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## Constitutional judgment 3-4-1-14-09

### JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

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|-----------------------------|---|
| <b>No. of the case</b>      | 3-4-1-14-09   |
| <b>Date of decision</b>     | 20 October 2009   |
| <b>Composition of court</b> | Chairman Märt Rask, members Jüri Ilvest, Peeter Jerofejev, Henn Jõks and Harri Salmann.   |
| <b>Court Case</b>           | Review of constitutionality of § 95 <sup>2</sup> of the Maritime Safety Act, of § 6(1)13) of the Merchant Shipping Code (in the wording in force until 24 April 2004); of clause 13 of the Government of the Republic regulation no. 1 “Grant of Authorisation for Establishment of Legislation Arising from the Merchant Shipping Code” of 7 January 1997 to the extent that it granted authorisation to the Minister of Transport and Communications to establish the rates of lighthouse dues and ice breaking dues and the bases and procedure for the provision of subsidies; of the Minister of Transport and Communications regulation no. 113 “Rates of lighthouse dues and ice breaking dues and the bases and procedure for the provision of subsidies” of 12 December 2001; and of § 50 <sup>1</sup> (1), § 50 <sup>2</sup> , § 50 <sup>4</sup> , § 50 <sup>5</sup> , § 50 <sup>6</sup> and § 50 <sup>7</sup> of the Maritime Safety Act (in the wording in force from 25 April 2004 until 2 June 2005) to the extent that these do not establish a sufficient and effective regulatory framework for the collection of lighthouse and ice breaking dues |
| <b>Basis of proceeding</b>  | The Tallinn Administrative Court judgment of 5 June 2009 in administrative case no. 3-09-349.   |
| <b>Hearing</b>              | Written procedure.  |

- 1. To declare that § 6(1)13 of the MSC in the wording in force until 24 April 2004 was unconstitutional.**
- 2. To declare that clause 13 of the Government of the Republic regulation no. 1 “Grant of Authorisation for Establishment of Legislation Arising from the Merchant Shipping Code” of 7 January 1997 to the extent that it granted authorisation to the Minister of Transport and Communications to establish the rates of lighthouse dues and ice breaking dues and the bases and procedure for the provision of subsidies, was unconstitutional.**
- 3. To declare that the Minister of Transport and Communications regulation no. 113 “Rates of lighthouse dues and ice breaking dues and the bases and procedure for the provision of subsidies” of 12 December 2001, was unconstitutional.**
- 4. To declare the part of the first sentence of § 95<sup>2</sup>(1) of the MSA reading “the lighthouse dues and ice breaking dues established in § 6(1)13 of the Merchant Shipping Code in the wording in force until 24 April 2004, and [...]”, unconstitutional and invalid.**
- 5. To dismiss the rest of the request of the Tallinn Administrative Court.**

## DECISION

## FACTS AND COURSE OF PROCEEDING

**1.** This court case deals with the issue whether the lighthouse, ice breaking and navigation dues and the procedure for the collection thereof have been established in conformity with the Constitution. The contested lighthouse and ice breaking dues were established by the Minister of Transport and Communications regulation no. 113 “Rates of lighthouse dues and ice breaking dues and the bases and procedure for the provision of subsidies” of 12 December 2001 (hereinafter “the Minister of Transport and Communications regulation”) on the basis of authority-delegating norm arising from clause 13 of the Government of the Republic regulation no. 1 “Grant of Authorisation for Establishment of Legislation Arising from the Merchant Shipping Act” of 7 January 1997 (hereinafter “the Government of the Republic regulation), issued on the basis of § 6(1)13) of the Merchant Shipping Code (RT 1991, 46 48, 577; hereinafter “the MSC”).

On 25 April 2004 the amendments to the Maritime Safety Act entered into force as a result of which the dues referred to in the preceding paragraph were established in Chapter 11<sup>1</sup> “Lighthouse dues and navigation dues” of the Act. The referred chapter defined lighthouse dues and navigation dues (the ice breaking due was incorporated into the navigation due), established the procedure for calculation of the dues and submission of payment notices, the rates of the dues and method of payment and the basis for calculating fines for delay. § 6(1)13) of the MSC was repealed.

On 16 November 2008 the amendments to the Maritime Safety Act (RT I 2002, 1, 1; hereinafter “the MSA”) entered into force, amending provisions of Chapter 11<sup>1</sup> and establishing implementing provision § 952, which entitled the Maritime Administration (hereinafter “the MA”) to submit a payment notice to a shipowner or ship’s agent who had failed to pay the invoices concerning the lighthouse and ice breaking dues established in § 6(1)13) of the MSC in the wording in force until 24 April 2004, and the lighthouse and ice breaking dues established in § 50<sup>1</sup> of the MSA.

**2.** The MA required, by its payment notice no. 1 of 13 January 2009 (hereinafter “payment notice no. 1), that the AS Tallink Grupp pay 13 947 520 kroons of lighthouse and ice breaking dues. According to the payment notice this constituted a debt which had incurred due to the fact that the AS Tallink Grupp had failed to pay the invoices for the period of 1 August 2003 until 24 April 2004, previously submitted by the MA.

By payment notice no. 2 of 13 January 2003 (hereinafter “payment notice no. 2”) the MA required the AS

Tallink Grupp to pay 3 850 560 kroons of lighthouse dues and 519 764 kroons and 30 cents of fine for delay. According to this payment notice this was the debt incurred on the basis of invoices submitted by the MA for the period of 24 April 2004 to 30 June 2004.

3. On 4 February 2009, with similar reasoning, the MA submitted to the AS Hansatee Cargo payment notices no. 7 (hereinafter “payment notice no. 7) and no. 8 (hereinafter “payment notice no. 8), requiring by the former that the AS Hansatee cargo pay 13 128 000 kroons of lighthouse and ice breaking dues for the period from 1 May 2003 until 24 April 2004, and requiring by the latter the payment of 2 627 520 kroons of lighthouse dues and 368 887 kroons and 58 cents of fine for delay for the period from 25 May 2004 until 30 June 2004.

4. The AS Tallink Grupp and the AS Hansatee Cargo submitted an action with the Tallinn Administrative Court against the payment notices enumerated in the preceding paragraph and requested the annulment of these. The complainants argued that the legal provisions serving as the basis of the payment notices were unconstitutional and therefore, pursuant to the Supreme Court judgment in case no. 3-3-1-56-04, the payment notices must be annulled.

