Constitutional judgment 3-4-1-6-08

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-6-08
Date of decision	1 July 2008
Composition of court	Chairman Märt Rask, members Peeter Jerofejev, Hannes Kiris, Indrek Koolmeister and Harri Salmann
Court Case	Review of constitutionality of the second sentence of § 7^1(2) of the Aviation Act.
Basis of proceeding	The Tallinn Circuit Court judgment of 11 April 2008 in administrative case no 3-06-2026
Hearing	Written proceeding
Conclusion	**To declare the second sentence of § 7^1(2) of the Aviation Act unconstitutional and invalid to the extent that it does not guarantee the determination of elements of the established public law financial obligations in conformity with the requirement of § 113 of the Constitution that state financial obligations must be provided by law.**

FACTS AND COURSE OF PROCEEDING

1. From 27 April 2006 to 16 October 2006 the AS Enimex performed different acts aimed at obtaining form the Civil Aviation Administration an airworthiness certificate to and a certificate of inspection of airworthiness of aircraft BAe ATP, originally registered in the United Kingdom of Great Britain and Northern Ireland, and a certificate of an organisation guaranteeing the continued airworthiness to the AS Enimex.

2. On 28 June 2006, pursuant to Commission Regulation (EC) No 2042/2003 of 20 November 2003 on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks (OJ L 315, 28.11.2003, p 1–165), as amended by

Commission regulation (EC) No 707/2006 of 8 May 2006 (OJ L 122, 9.5.2006, p 17–18) (hereinafter "regulation 2042/2003"), the AS Enimex submitted to the Civil Aviation Administration an application for issue of a certificate of continuing airworthiness management organisation, conforming to the requirements of part M subpart A subpart G, and related applications for the approval of a continuing airworthiness management exposition and for the approval of the maintenance programme for the aircraft BAe ATP.

3. On 24 July 2006 the AS Enimex submitted to the Civil Aviation Administration, pursuant to subpart M.B.902 of regulation no 2042/2003, an application for carrying out the annual review (airworthiness review) and for the issue of the airworthiness review certificate EASA (European Aviation Safety Agency) Form 15a.

4. On 25 July 2006 AS Enimex submitted an application for the determination of airworthiness and for the issue of certificate of airworthiness.

5. On 3 August 2006 the Civil Aviation Agency registered aircraft BAe ATP, which had arrived in Estonia on 18 July 2006, in the state register under registration mark ES-NBA, and issued a certificate of registration to that effect.

6. On 8 August 2006 the Civil Aviation Administration, in response to the enquiry of the AS Enimex about the reasons of the delay, informed the company that among other things the Administration was processing the application of the AS Enimex for the issue of a certificate of an organisation meeting the requirements of part M subpart A subpart G, and examining the related documents, and the relevant audit was planned to be conducted in the first half of September. The Civil Aviation Administration notified the AS Enimex of the fact that the Administration was going to conduct part of the audit provided in part M subpart A subpart G and part of the airworthiness inspection of aircraft ES-NBA in co-operation with company AviaQ AB, registered in the Kingdom of Sweden (hereinafter "the AviaQ").

7. On 22 August 2006 the AS Enimex paid the state fee of 11 763 kroons for the determination of the airworthiness of aircraft BAe ATP; on 9 October 2006 it paid 1000 kroons for having aircraft BAe ATP entered in the operations specification of an air operator's certificate with registration mark ES-NBA, 2000 kroons for the issue of a certificate of an organisation guaranteeing the continued airworthiness, and 2945 kroons for the issue of an airworthiness certificate of BAe ATP.

8. On 30 August 2006 the Civil Aviation Administration informed the AS Enimex that on 12 to 14 September, in co-operation with the AviaQ, it will audit the AS Enimex, in the course of which it shall conduct the audit provided in part M subpart A subpart G, the inspection of airworthiness of aircraft ES-NBA, and shall review the conformity of the air carrier's aviation activities with the valid requirements.

