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JUDGMENT OF THE GENERAL ASSEMBLY OF THE SUPREME COURT

No. of the case 3-1-1-88-07

Date of judgment 16 May 2008

Composition of court Chairman Märt Rask and members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Julia Laffranque, Jaak Luik, Jüri Põld, Harri Salmann and Tambet Tampuu.

Court Case Misdemeanour matter concerning the punishment of Serhiy Mulyar under § 73(1) of the Customs Act and the confiscation of the assets of OAO AIT under § 94(4) of the Customs Act.

Disputed judgment Judgment of Tartu County Court of 9 August 2007 in misdemeanour matter no 4-07-1718.

Complainant and the type of appeal Appeal in cassation of the Lõuna Tax and Customs Centre of the Tax and Customs Board

Date of hearing 19 February 2008

Persons participating hearing Representatives of the Tax and Customs Board: Piret Valner and Jaanus Jõgi; at representative of the OAO AIT: sworn advocate Jaan Lindmäe, and representatives of the Legal Chancellor: Madis Ernits and Nele Parrest.

1. To declare § 114(1)2) of the Code of Misdemeanour Procedure unconstitutional and invalid to the extent that it does not allow a person who is not a participant in the proceedings to file an appeal with the court against a decision made under § 73(1) of the CMP by way of general procedure, by which a transport vehicle belonging to the person not participating in the proceeding is confiscated.

DECISION

2. To uphold the conclusions of the Tartu County Court judgment of 9 August 2007, but to substitute the reasoning of the county court concerning the grounds for the right of appeal to the court of the OAO AIT by the reasons set out in paragraphs 14-46 of the Supreme Court judgment.

3. To dismiss the appeal in cassation.

FACTS AND COURSE OF PROCEEDING

1. On 7 October 2006 the Lõuna [South Estonian] Tax and Customs Centre of the Tax and Customs Board prepared a misdemeanour report concerning Serhiy Mulyar due to the following act committed by him.

S. Mulyar, who was driving a motor-coach (Volvo B10M55) on the route Kiiev-Tallinn, arrived in the Republic of Estonia from the Russian Federation through the Luhamaa customs checkpoint. In the course of the customs control a covert was discovered between the luggage compartments, above the rear axle, under the passenger compartment of the motor-coach, in which all in all 100 000 cigarettes were found. Furthermore, above the fuel tanks mounted by the manufacturer two additional containers were discovered, containing 191.5 kilograms, i.e. 228 litres of diesel fuel. According to the misdemeanour report, by bringing the referred non-Community cigarettes and diesel fuel into Estonia S. Mulyar had violated the requirements of §§ 57(1) and 69 of the Alcohol, Tobacco and Fuel Excise Duty Act.

2. By the decision of the body conducting extra-judicial proceedings of 28 March 2007 S. Mulyar was punished under § 73(1) of the Customs Act (hereinafter “the CA”) for the act referred to in the previous paragraph by a fine of 190 fine units, i.e. 11 400 kroons, and under § 94(3) of the CA the 100 000 cigarettes and 228 litres of diesel fuel were confiscated. By the same decision, under § 94(4) of the CA, the extra-judicial body also confiscated the motor-coach Volvo B10M55, belonging to the open public limited company (OAO) AIT registered in the Ukraine.

The extra-judicial body was of the opinion that it was S. Mulyar who brought the cigarettes and the excess quantity of fuel into Estonia. As S. Mulyar is not a member of the OAO AIT or a member of the managerial staff thereof, the liability of a legal person for the commission of the misdemeanour is precluded under § 14(1) of the Penal Code (hereinafter “the PC”). Upon imposing the punishment on S. Mulyar the extra-judicial body pointed out, inter alia, that for the commission of the misdemeanour S. Mulyar had made use of the work equipment entrusted to him by his employer.