5. By its judgment of 5 June 2009 the Tallinn Administrative Court satisfied the actions of the AS Tallink Grupp and the AS Hansatee Cargo. Upon adjudicating the matter the court declared unconstitutional and did not apply § 95<sup>2</sup> of the MSA, § 6(1)13) of the MSC (in the wording in force until 24 April 2004), clause 13 of the Government of the Republic regulation no. 1 “Grant of Authorisation for Establishment of Legislation Arising from the Merchant Shipping Code” of 7 January 1997 to the extent that it granted authorisation to the Minister of Transport and Communications to establish the rates of lighthouse dues and ice breaking dues and the bases and procedure for the provision of subsidies; the Minister of Transport and Communications regulation no. 113 “Rates of lighthouse dues and ice breaking dues and the bases and procedure for the provision of subsidies” of 12 December 2001, and § 50<sup>1</sup>(1), § 50<sup>2</sup>, § 50<sup>4</sup>, § 50<sup>5</sup>, § 50<sup>6</sup> and § 50<sup>7</sup> of the MSA (in the wording in force from 25 April 2004 until 2 June 2005) to the extent that these do not establish a sufficient and effective regulatory framework for the collection of lighthouse and ice breaking dues; by this the court initiated a constitutional review proceeding.

## **JUSTIFICATIONS OF PARTICIPANTS IN THE PROCEEDING**

6. The Tallinn Administrative Court held that the contested lighthouse and ice breaking dues were, by nature, financial obligations in public law which are included in the sphere of protection of § 113 of the Constitution. The same is argued in the judgment of the Civil Chamber of the Supreme Court of 20 June 2008 in civil case no. 3-2-1-55-08.

What is contested as the basis for collection of these dues are subsections (1) and (2) of § 952 of the MSA, which are procedural provisions that can not establish a substantive basis to claim lighthouse and ice breaking dues. A substantive basis for claiming these dues arises, as regards payment notices no. 1 and no. 7 (see above paragraphs 2 and 3), from the Minister of Transport and Communications regulation, issued on the basis of § 6(1)13) of the MSC and clause 13 of the Government of the Republic regulation. The substantive bases for payment notices no. 2 and no. 8 (see above paragraphs 2 and 3) are § 50<sup>1</sup>(1), § 50<sup>2</sup>, § 50<sup>4</sup>, § 50<sup>6</sup> and § 50<sup>7</sup> of the MSA. In the case of non-existence of these norms it would not be possible to claim the dues, consequently, the provisions are relevant for the purposes of constitutional review.

The court agreed with the opinion of the complainants that the establishment of lighthouse and ice breaking dues by the regulation of the Minister of Transport and Communications was in conflict with § 113 of the Constitution, pursuant to which state taxes, duties, fees, fines and compulsory insurance payments must be provided by law. A norm in an Act which in full delegates the establishment of lighthouse and ice breaking dues and the establishment of the conditions of collection thereof to the executive, can no way be regarded as provision of the dues by law. The fact that the dues have been established by a minister’s regulation and not by law, in itself creates a conflict with § 113 of the Constitution.

Furthermore, any procedural provision providing for the collection of such unconstitutional dues, too, is in conflict with § 113 of the Constitution. That is why the court is of the opinion that § 95<sup>2</sup> of the MSA is in conflict with § 113 of the Constitution irrespective of the fact that this provision is included in a parliamentary Act. Even if the aim of § 95<sup>2</sup> of the MSA was to retroactively legitimise the obligation to pay a due in public law, which had been established in conflict with § 113 of the Constitution, the provisions is, nevertheless, in conflict with the principle of protection of confidence, arising from § 10 of the Constitution, because in the substantive sense this would amount to imposition of an obligation to pay so that the circumstances and facts serving as the basis for this obligation had taken place prior to the establishment of the due. Such retroactive establishment of obligations could exceptionally be admissible in the existence of some special and superior reasons, which – in this case – do not exist.

As on 25 April 2004 Chapter 11<sup>1</sup> of the MSA entered into force, providing on the level of law for the obligation to pay lighthouse and ice breaking dues, the conflict with § 113 of the Constitution ceased to exist as of that date. Nevertheless, the regulatory framework of the procedure for the collection of these dues, included in the referred provisions, was deficient until 16 November 2008, and the collection of public law dues on the basis of these provisions was in conflict with § 14 of the Constitution, which gives rise to the right to good administration. The lack of sufficient procedural regulation is also in conflict with § 13(2) of the Constitution, pursuant to which the law shall protect everyone from the arbitrary exercise of state authority, and which contains the principle of legal clarity, i.e. definitiveness of law.

The establishment of a due in public law includes the establishment of both substantive norms requiring the payment (substantive basis of the state's right of claim) and the norms regulating the procedure for the payment and collection of the dues (procedure). Public authority can not require a person to perform obligations on the mere basis of a substantive norm requiring performance if there are no relevant procedural norms or if the procedural norms are insufficient. Without relevant procedural norms a substantive norm requiring the performance of something is declarative in essence and a person is not required to perform the obligations established by such a norm.

The Tallinn Administrative Court is of the opinion that the right established in § 14 of the Constitution is not guaranteed when the legislation established an obligation, whereas there are no norms determining how public authority shall ensure the performance of the established obligation. Before 16 November 2008 the regulatory framework of the Maritime Safety Act was such that the addressee of an obligation could foresee that public authority could not, in fact, collect the dues, and the person could count on that it would be impossible to collect these from the person.

As proceeding from the principle of protection of confidence, arising from § 10 of the Constitution, personal obligations can not, as a rule and without a prevalent reason be established retroactively, the procedural rules forcing the performance of such obligations can not be established in this manner, either. At the time when the circumstances serving as the basis for the creation of the obligation to pay the lighthouse dues referred to in payment notices no. 2 and no. 8 the Maritime Safety Act contained no norms enabling the MA to collect the dues effectively. The necessary regulation was not included in the general provisions regulating administrative procedure, either. The substantive basis of claiming a due in public law and the regulatory framework of collection of such dues must be regarded as a single whole and the establishment of either of the elements *a posteriori* amounts to retroactive establishment of tax liability.

Neither did the court agree with the opinion of the MA that the collection of the contested lighthouse and ice breaking dues from the complainants was justified by the need to treat all participants in the market equally. The fact that other market participants had paid the unconstitutionally established dues and did not consider it necessary to contest these can not restrict the complainants' right to have recourse to the court for the protection of their rights and to apply for the non-application of the unconstitutional norms that restrict their rights. Neither can the requirement that the complainants pay the dues be justified with the argument that the state has guaranteed to the complainants the lighthouse and ice breaking services. As already pointed out above the lighthouse dues and ice breaking dues are dues in public law in return of which the persons who

have paid such dues have no right to demand performance.

For the above reasons the Tallinn Administrative Court declared the contested provisions to be in conflict with §§ 113, 14, 13(2) and 10 of the Constitution, and did not apply the provisions.

**7.** The AS Tallink Grupp and the AS Hansatee Cargo argue that the provisions which were not applied by the Tallinn Administrative Court are in conflict with the Constitution and are to be repealed. As, in their opinion, the court has rendered a judgment that is correct in every aspect, they do not consider it necessary to repeat the thorough reasoning set out by the court.

