purely hypothetical (see *Paykar Yev Haghtanak Ltd v Armenia*, request no. 21638/03, para. 49). According to the case-law of the European Court of Justice (The European Court of Justice Second Chamber judgment of 22 December 2010 in Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*), the effective remedy provided in Art. 47 of the Charter of Fundamental Rights of the European Union shall be interpreted within the scope of application of the European Union law so that relying on it by legal persons is not precluded and that assistance granted upon application of the principle may include, above all, exemption from making a prepayment of procedural expenses and/or legal aid of a lawyer.

57.4. The restriction in § 183(1) of the CCP precluding grant of procedural assistance may not harm the right to appeal more than is justifiable by procedural economy and the participation of the participants in bearing the legal costs in an action of a civil matter. In the opinion of the Supreme Court *en banc*, in a situation where the general level of state fees is high (see para. 48 of the judgment), necessary procedural assistance shall be granted to all Estonian legal persons in private law at least for payment of state fees on appeals.

Although the obligation to pay a state fee of 300,000 kroons on a civil matter with the value of 31,500,000 kroons is in itself constitutional, it cannot be deemed moderate that for payment of that amount the plaintiff cannot, in principle, receive procedural assistance. It is such a high state fee that it may prevent disproportionately a company operating in its own economic interests to exercise the right to appeal in order to exercise its rights. In such a situation it would be unreasonable to start assessing the constitutionality of § 183(1) of the CCP considering every appellant and his or her financial situation and the state fee to be paid by him or her. Therefore, the Supreme Court *en banc* deems, considering the current fee system, non-

moderate and unjustified the lack of an option to receive procedural assistance by Estonian legal persons in private law for performing the obligation to pay a state fee on an appeal.

58. Based on the aforementioned, the Supreme Court *en banc* declares unconstitutional and invalid the first sentence of § 183(1) of the CCP in the part it precludes grant of procedural assistance for exemption in full or in part from payment of a state fee on an appeal in a civil court proceeding to Estonian legal persons in private law not meeting the criteria provided in the said provision.

59. The Civil Chamber also raised the issue of a possible infringement of the first sentence of § 12(1) of the Constitution. Since the Supreme Court *en banc* found that the regulatory framework is unconstitutional due to the infringement of § 24(5) of the Constitution, the Supreme Court *en banc* does not deem it necessary to verify it. The Supreme Court *en banc* also does not deem it necessary to verify the constitutionality of the regulatory framework with respect to an infringement of other fundamental rights (above all the right to enterprise, to property).

V. Adjudication of the appeal against the court ruling

60. Based on the aforementioned, the Supreme Court *en banc* annuls the circuit court ruling and refers the matter back to the same circuit court for adjudication of the request for procedural assistance and for deciding on acceptance of the appeal. The appeal against the court ruling is satisfied in part.

The Supreme Court *en banc* determines the amount of the state fee to be paid on the appeal to be 19,173 euros and 49 cents (300,000 kroons) (see para. 51 of the judgment).

61. The Supreme Court *en banc* notes that as a so-called pure civil matter, the appeal against a court ruling should be adjudicated by a ruling pursuant to § 701(2) of the CCP. Nevertheless, since the judgment declares provisions unconstitutional and invalid, the matter shall be adjudicated by a judgment. Whereas the Supreme Court *en banc* shall follow § 14(3) and § 57(1) of the CRCPA.

62. Next, the Supreme Court *en banc* deems it necessary to analyse on which bases and pursuant to which procedure the circuit court upon the new hearing of the matter and also other courts until the legislator specifies the regulatory framework shall assess requests of Estonian legal persons in private law for procedural assistance for payment of state fees. There are no such provisions in the Code of Civil Procedure but in the assessment of the Supreme Court *en banc*, it is possible to apply either directly or by means of an analogy several applicable provisions regulating grant of procedural assistance.