To justify the confiscation of the motor-coach the Tax and Customs Board argued that under § 94(4) of the CA the extra-judicial body was entitled to confiscate a means of transport which has been specifically reconstructed with a view to committing a violation of the customs rules, which does not belong to the person who had used it as the means of committing a violation of the customs rules. Unlike § 94(3) of the CA, subsection (4) of the same sections makes no reference to § 83 of the PC. Consequently, § 94(3) constitutes a specific norm in regard to § 83 of the PC. According to § 74(1)12) of the Code of Misdemeanour Procedure (hereinafter “the CMP”) a decision of a body conducting extra-judicial proceedings shall set out the decision on confiscation. The extra-judicial body was of the opinion that the motor-coach was to be confiscated because the use of the specifically reconstructed motor-coach for the

commission of committing violations of the customs rules in the future could not be precluded.

3. The decision of the Lõuna Tax and Customs Centre of the Tax and Customs Board was appealed against by sworn advocate Jaan Lindmäe, the representative of the OAO AIT, who applied for the annulment of the decision of the extra-judicial body concerning confiscation. Neither S. Mulyar – the person subject to the proceedings – nor his counsel contested the decision of the extra-judicial body.

4. By the judgment of 9 August of 2007 of the Tartu County Court the decision of the extra-judicial body on confiscation was annulled and the motor-coach was returned to the OAO AIT.

The court admitted that according to §§ 114(1)2) and 118(2)2) of the CMP the OAO AIT as a person not participating in the proceeding had no right to contest the decision of the extra-judicial body. Nevertheless, the company could have contested the decision on confiscation under § 193(2) of the CMP, if the extra-judicial body had adjudicated the confiscation issue with a ruling, pursuant to the procedure provided for in § 67 of the CMP, and not with a final decision. By confiscating the motor-coach by a decision instead of a ruling the extra-judicial body deprived the OAO AIT of the possibility to contest the restriction of its rights. Such a situation is in conflict with § 15 of the Constitution.

The county court also held that the extra-judicial body had wrongly applied § 94(4) of the CA, by not having taken into account the provisions of § 83(3)1) of the PC, according to which, as an exception, a court may confiscate the substance or object used to commit an offence, if these belong to a third person at the time of the making of the judgment or ruling and the person has, at least through recklessness, aided in the use of the objects or substance for the commission or preparation of the offence. The decision of the extra-judicial body sets out no evidence proving that the road passenger transport operator OAO AIT had in any way or at least through recklessness aided s. Mulyar in the use of the motor-coach for the commission of the offence.

In addition to the aforesaid the court held that even allowing that § 94(4) of the CA may be applied independently of § 83 of the PC, confiscation is still not mandatory under § 94(4) of the CA. In the present case, proceeding from the principle of proportionality, the confiscation of the motor-coach is unjustified and excessively severe in regard to the OAO AIT, because there is no information that the referred company had encountered any problems when crossing the frontier in the past.

5. The Lõuna Tax and Customs Centre of the Tax and Customs Board submitted an appeal in cassation against the judgment of the Tartu County Court, applying for the annulment of the judgment of the county court, the enforcement of the decision of the extra-judicial body or rendering of a new decision or the referral of the misdemeanour matter to the county court for a new hearing.

In its response to the appeal in cassation the representative of the OAO AIT argued that the appeal in cassation was unfounded.

6. By the ruling of the Criminal Chamber of the Supreme Court of 14 January 2008 the misdemeanour matter was referred, under § 169(2) of the CMP, to the general assembly of the Supreme Court for hearing.

