Constitutional judgment 3-4-1-5-08

RULING
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-5-08
Date of decision	26 June 2008
Composition of court	Chairman Märt Rask, members Peeter Jerofejev, Hannes Kiris, Indrek Koolmeister and Harri Salmann
Court Case	Review of constitutionality of § 38(1)4) of the Public Procurement Act in the wording in force from 1 May 2007 to 27 March 2008.
Basis of proceeding	The Tallinn Circuit Court judgment of 28 March 2008 in administrative case no 3-07-2391
Hearing	Written proceeding
Conclusion	**1. To return the petition of the Tallinn Circuit Court without a hearing**

FACTS AND COURSE OF PROCEEDING

1. On 14 September the Public Limited Company Government Real Estate (hereinafter “the GRE”) published, in the public procurement register, a notice of a public procurement by open tendering procedure with reference number 101475 “Demolition of a structure at 2 Lasnamäe street and execution of a cutting”.

2. On 8 October the Aspen Grupp OÜ submitted a tender for participation in the open tendering procedure.

3. By decision of a member of the GRE management board no 13/07 of 17 October 2007 (hereinafter “the GRE decision”), the Aspen Grupp OÜ was excluded, among others, form the procurement procedure on the basis of § 38(1)4) of the Public Procurement Act (hereinafter “the PPA”). By the same decision, on the basis of §§ 39(6) and 47 of the PPA, AS Koger ja Partnerid was declared a qualified tenderer, and its tender a suitable and successful one.

4. In the wording in force at the time of making of the decision § 38(1)2) of the PPA provided as follows: "The contracting authority shall not conclude public contract with the person and shall at any time exclude from the procurement procedure the tenderer or candidate […] which has had tax arrears within the last 12 months for more than 30 days in total prior to submission of the relevant certificate to the contracting authority".

5. Tenderer Aspen Grupp OÜ had submitted to the GRE a certificate of the Tax and Customs Board, from which it did not appear whether it had had tax arrears within the last 12 months for more than 30 days in total. The GRE made an inquiry to the Tax and Customs Board; from the reply thereof it appeared that the Aspen Group OÜ had had tax arrears within 12 months for 47 days in total. This certificate served as the ground for excluding the company from the public procurement procedure.

6. On 25 October 2007 the Aspen Grupp OÜ submitted a protest concerning the decision on exclusion from the procurement procedure and on declaration of the tender of AS Koger ja Partnerid as successful to the contestation committee of the Public Procurement Office (hereinafter "the contestation committee"). The Aspen Grupp OÜ invoked the argument that there was no legal ground for excluding it from the procurement procedure, as § 38(1)4) was in conflict with the Constitution of the Republic of Estonia, as well as with Article 45(2)e) and f) of the Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, pp 114–240; hereinafter "directive 2004/18"), and the GRE ought to have set aside the Estonian law and directly applied the provision of the directive.

7. By its decision no 120-07/101475 of 19 November 2007 (hereinafter "the contestation committee decision") the contestation committee dismissed the protest, finding that the Aspen Grupp OÜ was excluded from the procurement procedure on a legal basis and that § 38(1)4) of the PPA was not in conflict with directive 2004/18 and therefore the latter was not directly applicable. In regard to the review of constitutionality of the Public Procurement Act the contestation committee pointed out that this was not within its competence.

8. The Aspen Grupp OÜ filed an action with the Tallinn Circuit Court, applying for the annulment of the contestation committee decision and the decision of the GRE to the extent that it was excluded from the procedure and the tender of AS Koger ja Partnerid was declared as successful, and for the initiation of a constitutional review proceeding for the declaration of unconstitutionality of § 38(1)4) of the PPA.

9. The Aspen Grupp OÜ substantiated its action by stating first that there was no legal ground for the exclusion of the company from the procurement procedure, as the relevant provision of Estonian law was in conflict with Article 45(2) e) and f) of directive 2004/18, and therefore the GRE ought to have set aside the Estonian law and directly applied the directive. Secondly, the Aspen Grupp OÜ argued that the decision on its exclusion from the procurement procedure was disproportional, because the general norm on the basis of which this had been decided was unconstitutional as a disproportional one.