9. On 21 September 2006 the Civil Aviation Administration informed the AS Enimex that the aviation activities department of the Civil Aviation Administration had inspected the conformity of AS Enimex to the requirements of regulation 2042/2003, and submitted to AS Enimex the results of the audit. On the same day the company was informed that the inspection of airworthiness of the aircraft had been conducted on 15 September 2006, and it received a copy of the report of the inspection of airworthiness of AS Enimex.

10. On 26 September 2006 the Civil Aviation Administration submitted to AS Enimex invoice no 27, the due date of which was set out to be 6 October 2006. In the invoice the basis thereof was specified as follows: audit 12 – 19.09.2006, 120 870 kroons + value added tax 21 756 kroons and 60 cents (basis: AviaQ AB invoice E20063); air tickets 9993 kroons (basis AS Estonian Air invoice 21015388); accommodation 3144 kroons and 95 cents (basis OÜ Central Hotel invoice 535261).

11. On 29 September 2006 and 5 October 2006 the AS Enimex gave notice that it had rectified the deficiencies discovered in the course of the audit.

12. On 12 October 2006 the AS Enimex filed an action with the administrative court requesting that the court require the Civil Aviation Administration to issue a certificate of airworthiness of aircraft BAe ATP

(with registration mark ES-NBA), a certificate of inspection of airworthiness and a certificate of an organisation guaranteeing the continued airworthiness to the AS Enimex. In addition it claimed compensation for material damage in the amount of 810 000 kroons caused by the delay in issuing the certificates.

13. On 13 October 2006 the Civil Aviation Administration sent to the AS Enimex a reminder for the payment of invoice no 27. The Civil Aviation Administration pointed out also that it will be able to issue to the AS Enimex the certificates proving airworthiness after the invoice has been settled.

14. In its letter of 16 October 2006 the AS Enimex contested the submitted claim of expenses arguing that it was unlawful. On 16 October 2006 the AS Enimex paid 155 764 kroons and 55 cents on the basis of invoice no 27.

15. On the same date the Civil Aviation Administration issued to the AS Enimex a certificate of airworthiness, a certificate of inspection of airworthiness, and a certificate of a certificate of an organisation guaranteeing the continued airworthiness, conforming to the requirements of part M subpart A subpart G.

16. For this reason the AS Enimex amended the request of the action filed with the administrative court and applied for the declaration of unlawfulness of delay in the issue of the certificates and for the compensation of the material damage caused by the delay. The AS Enimex argued also that the Civil Aviation Administration had – without a basis and illegally required the payment of costs of inspection of airworthiness in the amount of 155 764 kroons and 55 cents, which amounts to unjustified enrichment.

17. With regard to the costs of inspection of airworthiness the AS Enimex argued that the second sentence of § 7^1(2) of the Aviation Act, which is the basis for claiming these expenses, was in conflict with § 113 of the Constitution. In the opinion of the company the obligation to cover the expenses of inspection amounts to a public law financial obligation, which falls within the sphere of protection of the latter provision, the bases of calculation and the limits of which must be provided by law.

18. The Civil Aviation Administration did not accept the action and requested that the court dismiss it. The inspection of civil aircraft and their operators, which is often conducted on the basis of a civil law contract concluded between the Director General of the Civil Aviation Administration and a legal person in private law, can not be deemed as performance by a person in private law of a public law function delegated to it. Upon the inspection the contracting parties are the air operator and the recognised classification society. The charge collected from an air operator for the inspection can be regarded as a private law service charge. Therefore, what is provided in § 7^1(2) of the Aviation Act is not in conflict with § 113 of the Constitution. The Civil Aviation Administration pointed out further that the AS Enimex had paid the state fee of 11 736 kroons for the determination of airworthiness, and the airworthiness was determined by the inspectors of the Civil Aviation Administration. The amount paid to the AviaQ is the amount paid for the inspection of an organisation guaranteeing the continued airworthiness.

