Constitutional judgment 3-4-1-6-10

RULING
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-6-10
Date of ruling	22 November 2010
Composition of court	Chairman Märt Rask, members Jüri Ilvest, Peeter Jerofejev, Ott Järvesaar, Jüri Põld
Court Case	A request of the Chancellor of Justice for the declaration of invalidity of § 1 of the Tallinn City Government regulation of 30 June 2009 no. 75 "Prices for water supply and leading off waste water services provided in the main area of operation of the Tallinn public water supply and sewerage system"
Basis of proceeding	A request no. 5 of the Chancellor of Justice of 7 June 2010
Hearing	Written proceedings
DECISION	**To return the request of the Chancellor of Justice without review.**

FACTS AND COURSE OF PROCEEDINGS

1. Tallinn concluded on 12 January 2001 with AS Tallinna Vesi a service contract (hereinafter the service contract) with which the parties agreed, due to grant of a special right for the provision of water supply and leading off waste water services to AS Tallinna Vesi, among other on the levels of quality of the water supply and leading off waste water services and on the bases of price formation.

2. On 1 October 2008 the Tallinn City Government adopted a regulation no. 66 "Prices for water supply and leading off waste water services provided in the main area of operation of the Tallinn public water supply and sewerage system".

3. On 7 July 2009 the Chancellor of Justice commenced proceedings based on an application forwarded by the Harju County Governor to verify the lawfulness of the regulation no. 66 of the Tallinn City Government of 1 October 2008.

4. –5. [Not translated.]

6. On 1 December 2009 the Estonian Competition Authority forwarded to the Chancellor of Justice a recommendation presented to AS Tallinna Vesi on 30 November 2009 which was based on an analysis of the Estonian Competition Authority which aimed to assess the justification of the prices for water supply and leading off waste water services applied by AS Tallinna Vesi. On the basis of § 55 (2) of the Competition Act (CA), the Estonian Competition Authority analysed the competitive situation in 2008 and 2009 on the water supply and leading off waste water services market.
Having assessed the price formation of AS Tallinna Vesi in 2006, 2007 and 2008, the Estonian Competition Authority found that AS Tallinna Vesi has been guaranteed unfoundedly extensive profitability. The Estonian Competition Authority also found that the Tallinn City Government has not verified substantively the cost-orientation of the prices applied by AS Tallinna Vesi. Based on such a conclusion, the Estonian Competition Authority made a recommendation to AS Tallinna Vesi on the basis of § 61 of the CA.

7. On 23 March 2010 the Chancellor of Justice made a proposal to the Tallinn City Government to bring § 1 of the Tallinn City Government regulation of 30 September 2009 no. 75 "Prices for water supply and leading off waste water services provided in the main area of operation of the Tallinn public water supply and sewerage system" into conformity with § 14 (3) of the Public Water Supply and Sewerage Act (PWSSA), with § 89 (1) and § 90 (1) of the Administrative Procedure Act (APA), and with the first sentence of § 3 (1) and § 154 (1) of the Constitution.

8. The Tallinn City Government responded to the Chancellor of Justice on 14 April 2010 with a letter declared for internal use that it shall not comply with the proposal.
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9. On 7 June 2010 the Chancellor of Justice had recourse to the Supreme Court with a request for the declaration of invalidity of § 1 of the Tallinn City Government regulation of 30 September 2009 no. 75 "Prices for water supply and leading off waste water services provided in the main area of operation of the Tallinn public water supply and sewerage system" (the contested regulation).

REQUEST OF THE CHANCELLOR OF JUSTICE
10. The Chancellor of Justice found in his request that § 1 of the contested regulation is in conflict with § 14 (3) of the PWSSA, and with the first sentence of § 3 (1) and § 154 (1) of the Constitution.

11. In the assessment of the Chancellor of Justice, the contested regulation is legislation of general application.
Water supply and leading off waste water services are universal services for the purposes of § 2 6) of the Consumer Protection Act. The legislator has ensured the quality and availability of the public water supply and sewerage system with a regulatory framework which subjects the service provider to rules which restrict its activity upon provision of water supply and leading off waste water services. To balance the restrictions, the legislator has prescribed in § 7 (2) and (2^1) of the PWSSA the grant of a special or exclusive right to water undertakings, i.e. in terms of § 14 (1) of the CA the grant of such a right which gives them a competitive advantage on the goods market compared to other undertakings, or which makes them the only undertaking on that goods market. Since the public water supply and sewerage system cannot be duplicated in general, water undertakings are generally in control of essential facilities in their area of operation in terms of § 15 of the CA. Because water undertakings have a special or exclusive right and they are in control of essential facilities, the water undertakings are in a dominant position according to § 13 (2) of the CA, i.e. they have a monopoly on the provision of water supply and leading off waste water services in their area of activity. One restriction on water undertakings is that the prices for water supply and leading off waste water

services are determined by the public authority.

The public authority determines the prices by a regulation. Formally it is legislation of general application because it is explicitly so provided for in the second sentence of § 14 (2) of the PWSSA. The Chancellor of Justice indicates that there is no case-law of the Supreme Court on whether in the case of such a clear guideline from the legislator the substance of the legal act has to be analysed in addition in order to determine whether it is legislation of general or specific application, and points out the arguments why it constitutes a legal act in the substantive sense. On the basis of § 8 (3) and § 13 of the PWSSA, the provision of water supply and leading off waste water services are based on a contract concluded between a water undertaking and a client, conditions of which are regulated, among other, by the Public Water Supply and Sewerage Act and by legislation issued on the basis thereof. In addition to other mandatory contract conditions the public authority determines the prices in an imperative manner. In such a way the legislator has restricted the parties' freedom of contract. A restriction on the freedom of contract is in nature a generalising/abstract precept which restricts a person's right to free self-realisation, freedom of enterprise and fundamental right of ownership. Based on §§ 19, 31 and 32 of the Constitution, the legislator shall decide on the possibility of establishment of such a restriction and in doing so, it shall decide on all significant matters concerning the restriction of the fundamental rights; and the legislator has done so by § 14 (3) of the PWSSA.

By § 14 (2) of the PWSSA the legislator authorises a local government council or a local government to determine the price agreement, which is in accordance with the law, between a water undertaking and a client. This means that an act of the public authority replaces in all contracts between a water undertaking and its clients a very significant contract condition – agreement on the price. Since the act determines a contract condition in all contracts between a water undertaking and its clients, the legislator has authorised local governments to establish a generalising/abstract precept which binds both the water undertaking and its clients.