10. In regard to the conflict with directive 2004/18 the Aspen Grupp OÜ specified that Article 45(2)e) and f) thereof, establishing that any economic operator, who has not fulfilled obligations relating to the payment of social security contributions or taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority, may be excluded from participation in a contract, have to be read to the effect that the person must have fulfilled its tax obligations by the time of submission of a tender in a public procurement procedure. The Public Procurement Act, on the other hand, required that tax obligations had to be duly fulfilled during the 12 months preceding the participation in a procurement procedure, which is obviously a much stricter requirement than that provided in the directive. At the same time the directive allows to enact in the national law either the conditions explicitly provided in the directive or conditions more lenient than those of the directive. The Aspen Group OÜ based this argument on the judgment of the ECJ in joined cases C 226/04 and C 228/04, La Cascina Soc. Coop.arl et al ([2006] ECR I-01347).

11. In regard to unconstitutionality the Aspen Grupp OÜ specified first, that as § 38(1)4) of the PPA had retroactive force, it was in conflict with the principle of legal certainty established in § 10 of the Constitution. It explained that as, in fact, the requirement of § 38(1)4) of the PPA was retroactively applied, since the entering into force of the Act on 1 May 2007, until 1 may 2006, this served as the basis for excluding from the procedure those tenderers who had tax arrears during the 12 months preceding 1 May 2007, and who could, prior to that date, participate in procurement procedures when the same circumstances existed. The Aspen Grupp OÜ added further that such retroactive application was in conflict also with the requirements of equal treatment and transparency of procedure, set out in the directive. Secondly, the company pointed out that the provision unlawfully and disproportionately infringes the tenderers' freedom to engage in enterprise, and is thus in conflict with §§ 31 and 11 of the Constitution in their conjunction.

12. By decision of a member of the GRE management board no 02/08 of 10 January 2008 the public procurement procedure was terminated under § 29(3)6 of the PPA. Due to this the Aspen Grupp OÜ amended the request set out in the action on the basis of § 32(8) of the Code of Administrative Court Procedure (hereinafter "the CACP"), and instead of annulment of clauses 2 and 5 of the GRE decision no 13/07 of 17 October 2007 applied for the establishment of unlawfulness thereof.

13. In its response the GRE requested the dismissal of the action of the Aspen Grupp OÜ. As for the conflict with directive 2004/18 it pointed out that it consented to the opinion of the contestation committee that clauses e) and f) of Article 45(2) of the directive allow the Member States to specify the grounds for exclusion of tenderers from the procurement procedures. It argued further that the GRE as a company in private law has no right to interpret the law or the directives, or to request preliminary rulings from the ECJ. In relation to the unconstitutionality the GRE pointed out that the requirement in § 38(1)4) of the PPA was a proportional and appropriate one, because the lack of tax arrears also during the period preceding a tender characterises the solvency and financial discipline of companies.

14. In its response the AS Koger ja Partnerid requested the dismissal of the action. It found § 38(1)4) of the PPA to be in conformity with directive 2004/18 as well as with the Constitution.

15. On 13 March 2008 the Riigikogu passed the Public Procurement Act Amendment Act, which entered into force on 28 March 2008. By this amendment the condition that the contracting authority shall not conclude public contract with the person and shall at any time exclude from the procurement procedure the tenderer or candidate which has had tax arrears within the last 12 months for more than 30 days in total prior to submission of the relevant certificate to the contracting authority, was left out of the wording of § 38(1)4) of the PPA.

16. By its judgment of 28 March 2008 the circuit court satisfied the action of the Aspen Grupp OÜ, annulled the contestation committee decision, and declared clauses 2 and 5 of the GRE decision, concerning the exclusion of the Aspen Grupp OÜ from the procurement procedure and declaration of the AS Koger ja Partnerid tender as successful, unlawful. The circuit court held that § 38(4)1) of the PPA, which served as the legal basis of the referred clauses of the GRE decision, and which – in the wording in force from 1 May 2007 to 27 March 2008 – provided among other things for the condition that the contracting authority shall not conclude public contract with the person and shall at any time exclude from the procurement procedure the tenderer or candidate which has had tax arrears within the last 12 months for more than 30 days in total prior to submission of the relevant certificate to the contracting authority, was in conflict with the principle of proportionality arising from §§ 31 and 11 of the Constitution in their conjunction. The circuit court declared the referred provision unconstitutional, did not apply it, and referred the judgment to the Supreme Court, thus initiating a constitutional review proceeding.

It was pointed out in the circuit court judgment that an appeal in cassation against the judgment could be filed with the Supreme Court. The GRE submitted an appeal in cassation. By its ruling of 16 May 2008 no 7-1-3-193-08 the Administrative Law Chamber of the Supreme Court stayed the proceeding of deciding on the acceptance of the appeal in cassation of the GRE until the Constitutional Review Chamber adjudicates case no 3-4-1-5-08 and until the entry into force of the Supreme Court judgment.