The Criminal Chamber argued that as the OAO AIT was not a participant in the misdemeanour proceeding under § 16 of the CMP, it had no right – according to § 114(1)2) of the CMP – to contest the decision of the extra-judicial body of 28 March 2007 in the court. Neither can the right of appeal of the OAO AIT be deducted from § 67 of the CMP, referred to by the county court, because this provision regulates solely the confiscation of the direct objects of misdemeanours and only in a situation where it has proved impossible to identify the lawful possessor of the object to be confiscated. The confiscated motor-coach can be regarded as the object used to commit the misdemeanour, and not as a direct object thereof; furthermore, the extra-judicial body knew who was the owner and lawful possessor of the property to be confiscated. Consequently, the county court erred in finding that the extra-judicial body ought to have decided on confiscation pursuant to the procedure provided for in § 67(4) of the CMP, because this would have guaranteed to the OAO AIT the possibility of contesting the confiscation in the court. The Chamber argued

further that §§ 16(2) and 40¹(1) of the Code of Criminal Procedure (hereinafter “the CCP”) which entered into force on 1 February 2007 and according to which a third party may be involved in the criminal proceeding if the rights or freedoms of the person which are protected by law may be adjudicated in the adjudication of the criminal matter or in special proceedings are not applicable in misdemeanour proceedings. At the same time the Criminal Chamber had doubts whether § 16 of the CMP – to the extent that the provision does not regard a person who is not the person subject to the proceedings or the counsel thereof, but whose rights and freedoms may be adjudicated by a decision of the extra-judicial body, as a participant in the misdemeanour proceedings was in conformity with §§ 13, 14 and 15(1) and with the first sentence of § 12(1) of the Constitution.

JUSTIFICATIONS OF THE PARTICIPANTS IN THE PROCEEDING

7. The Tax and Customs Board argues in the appeal in cassation that according to § 114(1) of the CMP the OAO AIT had no right to appeal against the decision of the extra-judicial body, because it is not a participant in the proceeding enumerated in § 16 of the CMP. Consequently, under § 118(2)2) of the CMP the county court ought to have made a ruling on refused to hear the appeal of the OAO AIT and ought to have returned the appeal to the appellant.

Unlike the county court, the appellant in cassation is of the opinion that the provisions of § 83 of the PC need not be taken into account upon the application of § 94(4) of the CA, because § 94(4) of the CA is a specific norm in regard to § 83 of the PC. This conclusion is supported by the fact that unlike the third subsection of the same section, § 94(4) of the CA makes no reference to § 83 of the PA.

In the supplementary opinion submitted to the general assembly of the Supreme Court the Tax and Customs Board argues that § 16 of the CMP, to the extent referred to in the ruling of the Criminal Chamber of 14 January 2008, is in conformity with the Constitution. The Code of Misdemeanour Procedure has been drafted in conformity with the principle of efficient and economical procedure. It is necessary to restrict the right of appeal to the court to avoid the overloading of the court system as well as to observe the principle of efficiency and procedural economy. Also, it has to be taken into account that upon confiscation of the property of a person who is not a participant in the proceedings by a decision of an extra-judicial body the person can protect his rights without contesting the decision of the extra-judicial body. It proceeds from the ruling of the Civil Chamber of the Supreme Court of 9 December 1996 in case no 3-2-1-130-96 that upon the seizure and confiscation of assets a person can avail himself of remedies under civil law. As the motor-coach was seized in the course of customs control, the OAO AIT could have contested the seizure of the transport vehicle also pursuant to the procedure established in the Taxation Act, by submitting a challenge or by filing an action with an administrative court. In addition to the aforesaid, a person who is not party to a proceeding can, pursuant to the procedure established in §§ 76 to 80 of the CMP and until the extra-judicial body renders its decision, file an appeal with the head of the extra-judicial body against the activities of the body. The person has the right to file an appeal with the county court against the ruling of the head of the extra-judicial body made upon adjudicating such an appeal. During the period between the preparation of a misdemeanour report concerning S. Mulyar and the decision of the extra-judicial body, the OAO AIT could have filed an appeal with the head of the extra-judicial body to contest the activities of the body, and later, if necessary, could have had recourse to the county court. In its letter addressed to the OAO AIT in the initial stage of the misdemeanour proceeding the extra-judicial body had clearly indicated that should an expert give an opinion that the motor-coach has been specifically reconstructed with a view to committing a violation of customs rules, the vehicle shall be confiscated. Furthermore, more than one and a half months before making a decision in the matter, the extra-judicial body sent a letter to and informed the OAO AIT and the Estonian advocate representing it that the motor-coach shall be confiscated by a decision of the extra-judicial body.