**8.** The MA is of the opinion that § 95<sup>2</sup> of the MSA is constitutional. § 95<sup>2</sup> of the MSA is an implementing provision, allowing to apply the provisions concerning the collection of the dues, which were enacted by the Maritime Safety Act as of 16 November 2008, in regard to the debts incurred before the amendments took effect. § 95<sup>2</sup> of the MSA does not retroactively establish financial obligations for persons, instead this is a procedural norm. Upon enacting this norm the legislator has proceeded from the principle of equal treatment of all the shipowners and ship's agents who have paid these dues. By the non-payment of these dues the complainants have attained a significant competitive advantage over other participants in the market.

§ 6(1)13) of the MSC and the regulations issued on the basis thereof were established in conformity with the development level of the rule-of-law state of that time, and therefore, from the current aspect, the objective of § 113 of the Constitution was not attained. Since 25 April 2004 the lighthouse dues and navigation dues, incorporating the previous ice breaking dues, are established by law. Should the court, nevertheless, declare these provisions unconstitutional, it is possible that § 95<sup>2</sup> of the MSA is unconstitutional only to the extent that it allowed to collect the lighthouse and ice breaking dues which had been established by the Merchant Shipping Code and the regulations issued on the basis thereof.

The MA is of the opinion that irrespective of the lack of regulatory framework for the collection of the dues, § 50<sup>1</sup>(1), § 50<sup>2</sup>, § 50<sup>4</sup>, § 50<sup>5</sup>, § 50<sup>6</sup> and § 50<sup>7</sup> of the MSA were in conformity with the Constitution. As pursuant to § 1(7) of the MSA the provisions of the Administrative Procedure Act applied to the administrative proceedings prescribed in the MSA, the principles of administrative procedure had to be applied also in the establishment and contestation of lighthouse and navigation dues.

Should the Supreme Court hold that the establishment of § 95<sup>2</sup> of the MSA, which is a procedural norm, later than a substantive norm, is not in conformity with the Constitution and declare § 95<sup>2</sup> of the MSA unconstitutional in its entirety, the rest of the non-applied provisions are not relevant to the adjudication of this administrative case, because in the absence of § 95<sup>2</sup> of the MSA the MA could not submit the contested payment notices or collect the non-paid dues.

**9.** On behalf of the Riigikogu the opinion was submitted by the Constitutional Committee, who is of the opinion that § 6(1)13 of the MSC and the Government of the Republic regulation and the Minister of Transport and Communications regulation, issued on the basis of the provision, are to be declared to be in conflict with § 113 of the Constitution, as these provisions enabled to establish public law dues by legislation of the executive. § 95<sup>2</sup> of the MSA, too, is in conflict with the Constitution, because it gives the state the possibility to collect the dues established by the referred provisions.

The rest of the provisions of the Maritime Safety Act which the court did not apply are not unconstitutional. The fact that an Act lacks norms on enforcement does not automatically mean that the substantive norms establishing an obligation are unconstitutional.

**10.** The Minister of Justice is of the opinion that § 95<sup>2</sup> of the MSA is not a relevant norm to adjudication of the dispute concerning the collection of lighthouse dues established by the Maritime Safety Act as of 25 April 2004. After 25 April 2004, pursuant to § 50<sup>4</sup> of the MSA, it was possible to submit only payment notices. As § 95<sup>2</sup> of the MSA allows to retroactively submit payment notices only in the case of non-payment of previously submitted invoices, this provision only pertains to the invoices that had been

submitted on the basis of the Minister of Transport and Communications regulation before 25 April 2004. § 95<sup>2</sup> of the MSA can not be applied to the payment notices submitted after the referred date. That is why the rest of the non-applied provisions of the Maritime Safety Act are not relevant.

§ 6(1)13) of the MSC in the wording in force until 24 April 2004, as well as the Government of the Republic regulation and the Minister of Transport and Communications regulation issued on the basis thereof were, in the opinion of the Minister of Justice, in conflict with § 113 of the Constitution, because the financial obligations in public law established in these regulations must be provided by law.

Should the Supreme Court find that § 95<sup>2</sup> of the MSA is a relevant provision in regard to the dispute concerning also the dues enacted as of 25 April 2004, the provision is unconstitutional because it provides for the issuing of burdensome administrative legislation with retroactive force.

**11.** The Minister of Economic Affairs and Communications is of the opinion that the regulations issued on the basis of § 6(1)13) of the MSC were issued on the basis of the law that was valid at that time, they were in conformity with the norm delegating authority, and at the time of issue met the formal legal requirements.

As regards the non-applied provisions of the Maritime Safety Act the Minister of Economic Affairs and Communications argues that these are in conformity with the Constitution. Chapter 11<sup>1</sup> of the MSA enables the addressee of norms to understand the imposed obligation to pay the lighthouse dues and the navigation dues – all elements of this obligation have been explicitly set out. The right of a person to organisation and procedure (§ 14 of the Constitution) was guaranteed, as the Administrative Procedure Act was applied to the proceedings conducted on the basis of the Maritime Safety Act. The only provision that did not exist was the one enabling compulsory collection of the dues. This did not prevent persons from performing the obligations established by law. The rule-of-law state functions on the premise that persons voluntarily perform the obligations established by legislation.

§ 95<sup>2</sup> of the MSA is constitutional. This provision does not create a possibility to issue burdening administrative legislation with retroactive force, instead it establishes a mechanism for ensuring the performance of the obligations that have already been created. § 95<sup>2</sup> of the MSA is a procedural norm, whereas the substantive obligation arises from §§ 50<sup>1</sup> and 50<sup>2</sup> of the MSA. Pursuant to the principles of administrative procedure the procedural norms which were in force at the time of issuing administrative legislation or of performance of a procedure are applied, as well as the substantive norms which were in force at the time when the event took place which gave rise to an obligation.

Even when arguing that § 95<sup>2</sup> of the MSA infringes the rights of its addressees, the infringement is to be regarded proportional.

In any case, other provisions besides § 95<sup>2</sup> of the MSA are not relevant for the purposes of § 14(2) of the Constitutional Review Court Procedure Act (RT I 2002, 29, 174; hereinafter “the CRCPA”).

Both, the regulations issued on the basis of the Merchant Shipping Code and the invoices submitted on the basis of the Maritime Safety Act constitute administrative legislation, which is supported by the Supreme Court judgment in case no. 3-2-1-55-08 (paragraph 11). These pieces of administrative legislation are still in force and the validity thereof is not affected by the repeal of the legislation of general application which served as the basis of the administrative legislation. Legislation of general application which has been declared unconstitutional is not null and void, i.e. invalid *ex tunc*. Therefore, the situation would remain the same when all the non-applied provisions are repealed – there would still be no possibility to claim the payment of lighthouse and navigation dues, although the administrative legislation serving as the basis for possible claims would continue to be in force.

**12.** In the analysis of the relevance of the non-applied provisions the Chancellor of Justice argues that §§ 50<sup>2</sup>, 50<sup>4</sup>-50<sup>7</sup> of the MSA are not relevant to the extent that they regulate the navigation dues referred to in § 50<sup>1</sup> of the MSA, because these dues have not been collected by the payment notices that were annulled in the

main proceeding.