19. The Tallinn Administrative Court dismissed the action. With regard to the second sentence of § 7^1(2) of the Aviation Act the administrative court held that the requirement of this provision was in conformity with the Constitution. The administrative court is of the opinion that this was not a financial obligation in public law, because the inspection conducted by a competent organisation authorised by the Civil Aviation Administration on the basis of § 7^1(2) of the Aviation Act does not constitute a performance of a public law function. The Court held that the certification procedure organised by the Civil Aviation Administration can, by nature, be divided into the provision of a private law service in the course of which the conformity of civil aircraft to established parameters as well as the conformity of operators and maintenance organisations to the established requirements is ascertained, and into a public law activity in the course of which the Civil Aviation Administration, on the basis – inter alia of the prior inspection, issues, extends or declares invalid the relevant certificates. The administrative court is of the opinion that the technical inspection is, thus, a part of a certification procedure, but within the procedure no public law functions are performed. Differently form a state fee that the AS Enimex had to pay for the performance of a public law act, i.e. the issue of a

document by the state, the amount paid to the AviaQ was paid for the inspection of an organisation guaranteeing the continued airworthiness and can be deemed a service charge in private law.

20. On 7 May 2007 the AS Enimex filed an appeal with the Tallinn Circuit Court, in which it still maintained that the administrative procedure in regard to it had been delayed unlawfully, and that it had been required to cover the expenses on the basis of the second sentence of § 7^1(2) of the Aviation Act, which was in conflict with the Constitution.

21. The Civil Aviation Administration argued that the administrative court judgment was justified and requested that the appeal be dismissed. With regard to the second sentence of § 7^1(2) of the Aviation Act the Administration pointed out that it was not unconstitutional.

22. The Tallinn Circuit Court satisfied the appeal of AS Enimex by its judgment of 11 April 2008. It referred the claim of compensation for material damage back to the first instance court for a new hearing. With regard to the claim against unjustified enrichment the circuit court declared the second sentence of § 7^1(2) of the Aviation Act unconstitutional, did not apply it, and initiated a constitutional review proceeding. On the basis thereof the circuit court satisfied the claim of AS Enimex against the Civil Aviation Administration.

JUSTIFICATIONS OF THE COURT AND PARTICIPANTS IN THE PROCEEDING

23. The Tallinn Circuit Court held that the public law functions of the Civil Aviation Administration related to the guarantee of air safety and the organisation of supervision of that safety, and the supervision is exercised by the Civil Aviation Administration also through the certification procedures under discussion. The circuit court is of the opinion that these procedures have to be regarded as a single administrative proceeding and not to be divided into technical inspection under private law and public law activities consisting in the issue of certificates for which the state fee is payable. Inspection constitutes a part of a public administrative duty, and no civil law relationship arises within a certification procedure between the person performing the inspection referred to in § 7^1 of the Aviation Act and an air operator.

Consequently, the circuit court held that the inspection on the basis of § 7^1 of the Aviation Act amounts to the performance of a public law function (the circuit court argues that § 10(5) of the Aviation Act, according to which a state fee is payable for the determination of airworthiness by the Civil Aviation Administration, is also an indication of this) and therefore the obligation imposed on the air operator subject to inspection to pay a charge constitutes a financial obligation in public law for the purposes of § 113 of the Constitution.

The second sentence of § 7^1(2) of the Aviation Act is not in conformity with § 113 of the Constitution, because the provision in fact delegates the right to establish financial obligations to a person in private law, whereas the Act does not specify the bases of calculation or the limits of the costs of inspection.

Also, the circuit court agreed with the appellant that the discussed regulatory framework of the Aviation Act imposes the obligation to pay two payments (state fee and inspection costs), which is unreasonably burdening on the operators and disproportional.