JUSTIFICATIONS OF THE CIRCUIT COURT AND THE PARTICIPANTS IN THE PROCEEDING

17. The circuit court argued in its judgment and petition that § 38(1)4) of the PPA restricted the freedom to engage in enterprise, and that the restriction imposed on those who owe arrears serves the public interest to guarantee the use of public funds for the intended purposes. The court is of the opinion that this restriction does not conform to the requirement to see to it that an interest or a right protected by the law is not undermined more extensively than can be justified by the legitimate aim of the norm, as the measure set out in the referred provision is neither suitable nor necessary. There is no reasonable ground why e.g. a person who had no tax arrears at the time of publication of a tender notice should be excluded from the procurement procedure. The latter restriction would also sufficiently discipline tax offenders, as they would constantly have to keep in mind that a procurement which might interest them may be declared at any time and they would be unable to participate because of existing arrears.

18. As for the conformity of § 38(1)4) of the PPA with directive 2004/18 the circuit court found that as it declared the provision unconstitutional under § 29(9) of the CACP, did not apply it, and referred the judgment to the Supreme Court, thus initiating a constitutional review proceeding, there was no need to examine the conformity of the provision with the directive.

19. The Aspen Grupp OÜ did not submit an opinion.

20. The GRE is of the opinion that the restrictions arising from the relevant provisions were serving the desired purpose and were proportional and therefore not in conflict with the Constitution. The GRE points out first, that as the volume of contracting for services and purchasing of goods is comparatively small as compared to total turnover of goods and services, all persons interested in providing services and selling goods can pursue economic activities also beyond public procurements. Secondly, the GRE points out that the purpose of the ground for exclusion of tenderers, established in § 38(1)4) of the PPA, was the more strict and thorough regulation of the use of public funds, and more careful selection of parties of procurement contracts to ensure public interests. Considering all this the restriction established in the referred provision is appropriate, enabling to find a partner who behaves correctly in the economic and legal senses and is capable of performing procurement contracts as required. The lack of tax arrears during a longer period characterises the solvency and financial discipline of a company; the latter could not be ascertained if the lack of arrears were checked only at the moment of submission of tenders.

21. The AS Koger ja Partnerid did not submit its written opinion.

22. The Riigikogu is of the opinion that § 38(1)4) of the PPA was not unconstitutional. It points out that the restriction of participation in the public procurement market is not related to general restriction of freedom to engage in enterprise, and the obligation to pay taxes timely can not come as a surprise to any taxable person. In regard to the amendment of the referred provision the Riigikogu points out that as the subsidiary aim of the Public Procurement Act – to guarantee the timely receipt of taxes – had started to undermine the main aims of the Act – to guarantee the purposeful and economical use of funds, equal treatment of persons and effective use of existing competitiveness in public procurements – the requirement that there be no tax arrears within the last 12 months for more than 30 days in total was to be abolished from § 38(1)4) of the PPA.

23. The Minister of Justice is of the opinion that § 38(1)4) of the PPA was in conflict with § 11(2) and § 31 of the Constitution in their conjunction, as the provision contained a disproportional restriction of the freedom to engage in enterprise.

The Minister of Justice sees the provision as having three aims: mainly, to guarantee as economical and lawful use of public funds as possible, and also to guarantee tax discipline and equal treatment of tenderers by the state.
The Minister of Justice argues that the measure included in § 38(1)4) of the PPA is suitable and necessary

for the achievement of these aims, but is not proportional in the narrow sense for the achievement of the main aim of as economical and lawful use of public funds as possible. Namely, the existence of tax liability or tax arrears during the period specified in the contested provision, without taking into account the circumstances of creation of tax liability and the extent of outstanding tax commitments, need not *a priory* prove that an economic operator is not law-abiding or that it has economic problems. The incurring of tax arrears need not always be in direct correlation with the objective circumstances depending on the activities of a taxable person. Furthermore, this need not prove that an operator has economic difficulties or need not give it an edge over other tenderers, because the arrears very small from the point of view of economic turnover and only indirectly relating to economic activities are also deemed tax arrears. Finally, the Minister of Justice points out that the restriction of the circle of tenderers without a weighty justification diminishes the competition between tenderers and may undermine the objective of more economical use of public funds.