The lighthouse and ice breaking dues the payment of which is required by § 6(1)13) of the MSC, and the Government of the Republic regulation and the Minister of Transport and Communications regulation issued on the basis thereof, are dues in public law, belonging to the sphere of protection of § 113 of the Constitution. As § 6(1)13) of the MSC authorised the Government of the Republic to establish lighthouse and ice breaking dues, who in turn was entitled to delegate the authority to the Minister of Transport and Communications, and the obligation to pay these dues was, in fact, regulated by a regulation of the Minister of Transport and Communications, this infringed the sphere of protection of § 113 of the Constitution. As § 6(1)13) of the MSC did not establish any elements of tax relationship and did not restrict the executive's discretion in establishing the elements of this tax relationship, the provision is – in the opinion of the Chancellor of Justice – in conflict with § 113 of the Constitution in conjunction with § 3(1) of the Constitution. Pursuant to the 'subject to be established by law' principle the regulations issued on the basis of an unconstitutional norm delegating authority (in this case the Government of the Republic regulation and the Minister of Transport and Communications regulation) are unconstitutional, too.

In regard to § 50<sup>1</sup>(1), § 50<sup>2</sup> and §§ 50<sup>4</sup>-50<sup>7</sup> of the MSA, in the wording in force from 25 April 2004 until 2 June 2005, as far as they concern the lighthouse dues, the Chancellor of Justice argues that these provisions do not infringe the right to organisation and procedure as the procedure for collecting lighthouse dues, meeting the minimum requirements, is guaranteed by the application of the Administrative Procedure Act. Although, for the enforcement of financial obligations in public law it is necessary to establish coercive measures to be used when the obligation is not fulfilled, the lack of such measures does not mean the unconstitutionality of the substantive basis of this obligation.

Proceeding from the general principle of subject to be established by law, established in § 3(1) of the Constitution, the state may not use measures which restrict fundamental rights against obligated persons to ensure the enforcement of administrative legislation, if there are no relevant grounds established by law. A financial obligation in public law exists irrespective of that. This opinion is also supported by the fundamental general obligation to observe the law, which arises from § 19 of the Constitution.

As regards § 95<sup>2</sup> of the MSA the Chancellor of Justice points out that as this provision in conjunction with § 50<sup>7</sup>(2) of the MSA allows to apply compulsory execution measures to achieve the performance of the obligation to pay the lighthouse and ice breaking dues which was created before these provisions entered into force, the provisions have unfavourable retroactive effect concerning persons. The question is whether this effect is permissible.

As § 95<sup>2</sup> of the MSA does not establish the obligation to pay the dues, the constitutionality of the provision primarily depends on whether the obligation to pay the dues, concerning which a coercive payment notice may be issued under this provision, was in conformity with the Constitution. As the lighthouse and ice breaking dues established under § 6(1)13) of the MSC in the wording in force until 24 April 2004 were unconstitutional, § 95<sup>2</sup> of the MSA, too, is unconstitutional to the extent that it established that the MA was entitled to submit to a shipowner or ship's agent a payment notice referred to in § 50<sup>4</sup>(3) of the MSA, if the shipowner or ship's agent had failed to pay the invoice concerning the lighthouse and ice breaking dues established in § 6(1)13) of the MSC in the wording in force until 24 April 2004.

As regards § 50<sup>1</sup>(1), § 50<sup>2</sup> and §§ 50<sup>4</sup>-50<sup>7</sup> of the MSA in the wording in force from 25 April 2004 until 2 June 2005, the Chancellor of Justice is of the opinion that while the retroactive establishment of the possibility of compulsory execution in regard to these provisions does infringe the principles of protection of confidence and legitimate expectation, arising from § 10 of the Constitution, the infringement is justified by a vital public interest and the infringement is proportional. The state has a legitimate interest to enforce the obligations in public law, established according to the Constitution, and to collect the dues. Furthermore, it is necessary to ensure equal treatment of the persons who had paid the required lighthouse dues thus fulfilling the obligation to observe the law established in § 19(2) of the Constitution, and the persons who failed to do this for some or other reason. Those persons who had paid the lighthouse dues from 25 April 2004 until 2

June 2005 have no right to claim the refund of the dues. Consequently, the persons who did not pay the lighthouse dues could attain an advantage through unlawful behaviour. The attainment of such an advantage is not in conformity with the purpose of the principle of protection of confidence, which is to guarantee, first and foremost, the protection of a person's lawfully attained legal position.

## **THE NON-APPLIED PROVISIONS**

**13.** § 95<sup>2</sup> of the Maritime Safety Act reads as follows:

“§ 95<sup>2</sup>. Invoices submitted by the Maritime Administration to the shipowner or ship's agent

(1) If the shipowner or ship's agent fails to pay the invoice concerning the lighthouse dues and ice breaking dues established in § 6(1)13 of the Merchant Shipping Code in the wording in force until 24 April 2004 and the lighthouse dues and ice breaking dues established in § 50<sup>1</sup> of this Act, the Maritime Administration is entitled to submit to the shipowner or ship's agent the payment notice referred to in § 50<sup>4</sup>(3) of this Act. The term for payment of the dues set out in the payment notice is 30 days as of the receipt of the payment notice.

(2) The dues subject to payment, set out in the payment notice, are calculated on the basis of legislation in force at the time of submission of invoices.”

**14.** The Merchant Shipping Code, in the wording in force until 24 April 2004, read as follows:

[---]

“§ 6. The Ministry of Economic Affairs and Communications drafts and implements maritime development and safety policies.

1. The Government of the Republic or, on the authorisation thereof, the Minister of Economic Affairs and Communications shall establish the following by a regulation:

[---]

13) rates of lighthouse dues and ice breaking dues and the bases and procedure for the provision of subsidies;”

**15.** The Government of the Republic regulation no. 1 “Grant of Authorisation for Establishment of Legislation Arising from the Merchant Shipping Code” of 7 January 1997, in the wording in force until 24 April 2004, read as follows:

“Pursuant to § 6(1) of the Merchant Shipping Code (RT 1991, 46 48, 577; RT I 1993, 65, 923; 1995, 54, 882; 1996, 78, 1380), the Government of the Republic resolves:

To grant authorisation to the Minister of Transport and Communications to establish by regulation:

[---]

13) rates of pilotage dues, lighthouse dues and ice breaking dues and the bases and procedure for the provision of subsidies;”

**16.** The Minister of Transport and Communications regulation no. 113 “Rates of lighthouse dues and ice breaking dues and the bases and procedure for the provision of subsidies” of 12 December 2001 established the rates and procedure for calculation of lighthouse dues and ice breaking dues (Chapter 1) and the bases and procedure for the provision of subsidies (Chapter 2).

**17.** The Maritime Safety Act, in the wording in force from 25 April 2004 until 2 June 2005, read as follows:



[---]

“§ 50<sup>1</sup>. Lighthouse dues and navigation dues

(1) Lighthouse dues are dues for the use of the navigational infrastructure installed on public waterways to ensure maritime safety.