24. The AS Enimex did not submit its opinion.

25. The Civil Aviation Administration did not express its opinion.

26. On behalf of the Riigikogu it is the Economic Affairs Committee that has expressed its opinion; the opinion of the Constitutional Committee of the Riigikogu has been appended to the letter of the former Committee. The Economic Affairs Committee sees no conflict between the second sentence of § 7^1(2) of the Aviation Act and the Constitution, and in this regard the Committee makes a reference to the opinion of the Chancellor of Justice of 16 September 2005 on the constitutionality of § 7^1(2) of the Aviation Act, submitted to the Constitutional Committee of the Riigikogu. The Constitutional Committee admits, in the letter appended to the opinion of the Economic Affairs Committee, that the obligation to reimburse the costs of inspection of airworthiness and the conformity control of certificates has the characteristics of a public law

financial obligation for the purposes of § 113 of the Constitution.

The Economic Affairs Committee of the Riigikogu is of the opinion that although the determination of airworthiness of an aircraft and issue of airworthiness certificate constitute a single activity in the achievement of a public aim, this does not mean that it is not possible to involve competent persons on a contractual basis in the organisation of supervision. In this context the Economic Affairs Committee invokes § 3(4) of the Administrative Co-operation Act, according to which, upon grant of authorisation for performance of administrative duties, a civil law contract may be entered into unless only entry into a public law contract is provided by law, the contract regulates the rights or obligations of persons using public services or other third persons, the state or a local government is released from its duties, or the authority to exercise executive power is used upon performance of the duties. Unless a contract clearly reflects the intention of the parties to enter into a civil law contract, it is presumed to be a public law contract.

The Economic Affairs Committee of the Riigikogu is of the opinion that there exists a civil contract, as the inspection is conducted in cooperation with the Civil Aviation Administration, who issues a certificate and who – in the cases enumerated in the Act – may also perform inspections; and as the price of inspection is fixed in the agreement between the Civil Aviation Administration and the inspecting body and the payment is executed through the Civil Aviation Administration. The Committee admits, though, that to be convinced that there are no characteristics of an administration contract, it would be necessary to examine the contract in detail.

The Economic Affairs Committee of the Riigikogu adds that even if the contract were an administration contract, it proceeds from § 113 of the Constitution that the basis of calculation and limits of charges need not be determined on the level of Acts. Namely, § 10(4) of the Administrative Co-operation Act allows to specify the bases and limits for the calculation of fees charged by a contract under public law, if law or local government legislation prescribes the possibility of charging persons in respect of whom the administrative duty is performed.

The Economic Affairs Committee of the Riigikogu does not agree that in the case of payment of a charge for the performance of a public law function, including in the case of the obligation that an inspected operator pay a charge, this amounts to a financial obligation in public law for the purposes of § 113 of the Constitution. It would be a financial obligation of the referred kind if the inspection of airworthiness in its entirety, together with the authority of the executive power, were delegated to an operator.

27. The Minister of Justice is of the opinion that the second sentence of § 7^1 of the Aviation Act is not a relevant provision and he does not express his opinion on the constitutionality thereof.

The Minister of Justice is of the opinion that according to the second sentence of § 7^1(2) of the Aviation Act an operator is obliged to pay a charge only if the activities thereof meet the conditions set out in the provision and if it can freely choose the expert. This interpretation is supported by the first and third sentences of § 7^1(2) in their conjunction. The purport of § 7^1(2) presumes that each operator itself chooses the expert and pays directly to the expert for expenses as a service charge in private law, and not to the Civil Aviation Administration.

As the Civil Aviation Administration chose the expert, it acted on the basis of § 7^1(1) of the Aviation Act. Consequently, it had no right to require the payment of the expenses which can be claimed solely in a situation provided in § 7^1(2) of the Aviation Act. The Civil Aviation Administration has incorrectly applied § 7^1(2) of the Aviation Act by resorting only to the obligation to pay established therein and depriving the AS Enimex of the possibility to freely choose a competent organisation, i.e. an expert.