24. The Chancellor of Justice argues that § 38(1)4) of the PPA was in conflict with §§ 31 and 11 of the Constitution in their conjunction due to disproportional infringement of the freedom to engage in enterprise. In the Chancellor of Justice's opinion the restriction served the legitimate aims of guaranteeing fair competition, reliability and tax discipline. The restriction included in the relevant provision was, in the opinion of the Chancellor of Justice, both suitable and necessary for the achievement of these aims. But the restriction was not a reasonable one, as the interference into the freedom to engage in enterprise was too extensive and too intense as compared to the aims of the interference. In this regard the Chancellor of Justice points out first, that the imperative and automatic exclusion of persons from a procurement procedure did not render it possible to take into account the amount of tax arrears or the cases when a law-abiding tenderer's tax or interest arrears had incurred due to a mistake or wrong interpretation of a tax Act, which was later rectified voluntarily. Secondly, an indication of the imbalance between the importance of the aims and the intensity of the infringement is a situation where in some spheres no person proved suitable for entering into a procurement contract. Thirdly, the Chancellor of Justice points out that the effect of § 38(1)4) of the PPA reached into the past and retroactively rendered the situation of persons less favourable, thus being perfidious towards them.

With regard to directive 2004/18, the Chancellor of Justice points out that as he deems § 38(1)4) of the PPA manifestly disproportional there is no need to address the issue of the directive.

THE PROVISIONS NOT APPLIED

25. The Public Procurement Act (RT I 2007, 15, 76), in the wording in force from 1 May 2007 to 27 March 2008, provided as follows:

"§ 38. Exclusion of a tenderer and a candidate from a procurement procedure

(1) The contracting authority shall not conclude public contract with the person and shall at any time exclude from the procurement procedure the tenderer or candidate:

[…]

4) which has not fulfilled the obligations of payment of state taxes, local taxes of the location of the contracting authority or of its own residence or location or social insurance payments in accordance with the legal acts or which has had tax arrears within the last 12 months for more than 30 days in total prior to submission of the relevant certificate to the contracting authority;

[…]"

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

26. The Constitutional Review Chamber considers it necessary to underline that the Tallinn Circuit Court was of the opinion that as it had declared § 38(1)4) of the PPA unconstitutional, there was no need to review the conformity of the provision with directive 2004/18, referred to by the appellant.

27. The Constitutional Review Chamber is of the opinion that § 38(1)4) of the PPA is a provision relating to the EU law. As the circuit court failed to review either the conformity of the provision with the EU law or the prerequisites for the constitutional review of the provision, the Supreme Court can not review the constitutionality thereof.

28. First, the Chamber shall explain why, as a rule, the Supreme Court is not competent to adjudicate petitions for the review of constitutionality of the provisions of Estonian legislation of general application relating to the EU law (I). Thereafter the Chamber shall address the issue of the competence of the Supreme Court to review the constitutionality of a provision relating to the EU law (II). Next, the Chamber shall ascertain the relationship of the provision, which was not applied, with the EU law (III) and shall adjudicate the issue of permissibility of the petition (IV).

I.

29. First, the Chamber points out that, as a rule, the courts are not competent to review the constitutionality of the EU law.

On the basis of Article 2 of the Act of Accession appended to the Treaty of Accession of the Republic of Estonia to the European Union (RT II 2004, 3, 8), the Treaty establishing the European Community and the Treaty on European Union and the legislation adopted on the basis thereof became binding on the Republic of Estonia as of the date of accession. According to the European Court of Justice, these acts form a legal order, which is an inseparable part of the legal systems of the Member States, and which the courts of the Member States are obliged to apply (see Case 6/64, Flaminio Costa v E.N.E.L., [1964] ECR English special edition 00585).

With respect to the competence of the Member States' courts to review the conformity of the legislation which is a part of the EU legal order to the Constitutions of the member States, the European Court of Justice has held that the validity of measures adopted by the community institutions can only be judged in the light of community law, and the validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure (Case 11/70, Internationale Handelsgesellschaft, [1970] ECR 01125, paragraph 3). It must be added in this context that according to Articles 230 and 234 EC the Court of Justice shall review the legality of the EU secondary legislation and only the ECJ can declare acts of secondary legislation invalid.

Consequently, it would be contrary to the EU law if the Supreme Court reviewed whether an act of secondary legislation was in conflict with the Constitution of the Republic of Estonia.