[---]

§ 50<sup>2</sup>. Payer of dues

Lighthouse dues and navigation dues shall be paid by the shipowner or ship's agent.

[---]

§ 50<sup>4</sup>. Calculation of lighthouse dues and navigation dues and payment notices

(1) The Maritime Administration shall calculate lighthouse dues and navigation dues upon arrival of a ship at a port or a roadstead of a port once in a twenty-four hour period if at the roadstead of the port the ship is loaded, unloaded, supplied with (food, water etc.), repaired or the ship is associated with commercial activities in any other manner.

(2) The Maritime Administration shall submit to the shipowner or ship's agent a payment notice concerning the lighthouse dues and navigation dues subject to payment, which is prepared on the basis of the ship's general declaration or the pilot bill. An invoice for a calendar month and regarding a ship providing a scheduled service shall be submitted by the fifth day of the following month.

(3) A payment notice shall set out the name and address of the payer, the lighthouse dues and navigation dues subject to payment, the bases for the calculation thereof, reduction or increase of the rates of dues, the subsidies provided and the due date for payment.

(4) The term for payment set out in a payment notice shall be at least ten working days.

(5) Lighthouse dues and navigation dues for ships providing a scheduled service shall be paid by the 25th of the following month.

§ 50<sup>5</sup>. Rates of lighthouse dues and navigation dues

Lighthouse dues and navigation dues shall be paid at the following rates:

Gross tonnage of ship (GT) Lighthouse dues (in kroons) Navigation dues (in kroons)

|               |        |        |
|---------------|--------|--------|
| 100–250       | 640    | 100    |
| 251–500       | 1280   | 300    |
| 501–1000      | 1920   | 870    |
| 1001–1500     | 2560   | 1500   |
| 1501–2000     | 3200   | 2000   |
| 2001–3000     | 3840   | 2700   |
| 3001–5000     | 5120   | 3700   |
| 5001–7500     | 6400   | 6000   |
| 7501–10 000   | 8960   | 8500   |
| 10 001–12 500 | 11 520 | 11 000 |
| 12 501–15 000 | 14 080 | 13 200 |
| 15 001–18 000 | 16 640 | 15 500 |
| 18 001–24 000 | 19 200 | 17 500 |

24 001–30 000 25 600 19 700  
30 001–40 000 32 000 23 500  
40 001–60 000 38 400 28 000  
60 001–75 000 44 800 32 000  
over 75 000 51 000 35 000

§ 50<sup>6</sup>. Payment of lighthouse dues and navigation dues

(1) A shipowner or a ship's agent is required to transfer the lighthouse dues and navigation dues to the bank account specified in the invoice by the due date indicated in the invoice.

(2) The Maritime Administration shall submit a statement of holdings concerning receipt of dues to a shipowner or a ship's agent once per quarter.

§ 50<sup>7</sup>. Fine for delay

(1) If a shipowner or a ship's agent has not paid lighthouse dues and navigation dues by the due date indicated in the payment notice, the shipowner or ship's agent is required to pay a fine for delay in the amount of 0.019 per cent per day on the amount not paid by the due date, but the total amount shall not exceed the lighthouse dues or navigation dues indicated in the payment notice submitted to the shipowner or ship's agent by the Maritime Administration.

(2) The fine for delay on the amount not transferred is calculated as of the day following the due date until the day the dues are paid.”

## **OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER**

**18.** The provisions, which the Tallinn Administrative Court declared unconstitutional and did not apply, fall into two categories. The first category consists of the provisions on the basis of which the MA submitted payment notice no. 1 to the AS Tallink Grupp and payment notice no. 7 to the AS Hansatee Cargo. These are the following:

1) § 6(1)13) of the MSC;

2) clause 13 of the Government of the Republic regulation;

3) the Minister of Transport and Communications regulation in conjunction with which the obligation to pay the lighthouse and ice breaking dues was established, *inter alia*, in regard to the period from 1 May 2003 until 24 April 2004;

4) § 95<sup>2</sup> of the MSA, which creates a prerequisite for compulsory execution of the obligation to pay lighthouse and ice breaking dues.

**19.** The second category consists of the provisions in the application of which the MA submitted payment notice no. 2 to the AS Tallink Grupp and payment notice no. 8 to the AS Hansatee Cargo. These are the following:

1) § 50<sup>1</sup>(1), § 50<sup>2</sup>, §§ 50<sup>4</sup>-50<sup>7</sup> of the MSA, which established the obligation to pay lighthouse dues as of 25 April 2004;

2) § 95<sup>2</sup> of the MSA which creates prerequisites for the compulsory execution of this obligation.

**20.** First, the Chamber shall analyse the relevance of the provisions of the first category to the adjudication of the main proceeding and the constitutionality of the provisions (I), thereafter the Chamber shall analyse the provisions of the second category from the same aspects (II).

## I.

**21.** Pursuant to § 14(2) of the CRCPA a provision the constitutionality of which the Supreme Court shall review must be relevant to the adjudication of the main matter. Pursuant to the judicial practice of the Supreme Court a provision which is of decisive importance to the adjudication of a case is relevant (see e.g. judgment of the Supreme Court *en banc* of 22 December 2000 in case no. 3-4-1-10-00, paragraph 10). A provision is of decisive importance when in the case of unconstitutionality of the provision the court adjudicating the matter should render a decision different from that in the case of constitutionality of the provision (see e.g. judgment of Supreme Court *en banc* of 28 October 2002 in case no. 3-4-1-5-02, paragraph 15).

**22.** By its judgment of 5 June 2009 the Tallinn Administrative Court satisfied the actions of the AS Tallink Grupp and the AS Hansatee Cargo and annulled, among others, payment notices no. 1 and no. 7 of the MA. Pursuant to the judgment the legal basis of these payment notices was § 95<sup>2</sup>(1) and (2) of the MSA. Pursuant to § 95<sup>2</sup>(2) of the MSA the sums payable under payment notices are calculated on the basis of legislation in force at the time of submission of invoices and therefore the lawfulness of the annulled payment notices depends, firstly, on whether legislation in force at the time of submission of invoices was in conformity with the Constitution.

**23.** During the periods of time for which the MA requested payment, set out in the payment notices, the obligation to pay lighthouse and ice breaking dues was established by the Minister of Transport and Communications regulation, which had been issued on the basis of clause 13 of the Government of the Republic regulation, which, in turn, had been issued under § 6(1)13) of the MSC. When a norm delegating authority and the regulations issued on the basis thereof are unconstitutional, the court must not apply these provisions and annul the payment notices, i.e. decide differently than in the case of constitutionality thereof, when the court should not annul the payment notices and should dismiss the actions. Consequently, the provision is of decisive importance to the adjudication of the main matter and is, thus, also relevant.

Nevertheless, clause 13 of the Government of the Republic regulation is not relevant to the extent that it also refers to pilotage dues, because the main dispute does not concern these.