62.1. Upon grant of procedural assistance to legal persons in private law it is possible to apply § 181 of the CCP, pursuant to subsection 1 of which grant of procedural assistance requires simultaneous existence of two general prerequisites. According to § 181(1)1) of the CCP, procedural assistance shall be granted to a person if the person is unable to pay the procedural expenses due to his or her financial situation or is able to pay such expenses only in part or in instalments. Pursuant to § 181(1)2) of the CCP, assistance shall be granted to a person if there is sufficient reason to believe that the planned participation in the proceeding will be successful.

62.2. In case of legal persons in private law, the basis for refusing to grant procedural assistance may be § 182(2)2) of the CCP, pursuant to which procedural assistance shall not be granted if the person requesting procedural assistance is able to cover the procedural expenses out of existing assets which can be sold without any major difficulties and against which a claim for payment may be made pursuant to law. § 182(2)2) of the CCP therefore provides an obligation to sell, for the purposes of payment of a state fee, assets which the person requesting procedural assistance does not need directly for anything else. If a legal person in private law is able to cover the state fee out of assets which can be sold without any major difficulties, procedural assistance shall not be granted and a term for payment of the state fee shall be given. 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 (see also the Supreme Court ruling of 31 January 2011 in civil matter no. 3-2-1-159-10, para. 11).

In case of legal persons in private law, the Supreme Court *en banc* deems it possible to apply in part by means of an analogy also the restriction provided in § 183(2) of the CCP. Therefore, procedural assistance can 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. Behind a legal person as a legal abstraction there are generally, by way of shareholding or membership, other persons who, at least in case of companies, are financially interested in the outcome of the judicial dispute concerning the legal person. Financial interest can be presumed, above all, in case of shareholders of a company, but also in case of members of an apartment association. The ECHR has also not precluded a claim against shareholders for making additional instalments to pay a state fee required from the company, if they would be capable of that (see *Teltronic-Catv v Poland*, 59). It was also found in the European Court of Justice Second Chamber judgment in Case *Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* that upon grant of procedural assistance, the shareholders' financial capability and ability to find the amount necessary for filing an action can be taken into account.

62.3. In assessing the financial situation of a legal person in private law it is necessary to consider the financial consequences for the 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 loans 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 financial assistance, it is possible to rely on an annual report pursuant to § 185(4) of the CCP. 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 the filing of the request for procedural assistance. The person requesting procedural assistance shall submit the relevant documents.

62.4. In the assessment of the Supreme Court *en banc*, upon adjudication of requests of legal persons in private law for procedural assistance it is possible, with a few exceptions, to apply the provisions that regulate, above all, adjudication of requests of natural persons for procedural assistance. Thus, for example, § 184 of the CCP on submission of petition for grant of procedural assistance and continued provision of procedural assistance is applicable (save the court's right provided in subsection 5 to request information on the financial situation of the family members of the person receiving procedural assistance). § 185(1), (4) and (5) of the CCP apply to the requirements regarding application for procedural assistance. The legal person also has to submit a summary notification in free form about its financial situation, disclosing all significant information. § 186(5)–(8) of the CCP (save the provisions regarding family members) on requesting additional data from the person requesting procedural assistance and verification of the data are applicable. It is also possible to apply procedural provisions prescribed in §§ 187–191 of the CCP to adjudication of requests for procedural assistance, suspension and revocation of procedural assistance, division of procedural expenses and filing of an appeal against a court ruling.

63. The Supreme Court *en banc* notes additionally that this judgment may have an extensive effect. Therefore, in the assessment of the Supreme Court *en banc*, it is necessary to quickly analyse the regulatory framework for state fees as a whole. State fees have not been decreased in the current State Fees Act. On the contrary, as of 1 January 2011 the state fee maximum rate provided in the last sentence of Annex 1 to the SFA increased significantly, meaning that in case of a civil matter with the value exceeding 639,116.48 euros (10,000,000 kroons) the full rate of state fee is 3% of the value of the civil matter but not more than

131,955.82 euros (2,064,659 kroons and 93 cents). In order to prevent future disputes and normalise judicial procedural expenses, the legislator should, as soon as possible, generally and systematically lower the state fee rates.

64. Due to the satisfaction in part of the appeal against a court ruling, the paid security shall be refunded pursuant to the first sentence of § 149(4) of the CCP.