Should the general assembly of the Supreme Court recognise the OAO AIT's right of appeal, it could also form an opinion concerning the application of § 94(4) of the CA. The Tax and Customs Board argues, as before, that the provisions of § 83 of the PC need not be taken into account upon the application of § 94(4) of the CA, because § 94(4) of the CA is a specific norm in regard to § 83 of the PC.

8. The Legal Affairs Committee and the Constitutional Committee of the Riigikogu argue in their opinions that to the extent that the provision does not regard a person who is not the person subject to the proceedings or the counsel thereof, but whose rights and freedoms may be adjudicated by a decision of the extra-judicial body, as a participant in the misdemeanour proceedings, § 16 of the CMP is not in conformity with §§ 13, 14 and 15(1) of the Constitution.

The Constitutional Committee points out that when the rights or freedoms of a third person are restricted in a misdemeanour proceeding, that person must have a possibility to participate in the proceeding and to contest, if necessary, the decision restricting the person's rights. The basic procedural rights must be guaranteed to the person, such as the right to receive information, to be heard, and right of appeal. At present the third person can not have sufficient protection of rights in the misdemeanour proceedings.

The Legal Affairs Committee is of the opinion that in order to bring the Code of Misdemeanour Procedure into conformity with the Constitution, it should be amended similarly with the amendments to the Code of Criminal Procedure, which entered into force on 1 February 2007, so that the third persons would also be regarded as persons participating in the proceedings.

9. The Legal Chancellor argues in his opinion that § 16 of the CMP is not a relevant provision in this matter. Nevertheless, the Chancellor of Justice points out that should the general assembly of the Supreme Court deem the initiated constitutional review proceeding permissible, the Code of Misdemeanour Procedure is in conflict with §§ 32(1) and 15(1) of the Constitution to the extent that the Code precludes the right of appeal of a third person whose thing is confiscated within a misdemeanour proceeding.

The Chancellor of Justice is of the opinion that this case contains several different possibilities for the Constitution-conforming interpretations of procedural codes. The first possibility would be to interpret § 16 of the CMP as being non-exhaustive in regard to third persons; this would – proceeding from § 2 of the CMP – serve as a ground for involving third persons in misdemeanour proceedings under §§ 16(2) and 401(1) of the CCP. In addition, §§ 73(1), 114(1)2) and 118(2)2) of the CMP should be interpreted to the effect that a person in regard to whom a confiscation decision is made, too, has the right of appeal.

The second possibility would be to interpret § 193(2) of the CMP in the Constitution-conforming manner; this would give persons not participating in the proceedings the possibility to file appeals against the rulings concerning the issues affecting them.

If we assume that the person, whose transport vehicle is confiscated in a misdemeanour proceeding by a decision of an extra-judicial body, can not contest the confiscation within a misdemeanour procedure, the person can have recourse to the administrative court. A decision on the confiscation of a motor-coach under § 94(4) of the CA can be regarded as an administrative act, the addressee of which is the OAO AIT. A dispute over the lawfulness of this administrative act is a dispute in public law, and for the adjudication thereof no special procedure is provided for in the Code of Misdemeanour Procedure. Consequently, according to § 3(1) 1) and 2) of the Code of Administrative Court Procedure (hereinafter “the CACP”), this dispute falls within the competence of the administrative court. Should the general assembly of the Supreme Court find, though, that the review by the administrative court does not extend to the cases of infringement of the ownership right in a misdemeanour proceeding of a person not participating the proceeding, the Code of Misdemeanour Procedure – to the extent that it does not entitle a third person whose thing is confiscated within a misdemeanour proceeding to have recourse to the court – is not in conformity with the third sentence of § 32(1) of the Constitution separately and in conjunction with § 15(1) of the Constitution. The restriction of the circle of participants in a proceeding in misdemeanour procedure is justified by the legitimate aim of procedural economy, i.e. the necessity to achieve that the proceedings of less important offences are quick and economical. The restriction of the right to have recourse to the courts of persons who are not participants in the proceedings is a suitable and necessary measure for the achievement of this aim. But as the consequence of confiscation of a transport vehicle under § 94(4) of the CA can be a substantial material loss – amounting up to several millions, the small gain in the speed and cost of proceedings does