In a similar manner the legislator has decided to restrict also with the District Heating Act (DHA) the contracting parties' freedom to agree on the price. At the same time, based on § 9 (4) of the DHA, the price of heat to be sold is determined by a heating undertaking and its client. On the basis of § 9 (1) and (3) of the DHA, a heating undertaking shall, prior to reaching a price agreement with the client, obtain an approval of the public authority for the maximum price with which the heating undertaking may sell heat. Consequently, the Estonian Competition Authority or rural municipality governments or city governments do not replace with their act the agreement, in contracts between a heating undertaking and its clients, on the price of heat to be sold. In every single case the parties are free to agree on a price which shall not exceed the maximum price.

12. In the opinion of the Chancellor of Justice, the furnishing of the definitions *cost-oriented* and *founded profitability* shall be based on the guidelines and objectives of the legislator and the general principles of law.

It arises from § 3 (1) and § 154 (1) of the Constitution that legal acts of local governments shall comply with the law. The same requirement is provided for in § 89 (1) and § 90 (1) of the APA. The legislator has authorised local governments to regulate the prices for water supply and leading off waste water services for the purpose of guaranteeing fair prices for these services. § 14 (3) of the PWSSA restricts the local governments’ right of discretion. The fair price is formed by ensuring compensation for specific expenses related to the provision of the services, and founded profitability.

The general principles of the competition law are comprised in the Competition Act. The activity of an undertaking which has a special or exclusive right or which is in control of essential facilities is generally regulated in §§ 16–18 of the CA which include the general principles of the competition law. According to one of these principles, the costs of goods and the received profit shall be founded which means that they shall, in general, correspond to the situation where there is free competition on the market and consequently, undertakings act under so-called usual competition conditions. Consequently, the prices for water supply and leading off waste water services shall be, in principal, similar to the prices for which a water undertaking

would provide these services in the case of competition on the market, including it would manage itself efficiently.

Since there is generally no competition in the water supply and leading off waste water sector, the local governments shall model a situation of competition. Modelling is possible, for instance, by way of comparison and by means of a method of promised productivity on the invested assets. The European Court of Justice has, upon establishing unfair prices, compared the selling price and production costs of goods and assessed the excessiveness of profit. If it is excessive, the price may be unfair in itself or in comparison with other competing goods.

The local governments set the prices for water supply and leading off waste water in advance and are liable for the conformity of the regulation with the law and the Constitution. In constitutional review court proceedings the local government shall prove that it has formed the price in conformity with the law and the Constitution. By applying the right of discretion it has determined how effectively a water undertaking shall manage itself and what the profit of the undertaking shall be. The role of the Chancellor of Justice and the court upon verification of the right of discretion is restricted – above all, the compliance with the principles of the exercise of the right of discretion can be verified, but the right of discretion cannot be exercised instead of the local government and it cannot be dictated what is a fair price.

13. The Chancellor of Justice finds that upon verifying the constitutionality of the regulation it is not necessary to form an opinion on the issue whether what is agreed in the service contract is in conformity with § 14 (3) of the PWSSA and whether the privatisation of AS Tallinna Vesi was in accordance with the Constitution. In verifying the constitutionality of the regulation, relevant is only the fact whether the regulation is in conformity with the law and with the Constitution.

14. The Chancellor of Justice is of the opinion that upon setting the prices for water supply and leading off waste water services, the undefined legal term *cost-orientation* has not been furnished legitimately.

The Chancellor of Justice refers to the fact that the Tallinn City Government has justified the determination of the price by a mechanism for setting the price agreed on in the service contract, and to the assessment of the Estonian Competition Authority that by following the service contract the city can set prices without thoroughly analysing the expenses of the water undertaking. In the opinion of the Estonian Competition Authority, due to the differences, in principle, of the mechanisms for setting prices contained in the procedure for regulating prices and in the service contract, they cannot be applied simultaneously in reality. The Estonian Competition Authority has noticed that the increase of the fixed costs of AS Tallinna Vesi has been quite fast by periods, unlike, for instance, the water undertaking Tartu Veevärk. The assessment which is based on the reference data of the city government does not confirm the effectiveness of AS Tallinna Vesi. It should be assessed whether a water undertaking which manages itself effectively would manage itself as AS Tallinna Vesi. The Estonian Competition Authority is of the opinion that the productivity of AS Tallinna Vesi's invested assets is 2.18 times higher compared to the weighted average cost of its capital.

15. The Chancellor of Justice finds that the Tallinn City Government, upon setting the prices for water supply and leading off waste water services, has not furnished legitimately the undefined legal term *founded productivity*.

The calculations of founded productivity presented to the Chancellor of Justice by the Tallinn City Government did not include calculations on the volume of the promised productivity, and it was also not clear whether the WACC has been calculated according to the book value, the market value or the regulatory value. The Chancellor of Justice refers to the Estonian Competition Authority who has found, based on the application of the method of promised productivity on invested assets acknowledged in economic theory and used by the regulators of the developed countries, the productivity of the invested assets of AS Tallinna Vesi in 2008 which was 18.1 per cent, and compared to the average of the water undertakings in England and Wales 2.8 times higher, and 2.5 times higher than the indicator of the productivity of the invested assets of the water undertaking United Utilities which is a shareholder of AS Tallinna Vesi.

The Estonian Competition Authority has held that if to compare the margin of the average commercial profit of the water undertakings in England and Wales to that of AS Tallinna Vesi, the commercial profit of AS Tallinna Vesi is significantly higher and its absolute value has increased year by year. In the assessment of the Chancellor of Justice, conclusions on productivity cannot be made by comparing the prices set by the Tallinn City Government with prices set by other local governments. It is unclear why the city government deems justified the difference between the WACC of AS Tallinna Vesi and the actual productivity of AS Tallinna Vesi. The Tallinn City Government has not been able to justify why it has guaranteed to AS Tallinna Vesi as a price regulator precisely such productivity and with what it has been substantiated.