The Civil Aviation Administration has erroneously applied the obligation to pay a charge established in § 7^1(2) of the Aviation Act, and therefore the second sentence of § 7^1(2) of the Aviation Act is not relevant. According the judicial practice of the Supreme Court only those provisions can be regarded as relevant which actually regulate the relationship or situation under discussion.

28. The Minister of Economic Affairs and Communications is of the opinion that the second sentence of § 7^1 (2) of the Aviation Act is not in conflict with § 113 of the Constitution.

Technical inspection of an aircraft which is a part of a certification procedure through which the Civil Aviation Administration, in performance of public administration duties, exercises supervision over air safety – does not amount to performance of a public law function when viewed independently.

Unlike the Civil Aviation Administration, a competent organisation conducting inspections on the basis of agreements referred to in § 7^1 (1) and (2) of the Aviation Act does not have the liability arising from the law; consequently, such an agreement does not constitute a contract under public law for the purposes of § 95 of the Administrative Procedure Act. Public authority is not exercised in regard to air operators upon the conduct of the referred technical inspections.

The Minister of Economic Affairs and Communications is of the opinion that there is a civil law contract between the Civil Aviation Administration and the inspector. It is the Civil Aviation Administration as an administrative authority who decides on the creation, amendment or termination of the rights and obligations of an air operator. And the Civil Aviation Administration who exercises the powers of state is entitled within an administrative proceeding and pursuant to an agreement authorised by law to use private services of an organisation having the corresponding competence.

On the basis of the above the charge collectable for the inspection is not a public law charge, instead it is a reimbursement, under private law, of expenses relating to a service. The payment of state fees is provided solely for the acts performed by the Civil Aviation Administration, i.e. issue of certificates. An exception from this is the determination of airworthiness, which is a technical operation of large volume, but even in this case the state fee is payable under § 10(5) of the Aviation Act only when this is done by the Civil Aviation Administration.

Nevertheless, the Minister of Economic Affairs and Communications is of the opinion that the inspection has a certain connection to the performance of a public law function, and in the interests of legal clarity the expenses of conducting inspections should be specified more precisely in the Aviation Act.

29. The Chancellor of Justice is of the opinion that the second sentence of § 7^1(2) of the Aviation Act is not a relevant norm, and therefore the petition of the circuit court is not permissible. He sets out the following reasoning to support his opinion.

It proceeds from the Aviation Act and regulation no 2042/2003 in their conjunction that the Civil Aviation Administration is entitled to check the conformity of an air operator to the requirements set out in the regulation either on the basis of an inspection carried out by itself or on the basis of an inspection conducted by a competent organisation chosen by the Civil Aviation Administration, or on the basis of the results of an inspection conducted by a competent organisation chosen by an air operator and recognised by the Civil Aviation Administration.

The right of the Civil Aviation Administration to inspect the compliance of an air operator with the requirements set for the issue of certificates arises from § 7^1(1) and (4) of the Aviation Act in conjunction with regulation no 2042/2003. The right of the Civil Aviation Administration to use an organisation having corresponding competence or an Aviation Administration of a member state of the European Joint Aviation Authorities for the factual inspection directly arises from § 7^1(1) of the Aviation Act. In the latter case the person used in a certification procedure for the conduct of factual inspection is an expert chosen and involved in the proceeding by an administrative authority, and the opinion of the expert can be used as evidence in administrative proceedings. In such a situation, according to § 39(6) of the Administrative Procedure Act, the expenses for the involvement of an expert are to be borne by the Civil Aviation Administration, because the expert was involved at the request of the Administration.

The right of an air operator to choose a competent organisation or an Aviation Administration of a member

state of the European Joint Aviation Authorities to inspect the compliance with the requirements arises from all the sentences of § 7^1(2) of the Aviation Act in their conjunction. An operator who meets the conditions provided in the first sentence of § 7^1(2) of the Aviation Act is entitled to order an estimate from an organisation recognised by the Civil Aviation Administration on whether the operator complies to the requirements of the certificate it is applying for.