30. As a rule, the Supreme Court is not competent to review the constitutionality of a provision of an Estonian act of general application relating to the EU law, or to declare the provision invalid if the provision is in conformity with the EU law which serves as the basis thereof.

In such a situation the Supreme Court would, in essence, through the provision of an Estonian legal act, review the constitutionality of the EU law serving as the basis of the provision. This would not be in conformity with the principle expressed in the ECJ case-law.

The competence of the Supreme Court to declare invalid any Act or other legislation which is on conflict with the provisions or spirit of the Constitution, arises from § 152(2) of the Constitution and from the Constitutional Review Court Procedure Act, adopted for the implementation of the provision. If the Supreme Court exercised this competence in regard to the provisions of legislation of general application relating to the EU law, it would create a conflict with the European Union law.

Proceeding from of § 2 of the Constitution of the Republic of Estonia Amendment Act (hereinafter "the CAA"), pursuant to which, as of Estonia's accession to the European Union, the Constitution of the Republic of Estonia applies taking account of the rights and obligations arising from the Accession Treaty,

the result of the adoption of this Act is that only that part of the Constitution which is in conformity with the European Union law or which regulates the relationships not regulated by the European Union law can be applied. The effect of those provisions of the Constitution that are not compatible with the European Union law and thus inapplicable, is suspended (Opinion of the Supreme Court of 11 May 2005 no 3-4-1-3-06 –RT III 2006, 19, 176, paragraph 16).

Consequently, § 152(2) of the Constitution, as well as the Constitutional Review Court Procedure Act passed for the implementation thereof, must not be applied to the extent that these enable to declare invalid, due to unconstitutionality, a provision relating to the EU law of any Act or other legislation, which is in conformity with the EU law on the basis of which it was enacted.

31. The Supreme Court can not adjudicate a petition for the review of constitutionality of a provision of legislation of general application relating to the EU law, when the court adjudicating a legal dispute has not reviewed the conformity of the provision to the EU law. The hearing of a petition in such a case may result in a situation where, through a provision of Estonian legislation, which is in conformity with the EU law, the Supreme Court reviewed the constitutionality of the EU law, serving as the basis of this provision.

The Chamber consents to the opinion of the Administrative Law Chamber of the Supreme Court (see the Supreme Court ruling of 7 May 2008 in case no 3-3-1-85-07, the second subindent of paragraph 38) that in a situation where, within one and the same case, the conformity of a provision to both, the Constitution and the EU law is questioned, the court adjudicating the matter has to first check the conformity of the Estonian law with the EU law.

This can not be done by the Supreme Court within a constitutional review proceeding, because such a check constitutes a part of adjudicating a legal dispute and would therefore exceed the scope of hearing a constitutional review matter. That, in turn, would be in conflict with the second sentence of § 14(2) of the CRCPA, which provides that the Supreme Court shall not adjudicate a legal dispute which is to be adjudicated pursuant to the provisions of those procedural laws which are applicable in the concrete case.

If the court adjudicating a legal dispute had no obligation to review the conformity of the Estonian law to the EU law or if the court did not fulfil this obligation, it would be impossible to ascertain the possible conflicts with the EU law. This would undermine the performance of the duty of the Estonian courts under Article 10 EC to ensure fulfilment of the obligations arising out of the EC Treaty or resulting from action taken by the institutions of the Community, and to facilitate the achievement of the Community's tasks (see in this regard Case 14/83, von Colson and Kamann, [1984] ECR 1891).

If the courts had no obligation to review the conformity of the Estonian law to the EU law, the courts could not fulfil its duty to interpret the Estonian law in the EU-law conforming manner, i.e. the duty to interpret the Estonian law, as far as possible, taking account of the wording and objectives of the European Union law (see in this regard C 106/89, Marleasing, [1990] ECR I-04135, paragraph 8, and C 268/06, Impacts [2008], not yet published, paragraphs 98 101).
The lack of obligation to review the conformity with the EU law would impeach the possibility of the courts of Estonia to guarantee the full legal effect of community law provisions by not applying, if need be and on their own initiative, a national provision which is in conflict with the community law (see Case 106/77, Simmenthal [1978] ECR I 06307, paragraph 24).

32. The Chamber adds further that should it appear before the court reviewing the conformity of the Estonian law to the EU law – if necessary, with the help of a preliminary ruling from the European Court of Justice – that the Estonian law is in conflict with the EU law, and the conflict can not be overcome through the EU law conforming interpretation, the court must refuse to apply the provision without initiating a constitutional review proceeding (see in this respect the above referred ruling of the Administrative Law Chamber of the Supreme Court in case no 3 3 1 85 07, paragraph 38). If possible, in such a case the EU law having direct legal effect must be applied.