not preponderate over a person's right to contest the confiscation of a thing of great value in the court. The preclusion of the right of recourse to the court in the form under discussion is also in conflict with the principle of equality before the law, arising from the first sentence of § 12(1) of the Constitution.

10. The Minister of Justice agrees with the opinion expressed in the ruling of the Criminal Chamber of 14 January 2008, that §§ 16(2) and 40¹(1) of the CCP which entered into force on 1 February 2007 and according to which a third party may be involved in the criminal proceeding if the rights or freedoms of the person which are protected by law may be adjudicated in the adjudication of the criminal matter or in special proceedings are not applicable in misdemeanour proceedings. At the same time the Minister of Justice argues that as the Code of Misdemeanour Procedure and the Code of Criminal Procedure are closely related, § 16 of the CMP should also refer to third parties as participants in the proceedings.

Nevertheless, the valid law enables a third person to appeal against a confiscation decision, if the extra-judicial body adjudicates the confiscation issue by a ruling and not by a decision. In this case the person not participating in the proceeding can, according to § 67(5) of the CMP, file an appeal against the ruling on confiscation pursuant to the procedure provided for in § 76 of the CMP. Consequently, until the amendments to the Code of Misdemeanour Procedure are drafted, the extra-judicial bodies should take into account, upon confiscation, whether this affects third persons and make relevant decisions either in the form of rulings or final decisions, correspondingly.

11. At the hearing of the general assembly of the Supreme Court the participants in the proceeding adhered to their written opinions.

RELEVANT PROVISIONS

12. The Code of Misdemeanour Procedure (RT I 2002, 50, 313; 2008, 1, 1) provides as follows:

“[...]

§ 16. Participants in proceedings

The participants in the proceedings are the person subject to proceedings and the counsel of the person.

[...]

§ 114. Right of appeal to county court and term of appeal

(1) A participant in the proceedings has the right to file an appeal with a county court against the following decisions of the body which conducted the extra-judicial proceedings:

[...]

2) a decision made by way of the general procedure pursuant to subsection 73 (1) of this Code.

[...]

§ 118. Non-acceptance of appeal and refusal to hear appeal in pre-trial proceedings

[...]

(2) A county judge shall make a ruling on refusal to hear an appeal and shall send a copy of the ruling to the appellant together with the appeal if:

[...]

2) the appeal is filed by a person who pursuant to subsection 114 (1) of this Code does not have the right to

file an appeal;

[...]”

OPINION OF THE GENERAL ASSEMBLY

13. For the adjudication of the case the general assembly shall first ascertain whether, pursuant to the valid law, the OAO AIT has a possibility to contest the decision of the extra-judicial body of 28 March 2007 on the confiscation of the motor-coach in a court by way of 1) misdemeanour procedure, 2) some other court procedure, or 3) none of the valid procedural laws entitle the OAO AIT to file an appeal (I). Thereafter the general assembly shall identify the regulation relevant from the point of view of constitutional review (II), and shall review the constitutionality thereof (III). After that the lawfulness of confiscation of the motor-coach of the OAO AIT can be addressed on the substance (IV). Finally, the general assembly shall render its final opinion on the adjudication of the matter (V).

I.

14. The participants in the proceeding differ as to whether at all, and if yes, than pursuant to which procedure the valid law allows the OAO AIT to contest the confiscation of its motor-coach in the court. Therefore, before reviewing the constitutionality of the valid law, it must be found out whether it would be possible to interpret the existing procedural regulation in a manner that would guarantee the OAO AIT, in the situation under discussion, an effective and unambiguous possibility to have recourse to the courts.