A dissenting opinion of the justice of the Supreme Court Tambet Tampuu on the Supreme Court *en banc* judgment in matter no. 3-3-1-62-10, with which the justice of the Supreme Court Jüri Põld has concurred with

1. I do not concur with p. 1 of the decision of the Supreme Court *en banc* judgment and with the justifications regarding declaration of unconstitutionality of the provisions of the State Fees Act, also with p. 4 of the decision by which the state fee to be paid by the plaintiff on the appeal was determined to be 19,173 euros and 49 cents (300,000 kroons). I find that the plaintiff lacked the right to file an appeal against a court ruling for contesting the amount of the state fee and the constitutionality of the provisions prescribing payment thereof, and that the provisions of the State Fees Act declared unconstitutional by the Supreme Court *en banc* judgment are not relevant.

2. I am of the opinion that to assess the constitutionality of the first sentence of § 183(1) of the Code of Civil Procedure (CCP) it was not necessary to declare the provisions prescribing the amount of state fees unconstitutional because the Supreme Court *en banc* was able to adjudicate the plaintiff's request to declare the first sentence of § 183(1) of the CCP partly unconstitutional and invalid also without ascertaining the unconstitutionality of the contested provisions of the State Fees Act. To declare the first sentence of § 183(1) of the CCP unconstitutional it would have sufficed for the Supreme Court *en banc* to state that the state fee is too high and thus, not granting procedural assistance unconstitutional.

I find that the provisions of the State Fees Act declared unconstitutional by the Supreme Court *en banc* judgment were not relevant pursuant to the first sentence of § 14(2) of the Constitutional Review Court Procedure Act (CRCPA). The plaintiff could have requested in the appeal procedure verification of the constitutionality of the state fee required upon filing of the appeal only if the circuit court would have returned to him the appeal due to failing to pay the state fee by the term specified by the circuit court.

However, since the Supreme Court *en banc* determined itself the amount of the constitutional state fee to be paid on the appeal, it was premature to declare unconstitutional also the provision of the procedure code not enabling procedural assistance.

3. By assessing the moderation of the obligation to pay the disputable state fee and of the lack of an option for Estonian legal persons in private law to receive procedural assistance for performing the obligation to pay a state fee on an appeal in a civil matter (see pp. 48 and 57.4 of the judgment) the Supreme Court *en banc* should have considered the possibility provided in § 181(3^1) of the CCP that pursuant to the first sentence of § 183(1) of the CCP, legal persons in private law not receiving state procedural assistance have the right to request payment of the state fee in instalments (see the Supreme Court *en banc* ruling of 9 November 2010 in civil matter no. 3-2-1-95-10, p. 9; ruling of 21 December 2010 in civil matter no. 3-2-1-147-10, p. 10; judgment of 31 March 2011 in constitutional review matter no. 3-4-1-19-10, pp. 35–39). I am of the opinion that due to the possibility to receive state procedural assistance provided in § 181(31), legal persons in private law are ensured the fundamental right arising from § 24(5) of the Constitution also in case of relatively high state fees.

4. I find that the Supreme Court *en banc* in p. 2 of its decision declared the first sentence of § 183(1) of the CCP 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 this provision unconstitutional and invalid only in the part it precludes grant of procedural assistance to Estonian legal persons in private law not

meeting the criteria indicated in that provision for exemption in full or in part from payment of a state fee on an appeal in a civil court procedure in the amount stated in p. 1 of the decision of the Supreme Court *en banc* judgment.

5. According to p. 57.2 of the judgment, restrictions on grant of procedural assistance to legal persons in private law would be constitutional if the state fees to be paid on appeals would be relatively low. In the same paragraph the Supreme Court *en banc* found that in that case, due to no verification of the legal persons' financial situation, greater procedural economy would be ensured than in case of enabling procedural assistance to legal persons in private law in case of high state fees. Based on that opinion, the Supreme Court *en banc* could have considered decreasing the unconstitutional state fee to a rate that would have made, taking into account the current matter, the infringement of § 24(5) of the Constitution arising from the first sentence of § 183(1) of the CCP constitutional.

Links
[1] http://www.doingbusiness.org/