According to the second sentence of § 7^1(2) of the Aviation Act the costs related to the inspection are to be paid by the inspected operator. According to the third sentence of the same subsection the inspector shall issue the results to the operator who shall forward these to the Civil Aviation Administration. The Civil Aviation Administration decides on the basis of these results whether the operator complies with the requirements of the regulation, and if yes, issues the certificate.

The obligation to pay a charge in such a case is justified by the fact that an operator is free to choose between different organisations conducting inspections, and an independent private law relationship is created with the organisation it comes to an agreement with. If it was not so the operator would have no obligation to forward the results of the inspection to the Civil Aviation Administration. This interpretation is in conformity with § 39(6) of the Administrative Procedure Act, according to which the expenses for the involvement of an expert shall be borne by the person or administrative authority at whose request the expert is involved.

To further support this interpretation of § 7^1(2) of the Aviation Act the Chancellor of Justice makes a reference to the environmental impact assessment procedure, which constitutes a part of a proceeding for issuing several permits and in the case of which an operator has the freedom to choose from among the experts who hold a licence for environmental impact assessment the most suitable to the operator, to pay the expert for the assessment, and, also, submit the results of the assessment to the concerned administrative authority for approval.

The Chancellor of Justice adds that the interpretation of § 7^1(2) of the Aviation Act to the effect that on the basis of this provision the Civil Aviation Administration is not entitled to require the payment of the costs of the expert chosen by the Administration, meets the requirement of Constitution-conforming interpreting. An interpretation to the contrary would be in conflict with § 113 of the Constitution, because neither the rate of expenses to be reimbursed to an expert nor the bases of creation of such expenses have been provided on the level of statutory law. When the Civil Aviation Administration itself decides to involve an expert, this amounts to a procedural act necessary for the issue of administrative legislation. The requirement of payment for a procedural act performed in the course of an administrative proceeding can be regarded as a financial obligation in public law. The principles of creation of such obligations, as well as the minimum and maximum rates of such charges must be provided by an Act. The Aviation Act does not regulate the bases of calculation of charges. According to § 39(4) of the Administrative Procedure Act an expert has the right to receive a fee or compensation for the performance of his duties on the bases provided for in §§ 153 and 154 of the Code of Civil Procedure (hereinafter “the CCP”). According to § 153(1) of the CCP experts shall be paid fees for the performance of their duties in the form of hourly fees within the limits of minimum and maximum hourly wages established by a regulation of the Government of the Republic. According to § 154 of the CCP an expert residing in a foreign state may be paid compensation or fee according to a higher rate than the rates established by the Government of the Republic if such compensation or fee is usual in his or her state of residence and the person's participation in the proceeding is absolutely necessary. According to § 39(5) of the Administrative Procedure Act the procedure for payment of sums to experts shall be established by the Government of the Republic.

Irrespective of who actually conducts the inspection, in the end it is the Civil Aviation Administration who is responsible that the operator comply with the conditions set out in regulation no 2042/2003.

When applying the above interpretation to the facts of the court case serving as the basis for the constitutional review proceeding the Chancellor of Justice argues that the conditions for the application of § 7^1(2) of the Aviation Act have not been met, i.e. AS Enimex did not choose the expert itself, instead it was

the Civil Aviation Administration who, under § 7^1(1) of the Aviation Act, entered into an agreement with the Swedish company AviaQ, and in co-operation with this company inspected the compliance of the AS Enimex with the requirements set to an organisation guaranteeing the continued airworthiness. That is why the Civil Aviation Administration could not require that AS Enimex pay the costs under § 7^1(2) of the Aviation Act.

On the basis of the above the Chancellor of Justice is of the opinion that the Civil Aviation Administration as well as the courts of first and second instances have erroneously applied § 7^1(2) of the Aviation Act. Consequently, this norm is not a relevant provision, as it does not regulate the relationship under dispute.