OPINIONS OF OTHER PARTICIPANTS IN THE PROCEEDING

The Tallinn City Government

16. The Tallinn City Government finds that the request of the Chancellor of Justice is unfounded and shall be dismissed.

17. The Tallinn City Government is of the opinion that the contested regulation is an administrative act, supervision of which is not in the competence of the Chancellor of Justice. The name of the act is irrelevant in distinguishing between an administrative act and legislation of general application. Pursuant to the case-law, substantive criteria shall be proceeded from (the Administrative Law Chamber of the Supreme Court ruling of 17 October 1997 in matter no. 3-3-1-28-97, paragraph 3; and a ruling of 7 May 2003 in matter no. 3-3-1-31-03, paragraph 11). Based on the explanatory memorandum of the draft act which imposed the current wording of § 14 (2) of the PWSSA, it is justified to argue that the use of the word *regulation* was random. The references of the Chancellor of Justice to the Tartu Circuit Court ruling of 11 March 2008 in matter no. 3-08-148 and to the ruling of 13 October 2006 in matter no. 3-06-1385 are irrelevant because the later case-law of the Supreme Court overturns them. Relevant are the principles indicated in paragraph 9 of the Administrative Law Chamber of the Supreme Court ruling of 5 April 2010 in matter no. 3-3-1-7-10. It was found there that an order of a local government on setting the maximum price of heat to be sold is an administrative act. A decision of the executive power can only have an indirect effect also on contracts between a water undertaking and its clients because it is expressed in a relationship under the law of obligations. The clients have no obligation to conclude a contract, for which reason it is not possible to regard, a priori, the clients of a water undertaking as the addressees of the regulation. The regulation has been addressed only to the water undertaking and the restrictions have been imposed, above all, on the water undertaking. According to the theory of law, the regulatory framework contained in legislation of general application is directed at regulating the conduct of an unlimited number of persons in an unlimited number of cases. In this case, the addressees of the regulation are known or at least they can be easily determined. Such a regulation, application of which to its addressees depends on the existence of a contract under the law of obligations, cannot be deemed legislation of general application. The Supreme Court has held that a local government and a heat undertaking have a concession relationship, and the relationship between a local government and a water undertaking is the same. The regulation was enacted on the basis of a request of a water undertaking, for which reason it constitutes an administrative act. The act can be contested in an administrative court.

18. The Tallinn City Government alternatively finds that the regulation is a general order.
A general order is an act which is directed at persons determined on the basis of general characteristics and which resolves a specific legal situation, which in this case is the setting of the prices for water supply and leading off waste water services provided in the main area of operation of the Tallinn public water supply and sewerage system. The determined persons are the water undertaking and its clients. The Administrative Law Chamber of the Supreme Court has found in its ruling of 13 February 2008 in matter no. 3-3-1-95-07 that a general order may also include precepts of abstract nature which regulate the conduct of the addressees of the administrative act in an unlimited number of cases. The Administrative Law Chamber of the Supreme Court held in its judgment of 31 October 2007 in matter no. 3-3-1-54-07 about an act which is a general order that although the addressees do not appear directly from the act, they can be determined objectively on the basis of general characteristics. If to deem the regulation as a general order, people have a more effective legal protection than in the case it is legislation of general application because they can contest it in an

administrative court. The Administrative Law Chamber of the Supreme Court has found in its ruling of 7 May 2003 in matter no. 3-3-1-31-03 that the protection rules of a landscape protection area shall be deemed a general order because, among other, it is not reasonable to settle disputes related to them, regardless of the vast amount of persons concerned, in constitutional review proceedings which are intended for verification of the lawfulness of legislation of general application and for the direct commencement of which a person lacks an option.

19. The Tallinn City Government alternatively finds that the regulation is in conformity with the law and the Constitution. The Chancellor of Justice and the Estonian Competition Authority can verify only the adherence to the principles of the right of discretion; they cannot exercise the right of discretion instead of the local government and dictate what a fair price is. The Estonian Competition Authority recommended on 30 November 2009 for AS Tallinna Vesi to address the Tallinn City Government for the setting of lower prices. Also the proposal of the Chancellor of Justice was in essence a requirement for the setting of lower tariff rates. The Chancellor of Justice and the Estonian Competition Authority have referred in their press releases and interviews more precisely to what the prices should be. Consequently, the Chancellor of Justice and the Estonian Competition Authority have exercised the right of discretion outside their competence.

20. The Tallinn City Government points out that the basis for the formation of the prices for the services are the provisions of the Public Water Supply and Sewerage Act, the Tallinn City Council regulation of 22 December 1999 no. 47 "The procedure for the regulation of the prices for water supply and leading off waste water services of the Tallinn public water supply and sewerage system" (hereinafter the procedure for the regulation of the prices), and the regulatory framework of the tariff rates of the service contract between the city and the water undertaking which adheres to the aforementioned. The price formula of the latter considers the elements of the water price formation provided for in § 14 (3) of the PWSSA. According to the service contract and the regulation, proposals on the extent of the tariff rate can be made by AS Tallinna Vesi. Based on the regulation, the water undertaking justifies in its proposal the need to amend the price, adds the price calculation, the audited annual account of the financial year which ended, the predicted profit and costs of the coming financial year in current and in requested prices. Paragraph 9 (1) of the service contract provides that the water undertaking and the Supervisory Foundation of Water Undertakings in Tallinn are obligated to discuss, 6 months prior to the beginning of the next tariff rate period, the possibility for recommendations for the tariff rates, and at least 4 months before that the city and the water undertaking have the obligation to begin negotiations based on any recommendation of the foundation, and in the case the tariff rates have not been agreed on 3 months prior to the beginning of the next period the matter is referred to the expedited proceedings in the arbitrage tribunal. AS Tallinna Vesi presents every year a full set of materials, with an application to set tariff rates, required by the regulation no. 47, and therefore the city can inspect and compare the costs year after year.

The Tallinn City Government finds that § 14 (3) of the PWSSA provides for rules which are the basis for the forming of the service prices, and not detailed guidelines on how to calculate the permitted maximum tariff rate. The provision provides for a simplified model of input and output where the costs and profit provided for in clauses 1 and 4 are so-called input, and the fulfilment of the quality, safety and environmental requirements provided for in clauses 2 and 3 constitute so-called output. The input shall enable the performance of the output. The regulation no. 47 addresses the procedural and input aspect of the price formation; in addition to the applicable law, the output aspect is addressed also by the service contract which provides for additional environmental, safety and quality requirements, and also, for example, the network management requirements which are not regulated by the law and the inspection thereof.