**24.** The Tallinn Administrative Court has also considered § 95<sup>2</sup> of the MSA to be relevant. In regard to payment notices no. 1 and no. 2, what is applicable is the part of the first subsection of this provision, which entitles the MA “to submit to the shipowner or ship’s agent the payment notice referred to in § 50<sup>4</sup>(3) of this Act if the shipowner or ship’s agent fails to pay the invoice concerning the lighthouse dues and ice breaking dues established in § 6(1)13 of the Merchant Chipping Code in the wording in force until 24 April 2004 [---].” If this norm is not in conformity with the Constitution, the court must not apply it. When this provision is not applied the legal basis for the submission of repeated payment notices ceases to exist, and therefore the contested payment notices should be annulled. Consequently, this provision, too, is relevant to the constitutional review proceeding.

**25.** The lighthouse and ice breaking dues are financial obligations in public law, which are not referred to as state taxes or fees in the law but which, by nature, belong to the sphere of protection of § 113 of the Constitution. These are financial obligations in public law because the payment of the contested dues can only be required by the state through the MA, the dues do not depend on services rendered and the amount of the dues is based on the rates established by legislation. Pursuant to the Merchant Shipping Code and the Maritime Safety Act the relationships between the MA and the persons obligated to pay ice breaking and lighthouse dues were power relationships, wherein the MA has the powers, authorised by the state, to collect ice breaking and lighthouse dues and control the amounts paid (see the Civil Chamber of the Supreme Court judgment no. 3-2-1-55-08, paragraph 10, referred above).

**26.** Pursuant to § 113 of the Constitution state taxes, duties, fees, fines and compulsory insurance payments shall be provided by law. The Supreme Court has held that all financial obligations in public law,

irrespective of how these are named in different pieces of legislation, are within the sphere of protection of § 113 of the Constitution (see the referred Supreme Court *en banc* judgment in case no. 3-4-1-10-00, paragraph 20).

**27.** § 113 of the Constitution is aimed at achieving a situation where all financial obligations of public law are imposed by legislation adopted only by the *Riigikogu* in the form of parliamentary Acts (see the referred Supreme Court *en banc* judgment in case no. 3-4-1-10-00, paragraphs 20 and 21).

**28.** The requirement arising from § 113 of the Constitution that a financial obligation in public law must be established by law means that the law must determine the elements of the financial obligation in public law. These elements may include the basis of creation of the obligation, the obligated subjects, the amount of obligation or the conditions of determining the amount, the procedure for payment or collection and other characteristics inherent to the obligation.

**29.** § 113 of the Constitution gives rise to individual subjective right against the state (see the referred Supreme Court *en banc* judgment in case no. 3-4-1-10-00, paragraph 22, and the Constitutional Review Chamber of the Supreme Court (hereinafter “the CRC”) judgment of 26 November 2007 in case no. 3-4-1-18-07, paragraph 25). An Act infringes on the sphere of protection of § 113 of the Constitution if it authorises the executive to determine an element of tax law relationship. A regulation infringes on the sphere of protection of § 113 of the Constitution if it determines an element of tax law relationship (see the referred CRC judgment in case no. 3-4-1-18-07, paragraph 26).

**30.** As § 6(1)13) of the MSC delegated the establishment of lighthouse and ice breaking dues to the Government of the Republic, who, in turn, was entitled to delegate the authority to the Minister of Transport and Communications, and the obligation to pay the lighthouse and ice breaking dues was regulated by the Minister of Transport and Communications regulation, the contested regulatory framework infringed the sphere of protection of § 113 of the Constitution.

**31.** The first sentence of § 11 of the Constitution permits to restrict the fundamental rights only in accordance with the Constitution. Legislation of general application which infringes fundamental rights is in accordance with the Constitution if it is constitutional in both formal and substantive senses. Formal constitutionality means that legislation of general application, restricting fundamental rights, must be in conformity with the requirements of competence, procedure and form, as well as with the principles of definitiveness and principle of subject to be established by law (see the referred CRC judgment in case no. 3-4-1-18-07, paragraph 35 and the judgments referred to therein).

**32.** Pursuant to § 3(1) of the Constitution the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. The first sentence of § 3(1) of the Constitution establishes the principle of subject to be established by law (see the referred judgment of the Supreme Court *en banc* in case no. 3-4-1-10-00, paragraph 28, and the CRC judgment of 13 June 2005 in case no. 3-4-1-5-05, paragraph 9). The general principle of subject to be established by law delimits the competence of the legislative and the executive powers.

The Constitution does not exclude the legislator’s possibility to delegate some of its legislative competence to the executive. The general principle of subject to be established by law prohibits the legislator to delegate to the executive those functions the performance of which is imposed on the legislator by the Constitution.

**33.** § 113 of the Constitution obligates the legislator to establish all financial obligations in public law. The Supreme Court has admitted, though, that the legislator may delegate the right to establish obligations in public law to the executive, if this is prompted by the nature of the financial obligations and on the condition that that the legislator determines the extent of discretion, which may consist in establishing the minimum and maximum fees, the principles of calculating the amounts of fee, or in establishing something else that would guarantee that the amount of an obligation is determined on an objective basis, that the entitled subjects can predict with sufficient precision the extent of the obligation and the details of performance

thereof, and would guarantee equal treatment of persons (see the CRC judgment of 1 July 2008 in case no. 3-4-1-6-08, paragraph 41).

**34.** The general principle of subject to be established by law also gives rise to the requirement that the executive power may be exercised when there is relevant authorisation by law (see the referred judgment of the Supreme Court *en banc* in case no. 3-4-1-10-00, paragraph 28). Pursuant to this principle an authorisation by the legislator is required for the restriction of fundamental rights by a body ranking lower than the legislator (see the referred judgment of the CRC in case no. 3-4-1-5-05, paragraph 9). The same aim is served by § 87(6) of the Constitution, pursuant to which the Government of the Republic shall issue regulations and orders on the basis of and for the implementation of law, and § 94(2) of the Constitution, pursuant to which a minister, too, shall issue regulations on the basis of and for the implementation of law. Proceeding from the principle of subject to be established by law a regulation, which is issued on the basis of an unconstitutional norm which delegates authority, is in conflict with the Constitution.

**35.** The Chamber ascertained above in paragraph 30 that § 6(1)13 of the MSC authorised the Government of the Republic to establish the obligation to pay lighthouse and ice breaking dues and infringed the sphere of protection of § 113 of the Constitution. The Chamber is of the opinion that in the formal sense such an infringement of the general fundamental tax right is in conflict with the first sentence of § 3(1) and with § 113 of the Constitution.

**36.** The Chamber also ascertained that the right to establish lighthouse and ice breaking dues was further delegated, by the Government of the Republic regulation, to the Minister of Transport and Communications, and this infringed the sphere of protection of § 113 of the Constitution. In doing this the law put none of the restrictions referred to in paragraph 33 of this judgment on the executive. The Chamber is of the opinion that the infringement of the general fundamental tax right arising from clause 13 of the Government of the Republic regulation is, too, in formal conflict with the first sentence of § 3(1) and with § 113 of the Constitution.