RELEVANT PROVISION

30. § 7^1 of the Aviation Act, in the wording in force from 26 April 2004 to 7 February 2007, provided as follows:

"(1) The Director General of the Civil Aviation Administration shall conclude an agreement with an organisation having the corresponding competence or with the Aviation Administration of a member state of the European Joint Aviation Authorities for determination of the airworthiness of an aircraft and for verification of conformity to the international and national requirements of the maintenance organisations and air operators.

(2) In the cases listed in subsection (1) of this section, the inspection of civil aircraft and their operators to whom a certificate of an operator or maintenance organisation complying with the requirements of the joint aviation requirements has been issued, and whose aircraft, the airworthiness of which is being determined, the aircraft operated by the air operator or the aircraft maintained by a maintenance organisation has the maximum certificated take-off mass (MTOW) exceeding 15000 kg, or the number of seats of which, laid down in the Manual of the Operation of Aircraft, is more than 30, or the purpose of use of which is the regular international carriage of passengers, shall be performed by a competent organisation or the Aviation Administration of a member state of the European Joint Aviation Authorities. The costs related to such inspection shall be paid by the operator. After the inspection a concluding document concerning the inspection shall be issued to the operator who shall forward it to the Civil Aviation Administration.

(3) An organisation or the Aviation Administration of a member state of the European Joint Aviation Authorities referred to in subsection (1) of this section operates pursuant to the legislation in force in Estonia and the international conventions to which the Republic of Estonia has acceded.

(4) Upon termination of the agreement referred to in subsection (1) of this section, or in case it is impossible for the organisation to perform the obligation laid down in the agreement, or where the agreement is not concluded, the obligation shall be performed by the Civil Aviation Administration."

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

31. First, the Chamber shall explain why the second sentence of § 7^1(2) of the Aviation Act is a relevant provision in this constitutional review proceeding (I). Thereafter the Chamber shall examine whether the obligation to pay the costs of inspection falls within the sphere of protection of § 113 of the Constitution (II), and shall form an opinion on the constitutionality of the relevant provision (III).

I.

32. According to the first sentence of § 14(2) of the Constitutional Review Court Procedure Act (hereinafter "the CRCPA") the provision the constitutionality of which the Supreme Court reviews within concrete norm control must be relevant.

33. According to the judicial practice of the Supreme Court a norm is relevant if it is of decisive importance

for the adjudication of a matter. A norm is of a decisive importance when in the case of unconstitutionality of the norm a court should render a judgment different from that in the case of constitutionality of the norm. Only a norm that has been applied in regard of a person and which actually regulates a disputed relationship or a situation, can be regarded as relevant (see judgment of the Supreme Court of 13 February 2007 in case no 3-4-1-16-06 – RT III 2007, 6, 43, paragraph 14).

34. The second sentence of § 7^1(2) of the Aviation Act is a relevant provision because it is of decisive importance for the adjudication of the legal dispute serving as the ground for this constitutional review proceeding. If the norm under discussion were constitutional, the circuit court ought to have dismissed the claim against unjustified enrichment submitted by the AS Enimex, i.e. the court should have decided differently than in the case of unconstitutionality of the norm.

35. The Chamber is of the opinion that § 7^1(2) of the Aviation Act can not be interpreted to the effect that it entitles an air operator who conforms to the conditions enumerated in the provision to choose an organisation to verity its conformity to the requirements for the issue of a certificate of an organisation guaranteeing the continued airworthiness.

The provision of the Aviation Act, which is under discussion, does not give rise to the conclusion that an air operator has the possibility to choose an organisation to conduct the inspection. Neither can this possibility be derived from the third sentence of § 7^1(2) of the Aviation Act, pursuant to which, after the inspection a concluding document concerning the inspection shall be issued to the operator who shall forward it to the Civil Aviation Administration. In order to have such an option the Aviation Act should explicitly regulate – in order to guarantee air safety – the cases when the inspection is to be organised by the Civil Aviation Administration and the cases when an air operator itself must choose an organisation to conduct the inspection. Also, the Aviation Act should regulate the requirements to which such an organisation must conform. All this is not regulated by the Aviation Act.