According to the Tallinn City Government, the tariff rates of AS Tallinna Vesi are agreed on based on the service contract in such a way that the basis shall be the previous year's tariff rate to which the consumer price index, the agreed "K" coefficient and amendments of the law shall be added. The consumer price index shall be compared with the fixed costs, the variable expenses and the investment expenditure of AS Tallinna Vesi, in the framework of which the city analyses, among other, also the costs. In the application to set tariff rates the city shall be presented information which is more detailed than required by the law. The coefficient "K" regulates, among other, the productivity and enables the city to ensure that the increase of founded

productivity is not too extensive. By amendments of the law is meant whether the costs regulated by the state will increase or decrease more than 5 per cent per year or 7.5 per cent in two consecutive years. The tariff rates reflect only the increase of significant expenses which fosters the fact that AS Tallinna Vesi would be innovative and effective in its activity. The reached tariff rate will be analysed in the financial model report and the overall productivity will be compared with water undertakings in Great Britain in order to ensure an acceptable rate of productivity.

The Tallinn City Government refers to the fact that Tallinn has established a separate supervisory authority – the Supervisory Foundation of Water Undertakings in Tallinn – whose duties are to inspect and supervise AS Tallinna Vesi, and to verify the fulfilment, by the undertaking, of the requirements provided for in § 14 (3) 2) and 3) of the PWSSA and in the service contract. In addition to single inquiries, the service contract sets forth annual detailed formal reporting. The foundation verifies the information, analyses it and performs supervision.

The Tallinn City Government holds that the mechanism for the formation of the prices agreed on in the service contract is in conformity with the requirements of the Public Water Supply and Sewerage Act and of the regulation no. 47. The Chancellor of Justice and the Estonian Competition Authority refer to the existence of various methodologies, for which reason it is unclear why the prices for the water services in Tallinn should be formed by means of the methodology of the Estonian Competition Authority. The Estonian Competition Authority lacks a legal basis for the regulation of water economy, and the methodology used by it has been established for the heat sector and not for the water sector.

21. Regarding the costs the Tallinn City Government finds that based on § 14 (3) of the PWSSA, upon the formation of the prices, also the quality of the water and waste water purification shall be taken into account. The regulators usually analyse the service and quality standards which need to be adhered to in the water economy in order to fulfil the quality, safety and environmental requirements. In addition to the mandatory requirements arising from the law, the service contract provides for additional contractual environmental, safety and quality requirements. Non-fulfilment of the network management requirements not regulated by the legislation may have a serious impact on the quality of life and the surrounding environment in the form of sewerage blockages, leaks, interruption of services and so forth.

Without additional requirements the Tallinn Bay would still be on the Helcom list of the most polluted bodies of water (removed from the list in 2006), the ratio of leaks has decreased from 35 per cent to 18 per cent which is economically optimum, the response time to non-scheduled interruptions is 4 hours, blockages occur 50 per cent less than in 1999.

Further, AS Tallinna Vesi has agreed on sanctions which shall be paid to the city for non-fulfilment of additional quality and environmental requirements. This corresponds to the practice of the rest of the world. § 14 (3) 2) and 3) of the PWSSA enable to agree on additional requirements. Reaching of standards higher than minimum affects the tariff rate and this shall be taken into account upon setting of the final tariff rate. However, fulfilment of higher standards does not grant the right to receive bigger profit.

In the assessment of the Tallinn City Government, it is erroneous to proceed from only the consumer price index upon calculation of increase of the costs. Several costs affecting the prices have increased more than the consumer price index in many years. When the consumer price index was 4.1 per cent in 2005, 4.4 per cent in 2006, 6.6 per cent in 2007 and 10.4 per cent in 2008, the construction prices increased in the same years 7.3 per cent, 10.3 per cent, 12.7 per cent and 3.4 per cent, the nominal wages index increased 10.8 per cent, 16.5 per cent, 20.5 per cent and 14.1 per cent, the raw water rate increased 3.8 per cent, 6.4 per cent, 3.7 per cent and 6 per cent, and the pollution charges increased 20 per cent, 81.6 per cent, 20 per cent and 20 per cent. The construction price index is the main factor influencing the capital investment program of the water undertaking. The increase of the fixed costs of AS Tallinna Vesi as of the privatisation is 1.2 per cent per year on the average, and at the same time the average inflation of Estonia is 4.35 per cent.

The Tallinn City Government indicates that the Estonian Competition Authority has stated in its analysis

that considering the combination of the population concentration and the length of the networks, the best city for comparison in Estonia is Tartu. The analysis of the city of Tallinn has addressed Tartu and it became evident that the structure of the costs of AS Tallinna Vesi is more effective than the structure of the costs of the water undertaking in Tartu.

According to Tallinn, the city is making efforts to monitor the costs and cost efficiency of AS Tallinna Vesi. Every year AS Tallinna Vesi presents to the city, together with an application to set tariff rates, information based on which the city can review the cost figures by years and compare them. During the last three years Tallinn has negotiated thoroughly with the water undertaking and has reached an agreement for the reduction of the tariff rates. Due to the fact that Tallinn has established the Supervisory Foundation of Water Undertakings in Tallinn, the city's additional regulatory framework outperforms the water economy of Estonia and other fields of public services. The Foundation can order, if need be, expert assessments. AS Tallinna Vesi is under the obligation to present information in a consistent form, prepare quarterly financial reports which contain detailed financial analysis regarding cost indicators, and annual reports on performance of quality and investment programmes. The entire accounting and financial reporting has always been publicly available in the commercial register, as of 2002 also on the internet on the website of AS Tallinna Vesi, and as of 2005 the quarterly reports are published on the website of the stock exchange.

The Tallinn City Government admits that it uses a regulation method different from the one the Estonian Competition Authority uses but it is significantly more detailed than the regulatory framework or superficial simulation of an analysis used by other undertakings providing public services and by other water undertakings. The city of Tallinn finds that an analysis of costs should be ordered from an independent and experienced expert.

22. Regarding founded profitability, the Tallinn City Government finds that the prices have been determined in accordance with the applicable legislation. By stating otherwise the Estonian Competition Authority has neglected its previously set objective upon regulating the prices for electricity and gas – the investors shall be guaranteed acceptable profitability on the capital they have invested or at least a profit equal to that they would have obtained by making an investment with the same level of risk elsewhere.

The Tallinn City Government states that in the case of an effective and well-managing undertaking, the following formula is used upon calculating the founded profitability: invested capital * WACC = founded profitability. The residual cost of the fixed assets is not reasonable to set as the value of the invested capital because it is a mix of expenses of various years which do not reflect neither the actual nor the nominal value of the assets. In water economy, the residual cost of the fixed assets is generally not comparable to the economic value of these assets which is actually their replacement value. In the Western European countries the method of the residual cost of the fixed assets is rarely used. Further, it has to be taken account of the actual value of AS Tallinna Vesi at the time of the privatisation in 2001 which was formed as result of a public tender where the percentage of the tender price was 40 in the tender. Upon privatisation, the value of the undertaking was bigger than the residual cost of the fixed assets. This has to be considered when addressing the expectations of an investor. The methodology, pursuant to which the value of privatisation is accounted for upon calculating the value of the invested capital, is based on international and therefore significantly more justified economic principles and this methodology is used in the case of other privatised public utility undertakings around the world, it is also used by Ofwat (the Water Services Regulation Authority in England and Wales) in Great Britain.