Clause 13 of the Government of the Republic regulation was based on an unconstitutional norm delegating authority. Clause 13 of the Government of the Republic regulation, issued on the basis of an unconstitutional norm delegating authority, is in formal conflict with the first sentence of § 3(1) and § 87(6) of the Constitution.

The Chamber has also ascertained that the Minister of Transport and Communications regulation established all the elements of the obligation to pay lighthouse and ice breaking dues, and thus infringed the sphere of protection of § 113 of the Constitution. For this reason, this regulation, too, is in formal conflict with the first sentence of § 3(1) and with § 113 as well as with § 94(2) of the Constitution.

**37.** § 95<sup>2</sup>(1) of the MSA, which entered into force on 16 November 2008, established a legal basis for the submission to a ship's agent or shipowner the payment notice referred to in § 50<sup>4</sup>(3) of the MSA, if the ship's agent or shipowner had failed to pay the invoice submitted in accordance with § 6(1)13 of the MSC in the wording in force until 24 April 2004 and the regulations issued on the basis thereof. § 95<sup>2</sup>(2) of the MSA establishes that the dues subject to payment are calculated on the basis of legislation in force at the time when the obligation to pay existed. § 95<sup>2</sup> of the MSA is applied in conjunction with § 50<sup>7</sup>(2) of the MSA, which entered into force on the same date, and pursuant to which the payment notice (regulated by § 50<sup>4</sup> of the MSA), which is the basis for payment of lighthouse and ice breaking dues, constitutes a piece of administrative legislation for the performance of a financial obligation in public law for the purposes of § 2(1)21) of the Code of Enforcement Procedure, and the MA is entitled to submit it for compulsory execution.

**38.** As § 95<sup>2</sup> of the MSA has not established independent obligation to pay the dues, the constitutionality of the provisions depends, firstly, on whether the obligation to pay the dues in regard to which a compulsory payment notice may be issued under this provision, was in conformity with the Constitution. As the regulations issued under § 6(1)13 of the MSC were unconstitutional, the retroactive establishment of compulsory execution of this obligation is unconstitutional, too.

**39.** Taking into account what was ascertained in paragraphs 35 and 36 of this judgment the Chamber declares that § 6(1)13 of the MSC in the wording in force until 24 April 2004, clause 13 of the Government of the Republic regulation no. 1 “Grant of Authorisation for Establishment of Legislation Arising from the Merchant Shipping Code” of 7 January 1997 to the extent that it granted authorisation to the Minister of Transport and Communications to establish the rates of lighthouse dues and ice breaking dues and the bases and procedure for the provision of subsidies, as well as the Minister of Transport and Communications regulation no. 113 “Rates of lighthouse dues and ice breaking dues and the bases and procedure for the provision of subsidies” of 12 December 2001, were in conflict with the Constitution.

Taking into account what was ascertained in paragraph 38 of this judgment the Chamber declares the part of the first sentence of § 95<sup>2</sup>(1) of the MSA reading “the lighthouse dues and ice breaking dues established in § 6(1)13 of the Merchant Chipping Code in the wording in force until 24 April 2004, and”, unconstitutional and invalid.

## II.

**40.** By its judgment of 5 June 2009 the Tallinn Administrative Court annulled, in addition to payment notices no. 1 and no. 7, also the MA payment notices no. 2 and no. 8. The judgment refers to § 95<sup>2</sup>(1) and (2) of the MSA as legal bases of these payment notices, too, although these payment notices concerned the invoices that the complainants had failed to pay after Chapter 111 of the Maritime Safety Act, establishing lighthouse and ice breaking dues by law, entered into force on 25 April 2004. The lawfulness of these payment notices, too, depends primarily on whether the provisions, which were in force at the time when the obligation to pay lighthouse dues was created, were in conformity with the Constitution.

**41.** During the periods set out in payment notices no. 2 and no. 8, for which the MA requires payment, the obligation to pay lighthouse dues was established in § 50<sup>1</sup>(1), § 50<sup>2</sup> and §§ 50<sup>4</sup>-50<sup>7</sup> of the MSA. If these provisions are unconstitutional, the court must not apply these and annul the payment notices, i.e. decide differently than in the case of constitutionality thereof. Consequently, the provisions are of decisive importance to the adjudication of the main matter and are, thus, also relevant.

Nevertheless, the Chamber considers it necessary to specify that as it does not appear from the judgment of the Tallinn Administrative Court that also the navigation dues had been claimed from the complainants, § 50<sup>2</sup> and §§ 50<sup>4</sup>-50<sup>7</sup> of the MSA are relevant only to the extent that they pertain to the lighthouse dues referred to in § 50<sup>1</sup>(1) of the MSA.

**42.** The Tallinn Administrative court has also regarded § 95<sup>2</sup> of the MSA to be relevant. In regard to payment notices no. 2 and no. 8 what is to be applied is the part of the first sentence of this provision which entitles the MA to submit “to the shipowner or ship’s agent the payment notice referred to in § 50<sup>4</sup>(3) of this Act if the shipowner or ship’s agent fails to pay the lighthouse dues and ice breaking dues established in § 50<sup>1</sup> of this Act”. If this norm is not in conformity with the Constitution, the court must not apply it and then the legal basis for the submission of repeated payment notices ceases to exist, and therefore the contested payment notices should be annulled. Consequently, this provision, too, is relevant to the constitutional review proceeding.

**43.** I regard to § 50<sup>1</sup>(1), § 50<sup>2</sup> and §§ 50<sup>4</sup>-50<sup>7</sup> of the MSA the Tallinn Administrative Court held that these provisions infringed the right to organisation and procedure arising from § 14 of the Constitution. As in this court case the issue under examination falls within administrative law, it is to be admitted that in principle these provisions are capable of infringing the right to good administration, which manifests the right to organisation and procedure in the branch of administrative law (see the CRC judgment of 17 February 2003 in case no. 3-4-1-1-03, paragraph 16).

**44.** The right to good administration means the obligation of the state to establish for the protection of rights and freedoms of persons, in the sphere of administrative law, effective procedures which, among others,

guarantee the right to access the information concerning the person's case, right to be heard, right to require reasoned decisions from an administrative authorities and right to contest the decisions of administrative authorities.

Right to good administration does not include the right of a person to require that there must exist measures of compulsory execution for the implementation of administrative decisions, when the protection of other rights of the person does not depend on the exercise of coercive measures. The Chamber is of the opinion that the procedure for implementation of substantive provisions establishing an obligation is to be distinguished from the procedure for the application of coercive measures in the cases when a substantive obligation is not fulfilled. The right to good administration can be infringed in both proceedings. Nevertheless, the fact that the procedure for implementation of a substantive obligation has not been supplemented by a procedure enabling to coerce a person into fulfilling the obligation, can not infringe the right to good administration. It would be incompatible with the right to good administration if a person could invoke the right in order to demand that the public authority use coercive measures against this person if the person has failed to fulfil an obligation. Also, it would be incompatible with this right if solely in the absence of such coercive measures a person could demand the declaration of unconstitutionality also of the provisions which establish a substantive obligation and the administrative procedure for the implementation thereof.