15. The OAO AIT wishes to contest the confiscation of the motor-coach which belongs to it. The motor-coach was confiscated within a misdemeanour proceeding by a decision of the extra-judicial body of 28 March 2007. The misdemeanour proceeding was conducted concerning an act with the elements provided for in § 73(1) of the CA, in regard to S. Mulyar, who was charged with having illegally brought to Estonia cigarettes and diesel fuel. The motor-coach belonging to the OAO AIT was used by S. Mulyar to commit the offence. The circumstances ascertained gave no ground to reproach the company for the commission of this offence, and therefore no misdemeanour proceeding was commenced against the company. As, according to § 18(1) of the CMP, a person subject to proceedings is a natural or legal person with regard to whom misdemeanour proceedings have been commenced, in the present case the OAO AIT has to be deemed a person not participating in the proceeding.

16. The county court as well as the Minister of Justice have argued that in a situation where in a misdemeanour proceeding the property is confiscated which does not belong to the person subject to the proceeding, the property owner's right of appeal would be guaranteed if the extra-judicial body did not decide on confiscation by a final decision in the matter, but pursuant to the procedure provided for in § 67(4) of the CMP – by a ruling. § 76(4) of the CMP establishes that if a body conducting extra-judicial proceedings is competent to decide on confiscation and the direct object of commission of the misdemeanour has been seized in the misdemeanour proceeding but the lawful possessor of the object has not been identified, the body may decide on confiscation by a ruling made in the course of the misdemeanour proceeding. It proceeds from § 67(5) of the CMP, that also the persons not participating in the proceedings, whose legitimate interests are restricted by a ruling on confiscation, have the right to file an appeal pursuant to the procedure provided for in §76 of the CMP.

17. The Supreme Court agrees with the opinion expressed in the appeal in cassation of the Tax and Customs Board that it was not possible to confiscate the motor-coach of the OAO AIT by a ruling pursuant to the procedure provided for in § 76(4) of the CMP, because in the present case the confiscated motor-coach can be regarded as a means used to commit a misdemeanour, and not as a direct object thereof; also, the extra-judicial body knew who was the owner and lawful possessor of the property to be confiscated. Under § 67(4) of the CMP the thing which can be confiscated by a ruling prescribed in that provision must simultaneously meet the two following requirements: 1) it is the direct means of commission of the misdemeanour, and 2)

the lawful possessor of the object has not been identified. To understand the aim of the referred provision it is possible to proceed from what has been stated in regard to §§ 103 to 104 of the CMP – regulation analogous to that provided in §§ 66 to 67 – in the explanatory letter to the draft of the Code of Misdemeanour Procedure (441 SE, The IX Riigikogu). The explanatory letter refers to the following cases as the objects of regulation of the referred provisions: “Substances or objects, which no one claims to own, are left in a train crossing the state border. At the same time it becomes apparent that these objects must be confiscated, because it is prohibited to carry these across the border and they require a special permit.”