The Tallinn City Government refers to the fact that the Estonian Competition Authority has erroneously followed the methodology of Ofwat in its analysis. For instance, Ofwat uses the actual value of the invested capital (indexed) and the actual capital cost (non-inflationary), the Estonian Competition Authority uses at the same time the nominal capital cost and the nominal profitability rate. Ofwat regulates only the provision of water and waste water services and does not regulate services which are provided in competition conditions or where it is possible to choose the service provider. The Estonian Competition Authority has used in its simulation of an analysis financial reports, although these reflect information on services which are governed by the regulatory framework and also on other services.

The Tallinn City Government is of the opinion that the other key factor in the calculation of founded profitability is the calculation of the WACC. It is stated in the analysis of the Estonian Competition Authority that also inflation has been considered to a small extent but the principles, according to which the inflation is calculated or taken into account in tariff rate mechanisms, are unclear. Upon taking account of the inflation, the regulators generally use the principle of financial capital maintenance (hereinafter FCM). Within the framework of the FCM, profit is measured after the application of provision in order to maintain the purchasing power of the start-up financial capital. Upon calculating the WACC, the Estonian Competition Authority uses Germany's risk-free ten-year bond profitability which is the average nominal profitability of the last five years. During the period in question, the inflations of Germany and Estonia are not comparable: in 2007 they were respectively 2.26 per cent and 6.6 per cent, in 2008 they were 2.6 per cent and 10.36 per cent. As of the privatisation in 2001 the average annual inflation has been 1.6 per cent in Germany and 4.35 per cent in Estonia. The methodology applied by the Estonian Competition Authority does not protect the value of the invested capital from inflation. If the Estonian Competition Authority compares AS Tallinna Vesi's WACC of 8.31 per cent calculated by itself and the average of 6.5 per cent of the undertakings regulated by Ofwat, then 6.5 per cent is the actual rate of profitability which does not include inflation. The assessment of the Chancellor of Justice and of the Estonian Competition Authority on the value of the invested capital and the calculation of the actual and non-nominal profitability make the selective comparison of ratios immaterial. The actual profitability does not include inflation, but the nominal profitability does.

Tallinn does not calculate the WACC every year, but every year the actual profitability, which would be earned on the basis presented in the application to set tariff rates, is calculated. Any analysis should consider the regulatory profitability earned by the shareholders during the entire contract period which is 15 years. Since every investor, upon privatisation, would have wished for certainty that the investment ensures the rate of return promised for the duration of the contract, the city has reviewed and compared the profitability of AS Tallinna Vesi on other principles than the Estonian Competition Authority. Firstly, it has calculated the founded profitability up to the present for the nine-year contract period, because otherwise it would be in conflict with the contract concluded in 2001. The Estonian Competition Authority prepared a two-year profitability simulation. Secondly, Tallinn used the initial value of the invested capital for calculating the privatisation value of the undertaking which is in accordance with the Ofwat methodology. Thirdly, the city indexes every year the initial value of the invested capital and it corresponds to the FCM concept. Fourthly, since the calculation of the capital costs is complicated, the city assesses the reasonableness of the profit earned by AS Tallinna Vesi and compares it with the water undertakings in England and in Wales. It is a simplified, transparent methodology which is easy to understand.

The Tallinn City Government points out that the median value of the assets' net profit margin of the Estonian undertakings referred to by the Chancellor of Justice was 4.37–9.46 per cent during 2000–2007. The net profit margin of AS Tallinna Vesi during that period was 7.9 per cent. This indicator cannot be used upon assessing the profitability of a public utility undertaking because it is of accounting nature and not of economic nature. In public utility undertakings which require substantial investments during a long period, the most suitable way to regulate profit is the WACC method.

23. Regarding the general principles of the competition law, the Tallinn City Government finds that they should not be applied if field-specific provisions are applicable which in this case is the Public Water Supply and Sewerage Act. As to the city's knowledge, the Estonian Competition Authority has not found in its supervisory activity that AS Tallinna Vesi has disregarded the rules of the competition law or has misused the dominant position. Although the Competition Act is not applicable, the prices determined by the regulation and applied by AS Tallinna Vesi are in accordance with the fair price formation principles of the competition law, and the price is not unfairly high. It also has to be taken into account that the buyers are willing to pay more for some things because they have a special value for them which makes them more valuable for both the seller and the buyer, and thus increases their economic value. In order to assess whether the difference between the costs and the prices has a reasonable connection with the economic value of a thing, the relative importance of the factors unrelated to the costs also have to be taken into account. The

prices determined by the regulation correspond to the economic value of the service provided by the water undertaking and to the level prevailing on the market.

24. The Tallinn City Government finds that if the constitutionality of the prices in the regulation and of the services is under assessment, an assessment on the service contract and on the formula for calculating the service price contained in it shall also be given. The service contract was a part of the privatisation transaction of AS Tallinna Vesi. If the court holds that the contested regulation is in conflict with the law, it casts in doubt also the privatisation transaction of the water undertaking and the lawfulness of the service contract. The regulation itself does not analyse nor weigh the costs or the founded profitability rate of AS Tallinna Vesi, but its preamble refers to, among other, legislation and contracts, including the service contract, based on which the prices are established. Without examining and analysing the service contract it is not possible to verify whether the prices were set by considering the continuous outputs in a cost-oriented manner and within the promised founded profitability.

25. The Tallinn City Government finds that based on the principle of investigation provided for in § 21 (1) of the Chancellor of Justice Act, the Chancellor of Justice should have established all the facts relevant to the matter.

Minister of Justice
26. [Not translated]

Minister of Economic Affairs and Communiactions
27.–30. [Not translated.]

Estonian Competition Authority
31.–36. [Not translated.]

Association of Estonian Cities
37. [Not translated.]

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

CONTESTED PROVISIONS
39. § 1 of the "Prices for water supply and leading off waste water services provided in the main area of operation of the Tallinn public water supply and sewerage system":
"§ 1. To establish, according to the annex hereto, as of 1 January 2010 the prices for water supply and leading off waste water services provided by the water undertaking AS TALLINNA VESI in the main area of operation of the Tallinn public water supply and sewerage system."