It has to be pointed out that a conflict of a provision with the EU law does not necessarily mean the conflict of the provision with the Constitution or the Constitution Amendment Act. Nevertheless, the courts have not been given the competence to initiate constitutional review proceedings for the reason that legislation of general application is in conflict with the European Union law. With regard to the necessity of initiating a constitutional review proceeding in a situation where a conflict of a provision of the Estonian law with the EU law becomes apparent, the Supreme Court en banc has held that there are different possibilities for bringing the national law into conformity with the European Union law, and that neither the Constitution nor the European Union law provide for the existence of constitutional review proceedings for this purpose. The national law conflicting with the EU law is only to be set aside in the concrete dispute (see the judgment of the Supreme Court of 19 April 2005 in case no 3-4-1-1-05 – RT III 2005, 13, 128, paragraph 49, and the referred ECJ judgment in joint cases C 10/97 to C 22/97, IN.CO.GE'90 Srl [1998] ECR I 06307).

II.

33. The Chamber shall set out a non-exhaustive list of the cases when the Supreme Court is competent to adjudicate petitions for the review the constitutionality of a provision relating to the EU law.

34. First, the Supreme Court is competent to review the constitutionality of a provision relating to the EU law, if formal constitutionality of the provision is contested. This is so for the reason that the EU law does not regulate either the requirements concerning the competence, procedure and form established for the issue of legislation of general application in Estonia, or the observance of the requirement that laws be enacted solely by the parliament and the requirement of legal clarity.

35. Secondly, the Supreme Court is competent to review the constitutionality of such provisions relating to the EU law, which regulate also the situations not regulated by the EU law, and the constitutional review is petitioned in regard to those situations only.

36. Thirdly, the Supreme Court has this competence in a situation where the EU law, including the case-law of the ECJ, gives the Member States the right of discretion upon the transposition and implementation of the EU law, in the exercise of which the Member States are bound by their Constitutions and the principles arising from the Constitutions. When the EU law sets an objective to the Member States, but leaves the measures for the achievement thereof to be decided by the Member States, the measures chosen must conform both to the EU law and the Estonian Constitution (see the referred ruling of the Supreme Court in case no 3-3-1-85-07, paragraph 39).

37. The possible existence of the situations enumerated above can be ascertained upon reviewing the conformity of the Estonian law to the EU law.

III.

38. In the judgment serving as the basis for this constitutional review proceeding the Tallinn Circuit Court declared unconstitutional and did not apply § 38(1)4) of the PPA in the wording in force from 1 May 2007 until 27 March 2008. It is for the following reasons that the Chamber is of the opinion that the referred provision is a provision relating to the EU law.

39. First, this possibility is referred to by the superscript after the title of the Public Procurement Act, which makes a reference to an endnote concerning rules of legislative drafting at the end of the Act, pursuant to which the Act was passed proceeding from several European Union legal acts, directive 2004/18 being among these. At the same time, it appears from the 39tht recital of the directive that it regulates "verification of the suitability of tenderers in open procedures".

40. Secondly, the opinion of the Chamber is supported by the "Comparative Table of Sources of European Union law and the draft of the Estonian Act", appended to the draft of the PPA (816 SE), in which it is pointed out in relation to § 38 of the draft of the PPA, that it corresponds to directive 2004/17 and to Article 45 "Personal situation of the candidate or tenderer" of directive 1004/18.

41. Thirdly, similarly with § 38(1)4) of the PPA, clauses e) and f) of Article 45(2) of directive 2004/18 establish that any economic operator may be excluded from participation in a public contract where that economic operator “has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority” (clause e), or “has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority” (clause f).

42. The Chamber adds that the above is not an exhaustive explanation of the circumstances indicating that the provision is relating to the EU law. The courts must review on their own initiative the connection of the applicable law with the EU law.

IV.

43. As § 38(1)4) of the PPA is a provision relating to the EU law, the circuit court ought to have, according to the second subindent of paragraph 31 of this ruling, first reviewed the conformity thereof with the EU law. The circuit court has not done this. Neither has the circuit court analysed the prerequisites for the constitutional review of the provision (see in this regard part II of the ruling).

44. On the basis of the above considerations the petition of the Tallinn Circuit Court is not permissible, and it is to be returned without a hearing under § 11(2) of the CRCPA.