**45.** Consequently, the Chamber does not agree with the opinion of the Tallinn Administrative Court that § 50<sup>1</sup>(1), § 50<sup>2</sup> and §§ 50<sup>4</sup>-50<sup>7</sup> of the MSA did not guarantee the right to good administration, because the provisions established an obligation but failed to establish how the public authority shall guarantee the performance of the established obligation. The fact that the possibility of compulsory execution was not provided in these provisions for the enforcement of the financial obligation in public law established therein does not infringe a person's right to good administration.

**46.** Nevertheless, § 50<sup>1</sup>(1), § 50<sup>2</sup> and §§ 50<sup>4</sup>-50<sup>7</sup> of the MSA may infringe the right to good administration because the procedure for the implementation of the substantive obligation established by these provisions does not meet the constitutional requirements and does not guarantee the fundamental rights and freedoms of persons. The Chamber is of the opinion that these provisions do not, after all, infringe this right, as a procedure meeting the constitutional requirements is guaranteed. In regard to these provisions it is possible for a person to understand who and in which situations must pay the lighthouse dues, how big the due is and how it is calculated, on the basis of which document it is to be paid and where the dues must be accrued. As the proceedings concerning the dues are conducted by way of proceedings governed by public law (see the Civil Chamber of the Supreme Court judgment of 20 June 2008 in case no. 3-2-1-55-08, paragraph 10), and as pursuant to the general provisions of the Maritime Safety Act the provisions of the Administrative Procedure Act are applicable to the proceedings provided in the MSA, it can be presumed that the Act guarantees the accordance of the proceedings with the right to good administration. The Administrative Procedure Act specifies the right to good administration and other constitutional principles pertaining to the performance of administrative functions and realises the general right to organisation and procedure arising from § 14 of the Constitution (see in this regard the Administrative Law Chamber of the Supreme Court ruling of 4 April 2003 in case no. 3-3-1-32-03, paragraph 13).

**47.** The Chamber is of the opinion that, consequently, § 50<sup>1</sup>(1), § 50<sup>2</sup> and §§ 50<sup>4</sup>-50<sup>7</sup> of the MSA are in conformity with the Constitution. In regard to these provisions the request of the Tallinn Administrative Court is to be dismissed.

**48.** As regards § 95<sup>2</sup> of the MSA the Chamber is of the following opinion. The application of § 95<sup>2</sup> of the MSA in conjunction with § 50<sup>7</sup> of the same Act allows to issue an new, more encumbering administrative act, subject to compulsory execution under the Code of Enforcement Procedure, concerning the circumstances that took place before such a possibility entered into force on 16 November 2008. As before these provisions entered into force there was no possibility of compulsory execution of the requirements arising from the administrative legislation referred to in § 50<sup>4</sup> of the MSA, the provisions have – as regards persons - an unfavourable retroactive effect on the tax relationships that were created before § 95<sup>2</sup> and § 50<sup>7</sup>

of the MSA entered into force.

**49.** The Chamber does not agree with the opinion of the Tallinn Administrative Court that the retroactive establishment of the right of compulsory execution of lighthouse dues is in conflict with the principle of protection of confidence arising from § 10 of the Constitution. Firstly, the Chamber has already ascertained above that the establishment of lighthouse dues as an obligation in public law by Chapter 11<sup>1</sup> of the MSA, which entered into force on 25 April 2004, is not in conflict with the Constitution. Consequently, the provisions regulating this obligation, concerning which a payment notice subject to compulsory execution may be submitted under § 95<sup>2</sup> of the MSA, are constitutional and the obligation is lawfully subject to compulsory execution.

**50.** In regard to unfavourable retroactive effect the Supreme Court has held earlier that the legislator is entitled, taking into account the will of the people expressed in the Constitution, bearing in mind the general public interests of the state, and taking account of the actual situation as well as the principle of legality, to issue legislation with retroactive effect, not pertaining to criminal law (the CRC judgment of 21 December 1994 in case no. III-4/A-10/94).

The Administrative Law Chamber of the Supreme Court, too, has held in its judicial practice that attribution of retroactive effect to a norm is not, in itself, unconstitutional and that retroactive effect may also be attributed to encumbering provisions of law, if there exists justified need and this does not disproportionately prejudice the legitimate interests of a person and the regulatory framework does not come as a surprise to the person (the Administrative Law Chamber of the Supreme Court judgment of 17 March 2003 in case no. 3-3-1-11-03, paragraphs 33 and 34).

**51.** Nevertheless, the Chamber is of the opinion that the retroactive establishment of the possibility of compulsory execution does infringe the principles of protection of confidence and legitimate expectation, yet this infringement is not disproportional in the case under discussion. In the present case the public interest in the retroactive establishment of compulsory execution consists in the fiscal interest of the state to enforce the constitutionally enacted financial obligations in public law and collect the dues. Also, the Chamber considers it important to treat equally those business operators who observed the fundamental obligation to observe the law, arising from § 19(2) of the Constitution, and fulfilled the obligation to pay the lawfully established dues, and those operators who violated the obligation for some or other reason. If the contested provision were declared invalid, the persons who failed to pay lighthouse dues would attain, as a result of their unlawful behaviour, an economic advantage over the operators who had behaved lawfully. The attainment of such an advantage is not in accordance with the principle of protection of confidence, which protects, in the first place, the lawfully attained rights.

**52.** Upon assessing the reasonableness of the infringement the Chamber points out the fact that § 95<sup>2</sup> of the MSA does not change the obligation to pay the dues which had been created on the basis of administrative legislation (payment notices) issued before this provision and § 50<sup>7</sup>(2) of the MSA entered into force. It was known to persons for sure from Chapter 11<sup>1</sup> of the MSA that they were under the obligation to pay lighthouse dues. This obligation is not affected by the fact that due to legislative omission there was no possibility of the now contested compulsory execution which, *inter alia*, resulted in the claiming of these dues by way of civil court procedure by mistake (see the referred Civil Chamber of the Supreme Court judgment in case no. 3-2-1-55-08). Furthermore, § 95<sup>2</sup> of the MSA does not automatically allow for compulsory execution on the basis of old payment notices and instead requires the submission of new payment notices the term of payment of which is 30 days. It is only upon the expiry of this term that a payment notice becomes compulsorily executable (§ 19(1) of the Code of Enforcement Procedure). This regulatory framework excludes that compulsory execution is unexpected for a business operator and enables the operators themselves to avoid compulsory execution.

**53.** Consequently, § 95<sup>2</sup> of the MSA, as far as its concerns payment notices no. 2 and no. 8, is not unconstitutional, either, and the request of the Tallinn Administrative Court in this regard is to be dismissed.



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