40. The annex provides:
"1. The prices for water supply and leading off waste water services
1.1 Fee in kroons for 1 m3 of water from the public water supply:
Person Without value-added tax
Legal person (legal person in private and 36.35

in public law), self-employed person
Natural person (occupant of a dwelling on legal basis) 23.75 (including development expenses element of 8.75)*

Note: value-added tax shall be added to the service price;

*the development expenses element includes the development expenses of the public water supply and sewerage in that area of the Tallinn public water supply and sewerage development plan which meets the requirements provided for in § 14 (3) 5) of the Public Water Supply and Sewerage Act.

Pursuant to the Tallinn City Council decision of 29 November 2007 no. 283 and to the Tallinn City Council regulation of 29 November 2007 no. 42 "Amendment of the procedure for the regulation of the prices for water supply and leading off waste water services of the Tallinn public water supply and sewerage system approved by the Tallinn City Council regulation no. 47 of 22 December 1999", the city of Tallinn shall compensate for the adding of the development expenses element to the water price, for which reason the residents do not have to pay it to AS TALLINNA VESI. The city of Tallinn shall pay the development expenses element to AS TALLINNA VESI directly.

1.2 Fee in kroons for leading off and purifying 1 m3 of waste water, depending on the content of pollutants:

Person Pollution groups of Basic price (fee for Fee for purification Without value-

waste water leading off and of above standard added tax

purification) pollution

Natural person 12.14 0.00 12.14
Legal person, RG-1 26.56 0.00 26.56

self-employed RG-2 26.97 0.00 26.97

person -"- RG-3 27.18 0.00 27.18
-"- RG-4 27.18 3.98 31.16
-"- RG-5 27.18 5.31 32.49
-"- RG-6 27.18 9.30 36.48
-"- RG-7 27.18 15.94 43.12
-"- RG-8 27.18 29.22 56.40

Note: value-added tax shall be added to the service price.
2. The rate of the basic fee for water supply and leading off waste water services is zero."

OPINION OF THE CHAMBER

41. The participants in the proceedings argue over whether the contested regulation is legislation of general or specific application in substance. Pursuant to § 142 of the Constitution and § 6 (1) 1) of the Constitutional Review Court Procedure Act (CRCPA), the Chancellor of Justice may submit an application to the Supreme Court to repeal legislation of general application passed by a local government. According to § 2 (1) of the CRCPA, the Supreme Court is competent to adjudicate requests to verify the conformity of legislation of general application with the Constitution. The adjudication of requests submitted regarding legislation of specific application passed by a local government is not within the jurisdiction of the Supreme Court. Consequently, the Chamber shall assess whether the act, by which the local government established the prices for water supply and leading off waste water services, is legislation of specific or general application.

42. By form and name the contested regulation is legislation of general application. The regulation's legal basis arises from § 14 (2) of the PWSSA, pursuant to which a local government council or a rural municipality or city government sets the prices for water supply and leading off waste water services by a regulation. According to § 7 (1) of the Local Government Organisation Act, local councils and governments issue regulations as legislation of general application. The participants in the proceedings disagree on whether the established act is a regulation also by substance and is therefore legislation of general application, or whether it is such merely by title.

43. Upon determining the type of an act, the Supreme Court cannot proceed only from the preference of the legislator expressed in the provision delegating authority, but shall decide on the type according to its substance. The Constitutional Review Chamber has previously established the type of an act according to its substance, but then there were no clear guidelines from the legislator to that respect (the Supreme Court *en banc*

judgment of 17 March 2000 in matter no. 3-4-1-1-00, paragraph 12; the Constitutional Review Chamber of the Supreme Court judgment of 10 April 2002 in matter no. 3-4-1-4-02, paragraph 13). Also in the case of the legislator's clear guidelines the Administrative Law Chamber of the Supreme Court has assessed an act according to its substance (see the Administrative Law Chamber of the Supreme Court judgment of 15 October 2009 in matter no. 3-3-1-57-09, paragraphs 11 and 12).

The Constitutional Review Chamber also holds that the type of an act determined by the legislator does not prevent the court from assessing the type of the act according to its substance. The legislator cannot, at its own discretion, decide that in the field regulated by legislation of specific application which is such by substance, legislation of general application shall be issued or vice versa. Mainly because the protection of a person's rights differs in the case of legislation of specific and general application. In the case of an act directed at a person and directly concerning his or her rights, the person's right of recourse to the administrative court directly against the act for the protection of his or her rights cannot be precluded by naming an act legislation of general application. By demanding passing of legislation of general application, which is such by substance, as legislation of specific application, a situation may be created which might give an impression that the act does not apply to every person. It shall also be noted that for the verification of the constitutionality of legislation of general application, different procedures have been prescribed by the Constitution and the law.

44. The Chamber is of the opinion that the contested regulation is not legislation of general application by substance for the purposes of § 142 of the Constitution or § 6 (1) 1) of the CRCPA. As legislation of general application for the purposes of these provisions shall be deemed legal provisions, i.e. acts containing obligatory abstract rules of conduct, regardless of their name. The contested legal act is, based on authorisation to pass regulations and also by title, a regulation but in substance it is legislation of specific application.

45. The Chamber concedes that assessing the legal nature of the contested regulation is complicated based on legal criteria. Also the Administrative Law Chamber of the Supreme Court has had to state on several occasions that there is no clear line between legislation of general and specific application (ruling of 7 May 2003 in matter no. 3-3-1-31-03, paragraph 15; regulation referred to above in matter no. 3-3-1-7-10, paragraph 9). In such a situation, the Chamber deems it necessary to proceed from the previous case-law of the Administrative Law Chamber of the Supreme Court regarding a decision approving the maximum price for heat (ruling referred to above in matter no. 3-3-1-7-10). The contested regulation should be considered as legislation of specific application also based on the judgments of the Administrative Law Chamber of the Supreme Court which deem as an administrative act (more specifically a general order) protection rules of a natural feature (ruling of 7 May 2003 in matter no. 3-3-1-31-03), prison regulations (judgment of 31 October 2007 in matter no. 3-3-1-54-07) and restrictions approved by a directive of a prison director (ruling of 13 February 2008 in matter no. 3-3-1-95-07).