36. The Chamber is of the opinion that for the above reasons the circuit court was right in its interpretation that if the second sentence of § 7^1(2) of the Aviation Act were constitutional an air operator would be obliged to pay the costs related to the inspection.

II.

37. Next, the Chamber shall analyse whether the contested obligation to pay the costs is a financial obligation under public law, falling within the sphere of protection of § 113 of the Constitution.

38. The obligation provided in the second sentence of § 7^1(2) of the Aviation Act to pay the costs of inspection is a financial obligation in public law. In substance, the obligation under dispute amounts to a fee, the aim of which is to cover a part of the expenses relating to the performance of an act by the state, i.e. issue of a certificate. From the aspect of an air operator applying for a certificate the certification procedure constitutes a single administrative proceeding, within which a public law relationship is created only between the Civil Aviation Administration and the air operator. The fact that the Civil Aviation Administration is entitled, under § 7^1 of the Aviation Act, to authorise a private person to perform a part of the procedure, and the fact that in the concrete case it performed the procedure, under the same provision, in co-operation with a private person, are irrelevant. No legal relationship is created under § 7^1 of the Aviation Act between the Civil Aviation Administration and the inspecting organisation, and an air operator can not influence the conditions of the agreement between the air operator and the inspecting organisation.

39. According to § 113 of the Constitution the state taxes, duties, fees, fines and compulsory insurance payments shall be provided by law. The Supreme Court has expressed the opinion that all financial obligations of public law, irrespective of how these are named in different pieces of legislation, are within the sphere of protection of § 113 of the Constitution (judgment of the Supreme Court en banc of 22 December 2000 in case no 3-4-1-10-00 – RT III 2001, 1, 1, paragraph 20).

40. § 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 judgment of the Supreme Court en banc of 22 December 2000, paragraphs 20 and 21).

The requirement that public law financial obligations be provided by law means that the elements of public law financial obligations must be determined by law. Such elements may include the grounds for creation of obligation and the obligated subjects, the extent of the obligation or the conditions of determining the amount thereof, the procedure for payment or collection, and other inherent characteristics of a relevant financial obligation.

41. 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 (see judgment of the Supreme Court of 19 December 2003 in case no 3-4-1-22-03 – RT III 2004, 2, 14, paragraph 19), or in establishing something else that would guarantee that the amount of an obligation is determined on an objective bases, 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.

42. § 113 of the Constitution creates a subjective right of a person against the state (see the referred judgment of the Supreme Court en banc of 22 December 2007, paragraph 22; and judgment of the Supreme Court of 26 November 2007 in case no 3-4-1-18-07 - RT III 2007, 43, 341, paragraph 25).

III.

43. The first sentence of § 11 of the Constitution permits to restrict the fundamental rights and freedoms only in accordance with the Constitution. Legislation of general application infringing fundamental rights is in conformity with the Constitution if it is constitutional in the 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 from, as well as with the principle of determinateness and the principle that certain things be provided solely by law (see referred judgment of the Supreme Court in case no 3-4-1-18-07, paragraph 35 and the referred judicial practice).

44. As the second sentence of § 7^1(2) of the Aviation Act establishes the obligation to pay the costs of inspection without determining the necessary elements of this obligation, this is in conflict with the requirements that state financial obligations must provided by law and therefore is not constitutional in the formal sense. The elements of the financial obligation under discussion have not been provided in any legislation of general application. Under the contested provision the amount of this financial obligation is, in essence, decided by an agreement between the Civil Aviation Administration an and inspecting organisation.

45. On the basis of the above and under § 15(1)2) of the CRCPA, the Chamber hereby declares the second sentence of § 7^1(2) of the Aviation Act unconstitutional to the extent that it does not guarantee the determination of the elements of the established public law financial obligation in conformity with the requirement established in § 113 of the Constitution that state financial obligation must be provided by law.