46. Regarding distinguishing of legislation of specific application from legislation of general application and deeming it as a general order, the Supreme Court has stated that classifying a legal act as legislation of general or specific application depends on the actual level of concreteness of the regulatory framework (ruling referred to above in matter no. 3-3-1-31-03, paragraph 11).

47. For distinguishing between legislation of specific and general application, it is not enough to proceed from the obligatory nature of the act, i.e. the general application thereof to undefined persons. The opinion that legislation addressed to undefined persons can never be legislation of specific application is incorrect. Regulation of an individual case, which is a constitutive characteristic of an administrative act, does not mean that the addressees of the act have been determined by the act. The case when the addressees of a regulatory framework do not appear directly from a legal act may constitute regulation of an individual case. Such an administrative act which has been issued for the regulation of an individual case but has been addressed to undefined persons is a general order (see the ruling referred to above in matter no. 3-3-1-31-03, paragraph 12). § 51(2) of the APA defines a general order as an administrative act which is directed at persons determined on the basis of general characteristics or at changing the public law status of things.

Thus, the Administrative Law Chamber of the Supreme Court found in the ruling referred to above in matter no. 3-3-1-54-07 that although the addressees of the prison regulations approved by a directive of the prison director do not appear directly from the act, the addressees can objectively be determined on the basis of general characteristics. The prison regulations regulate only the rights and obligations of the persons on the premises of the Tartu Prison, and therefore the regulations do not constitute legislation of general application but legislation of specific application.

48. Deeming an act as a general order may be influenced, according to the opinion of the Administrative Law Chamber of the Supreme Court, by the option to contest the issues regulated by it. By analysing the legal nature of the protection rules of the landscape protection area of the Pirita river valley established by a regulation of the Government of the Republic (see the ruling referred to above in matter no. 3-3-1-31-03, paragraph 18), the Administrative Law Chamber found that disputes regarding a specific object (in this case the protected area), regardless of the large number of the persons concerned, are not reasonable to be settled in the constitutional review court proceedings prescribed for the verification of the lawfulness of legislation of general application, commencement of which the person concerned lacks a direct basis for. However, legislation of specific application can be contested by any person who finds that the act violates his or her rights. The proceedings for the issue of a general order protect the interests and rights of the persons concerned better than the proceedings for the issue of legislation of general application. The Administrative Procedure Act considers also the possibility that the number of participants in the proceedings may be vast. On the other hand, the appeal term for contesting legislation of specific application ensures in a better way the adherence to the principle of legal certainty.

49. The decisive criterion for distinguishing between legislation of general and specific application (including general orders) cannot be the fact how big is the area on which the legal act is applicable. However, the extent of the territory addressed in the legal act may be one of the characteristics which may speak in favour of one or another solution (ruling referred to above in matter no. 3-3-1-31-03, paragraph 13).

50. Further, the Administrative Law Chamber of the Supreme Court has noted about a general order in the ruling referred to above in matter no. 3-3-1-95-07 (paragraph 13) that a general order may include precepts of abstract nature which regulate the conduct of the addressees of the administrative act in an unlimited number of cases. The effect of a precept of abstract nature contained in a general order on the rights of its addressees may not necessarily appear at the time the act is published, but only then when the situation described in the act occurs and there is a need to use the established rules of conduct.

51. An order of a local government which approves the maximum price for heat is, according to the opinion of the Administrative Law Chamber of the Supreme Court, an administrative act for the purposes of § 51 (1) of the APA (ruling referred to above in matter no. 3-3-1-7-10, paragraph 9). In other words, it is legislation of specific application issued for the regulation of an individual case, and not legislation of general application. The Chamber justified it as follows. An order on approving the maximum price for heat to be sold is issued in the framework of a public law relationship between the rural municipality government and the heat undertaking. The legal relationship between the local government and the heat undertaking formed on the basis of the District Heating Act is, by nature, a public law concession relationship. By the said order, the heat undertaking was granted the right to sell heat with the approved maximum price in the specific network area and was put under the obligation not to exceed the approved maximum price upon sale. A lower price may be agreed on with the heat undertaking. The contested act regulates a specific individual case. The afore-mentioned order has a direct effect on the addressee who is the heat undertaking.

52. Based on the same arguments and considering the level of concreteness of the regulatory framework, also the contested regulation shall be deemed as an act issued for the regulation of an individual case. § 1 of the regulation provides: "To establish, according to the annex hereto, as of 1 January 2010 the prices for water supply and leading off waste water services provided by the water undertaking AS TALLINNA VESI in the main area of operation of the Tallinn public water supply and sewerage system." Consequently, the regulation sets prices for water supply and leading off waste water services for one certain undertaking and for one certain area. Similar price regulations have been established also for water undertakings operating in

other areas of the Tallinn public water supply and sewerage system (see e.g. § 1 of the Tallinn City Government regulation of 23 January 2008 no. 8 "Prices for water supply and leading off waste water services of the Kakumäe area of operation of the Tallinn public water supply and sewerage system"). On the basis of § 14 (3) of the PWSSA it is not possible to issue one general price regulation for all water undertakings in the areas of Tallinn. Namely, their production costs, above all, may vary depending on the size of the area, production capacities and other circumstances. Therefore, the price shall be set for every area's water undertaking by separate acts. The scope of application of the contested act, which is the main area of operation of the Tallinn public water supply and sewerage system, does not cover the entire city of Tallinn (see the Tallinn City Council decision of 29 November 2007 no. 284 "Establishment of the areas of operation of the Tallinn public water supply and sewerage system and the descriptions of their borders"). In the assessment of the Chamber, the establishment of a certain price for a certain service of an unambiguously determined undertaking in a certain area confirms that it is legislation of specific application.

53. Unlike the ruling of the Administrative Law Chamber of the Supreme Court in matter no. 3-3-1-7-10 in which the Chamber found that the act contested in that matter is an administrative act for the purposes of § 51 (1) of the APA, the regulation contested in the current matter is a general order for the purposes of § 51 (2) of the APA in the opinion of the Constitutional Review Chamber.

54. The regulation in question differs from the order approving the maximum price for heat, which was under dispute in the court case no. 3-3-1-7-10 referred to above, in terms of addressees. The Administrative Law Chamber of the Supreme Court stated about that order that since the maximum price does not determine the price according to a contract concluded with a specific consumer, that order lacks direct effect on the rights and obligations of a specific heat consumer. The approval of the maximum price can have only an indirect effect on the price of the heat to be sold to a specific consumer and thereby on the consumer's rights and obligations, and it can be expressed only in a relationship under the law of obligations (see the ruling referred to above in matter no. 3-3-1-7-10, paragraph 10).

55. The act contested in the current matter, however, determines the price for the services for both the provider and the consumer. In addition to AS Tallinna Vesi, the contested regulation is directed at all consumers of the water supply and leading off waste water services provided in the main area of operation. It appears from paragraph 1 of the annex to the regulation that the price for the services has been determined for legal persons in private and in public law, for self-employed persons and for natural persons. The price contained in the regulation replaces one condition of the contract to be concluded with the water undertaking, for which reason the legal act directly affects the rights and obligations of the consumers. The addressees of the regulation can be objectively determined on the basis of general characteristics regardless of the fact that the addressees do not fully appear from the regulation itself. The determination of the addressees is also not affected by the fact that the addressees can change in time.

56. Consequently, the contested legal act affects directly the rights of the consumer because the consumer cannot negotiate in any way on the price and he or she cannot do without the service either. The contested legal act restricts substantially the consumer's freedom of contract. The consumer could not contest in civil court proceedings the price condition of a contract under the law of obligations because it has been determined by the legal act in an imperative manner. It is not justified to deem such an act as legislation of general application and to enable the verification of its lawfulness only in the constitutional review court proceedings. Classifying the contested regulation as a general order which can be contested in an administrative court ensures in a better way the interests of the consumers of the water supply and leading off waste water services provided in the main area of operation of the Tallinn public water supply and sewerage system.

57. The deeming of the contested regulation as an administrative act is also supported by the need to ensure that AS Tallinna Vesi would be able to contest this regulation in court as an act directly addressed to it. If to hold that the contested regulation is legislation of general application, AS Tallinna Vesi would not be able to contest it in the administrative court. It could contest it only by addressing the Chancellor of Justice or by waiting for the possible court proceedings following violation of the regulation.

58. Establishment of the contested regulation for an undefined term, i.e. until it is repealed, does not mean that it is legislation of general application. Also such general orders as prison regulations or protection rules are established for an undefined term.

59. In response to the argument of AS Tallinna Vesi that the contested act is an administrative act because it was issued on the basis of AS Tallinna Vesi's request, i.e. in the proceedings prescribed for the issue of an administrative act, the Chamber notes the following. The Public Water Supply and Sewerage Act does not prescribe submission of applications, but such a procedure has been established by the city of Tallinn in the procedure for the regulation of the prices. Based on the way of submitting data established by one local government, conclusions cannot be made on the type of an act provided by law. A local government may prescribe that instead of an application, a request, information or other shall be submitted without the regulatory framework being different in substance. Even if the obligation to submit an application would arise from the law, it cannot be concluded that it is an administrative act. If a local government has to consider the expenses of an undertaking upon formation of the price, it is probably complicated without the information obtained from the water undertaking. The obligation to forward information cannot, however, affect the legal nature of the act issued on the basis thereof.

60. The Chancellor of Justice has held in his opinion that although the act approving the maximum price (for heat) is an administrative act, the act establishing specific prices for water supply and leading off waste water services is legislation of general application. The Chancellor of Justice noted that heat can be sold pursuant to law also for a price that is lower than the maximum price established by an order. Therefore, the Chancellor of Justice is of the opinion that in the case of approval of the prices for heat, there is no such restriction on the freedom of contract as there is in this case where the city government has determined a price which must be adhered to. Approving the prices for heat constitutes a restriction, addressed only to heat undertakings, to sell heat with a higher price.

The Chamber is of the opinion that the Chancellor of Justice notes correctly that determining the price condition with an act of the public authority is a restriction on the freedom of contract and therefore also on the fundamental rights. But he makes an incorrect conclusion that an act establishing such a restriction is legislation of general application. An abstract restriction on the freedom of contract has been, in this case, provided for in § 14 of the PWSSA, wherein the legislator has also provided for significant conditions for its specific application. Pursuant to § 14 (2) of the PWSSA, a local government council or a rural municipality or city government shall establish the price and therefore also the restriction on the freedom of contract. In the current matter, the Tallinn City Government has, by applying the law and the procedure for the regulation of the prices adopted based on the law, established an administrative act which contains a specific restriction on the freedom of contract.

61. The contested regulation does not become legislation of general application also by the fact that the effect of the act on the persons depends on whether the persons as a result of their conduct end up in the scope of application of the regulation, i.e. become the consumers of the services in question. Such effect is also a characteristic of a general order. It has also been addressed by the Administrative Law Chamber of the Supreme Court, noting that in the case of a general order an abstract precept may have an effect on its addressee later when the situation described in the act occurs and there is a need to use the established rules of conduct (a ruling referred to above in matter no. 3-3-1-95-07, paragraph 13).

62. Unlike the opinion of the Chancellor of Justice, it cannot be concluded from paragraph 6 of the judgment referred to above of the Constitutional Review Chamber in matter no. 3-4-1-1-08 that the contested regulation is legislation of general application. In that case the main issue was whether the inability to contest in arbitration proceedings the constitutionality of legislation of general application means that a person lacks effective means to exercise the right of recourse to the courts provided for in § 15 of the Constitution. The Chamber had to assess whether a person has, in principle, an option, if the contested legal acts (including the regulation for the establishment of the prices for water supply and leading off waste water services) would constitute legislation of general application, to have the constitutionality thereof verified in

some proceedings. The Supreme Court held in that decision that, in principle, the applicant has been ensured in the legal system as a whole effective means for the judicial verification of an alleged violation of the fundamental rights. Consequently, it was not necessary to assess whether the legal acts indicated in the application (including the regulation for the establishment of the prices for water supply and leading off waste water services) were legislation of general application in the first place. It should have been assessed in proceedings wherein it is possible to review the issue of the constitutionality of these acts. Such proceedings, however, did not take place in that matter. The ruling of the Supreme Court does not address the classification of the price regulation.

63. The opinion of the Chamber is also not overturned by the fact that an administrative act shall be reasoned and issued in different procedure than a regulation, but that is not the case regarding the contested regulation. The Chamber does not cast in doubt in this decision the fulfilment of the obligation to reason and the fulfilment of procedural requirements. It only has to be noted here that in no case would the failure to fulfil the obligation provided by law change an administrative act which is not reasoned and is with procedural shortcomings into legislation of general application.

64. Since the contested regulation is, in substance, an administrative act of a local government unit, the Supreme Court is not competent to review the request of the Chancellor of Justice pursuant to § 2 of the CRCPA. The request is to be dismissed on the basis of § 11(2) of the CRCPA.