18. The provisions of § 67(4) of the Code of Misdemeanour Procedure constitute an exception from the general procedure of confiscation, pursuant to which the decision on confiscation, if the body is competent to decide on confiscation, shall be made in a decision of a body conducting extra-judicial proceedings referred to in § 73(1) 1) or 2) of the CMP, that is in the decision on imposition of a fine, or a fine and a supplementary punishment (§ 74(1)12) of the CMP), or in a ruling on termination of a misdemeanour proceeding (§ 75(3)2) of the CMP). The requirement that the issue of confiscation must be adjudicated by a final decision of an extra-judicial body can be justified by the fact that before the circumstances of a misdemeanour matter are finally established it is not possible, as a rule, to make a legal and reasoned decision of confiscation. In order to confiscate the object used to commit a misdemeanour or a direct object of a misdemeanour, the extra-judicial body must, in the first place, have come to the conclusion that a misdemeanour has been committed, because without a misdemeanour there can be no object used to commit it or a direct object thereof. In the legal sense the extra-judicial body can have such a conviction only from the moment when this is expressed in the decision of that body. If the issue of confiscation were adjudicated separately from the rest of a misdemeanour matter – not in the final decision of the extra-judicial body but in a separate ruling preceding the decision, this would create conditions for conflicts between the final decision and the ruling on confiscation. Furthermore, in a situation where the extra-judicial body has not yet finally established either the fact or the circumstances of the commission of a misdemeanour, the court would lack an effective possibility to check, when adjudicating an appeal against a ruling on confiscation, whether the confiscated object constitutes an object used to commit the misdemeanour or a direct object of the misdemeanour (whether a misdemeanour has been committed at all, whether the circumstances of the commission of the misdemeanour are such as to give ground to consider a concrete object an object used to commit the misdemeanour or a direct object of the misdemeanour, etc.). In such a case, to review whether a confiscation was justified, the court should form an opinion in a written proceeding also on the circumstances of commission of the misdemeanour and render a legal opinion concerning the circumstances. At the same time, as a rule, the court would lack sufficient information – meeting the acceptable level of proof for rendering such an opinion before the extra-judicial body has made its decision.

19. In the cases referred to in § 67(4) of the CMP there are no reasons precluding the making of a decision on confiscation separately from the final decision concerning a misdemeanour matter as a whole. In a situation where no person claims to own the confiscated property, there is no actual danger of conflict between a ruling on confiscation and a final decision of an extra-judicial body. It is important to decide on confiscation pursuant to the procedure established in § 67(4) of the CMP e.g. in such misdemeanour matters where, in addition to the lawful owner of the property to be confiscated also the person who committed the misdemeanour has not been ascertained. The general assembly points out that § 67(5) of the CMP, which provides that participants in the proceedings and the persons not participating in the proceedings have the right to file an appeal against a ruling referred to in § 67(4) of the CMP, regulates the situations where the lawful possessor of confiscated property is ascertained only after making of the ruling on confiscation. If the person, whose rights may be violated by the confiscation of property, is ascertained before making a decision on confiscation, confiscation can not be decided on by a ruling on imposition of a fine, made pursuant to the procedure provided for in § 67(4) of the CMP.

20. In the misdemeanour matter under discussion the person who is the lawful possessor and owner of the motor-coach was known to the extra-judicial body; neither could the motor-coach be regarded as a direct object of the misdemeanour with which S. Mulyar was charged, instead it constituted a means of committing the misdemeanour. Consequently, the Tax and Customs Board could not have decided on the confiscation of

the motor-coach by a ruling pursuant to the procedure established in § 67(4) of the CMP, it had to adjudicate the issue according to § 74(1)12 of the CMP, in a decision of the extra-judicial body. Consequently, the allegation that the OAO AIT was deprived of the right to have recourse to the court because the extra-judicial body decided on the confiscation of the motor-coach in a wrong form, is not founded.

21. However, a decision on confiscation which is included in the decision of an extra-judicial body, can not serve as an object of the appeal procedure established in §§ 76 to 80 of the CMP. It is possible to file an appeal against the activities of a body conducting extra-judicial proceedings only until the decision is made in the matter by the body (§ 76(1) of the CMP). The head of an extra-judicial body, constituting a mandatory instance of appeal in the procedure provided for in §§ 76 – 80 of the CMP before filing an appeal with the county court, is not competent to adjudicate appeals filed against the decisions of the extra-judicial body. Neither would a situation, where different parts of a decision of an extra-judicial body were to be contested pursuant to different procedures of appeal, be compatible with the valid law on misdemeanour procedure.

22. Next, it has to be examined whether the valid law gives the OAO AIT as a person not participating in the proceeding some other possibilities to contest the decision of the extra-judicial body of 28 March 2007, by which, alongside with imposing a punishment on S. Mulyar, the confiscation of the motor-coach of the OAO AIT was decided on.

23. According to § 114(1)2) of the Code of Misdemeanour Procedure only a participant in the proceedings has the right to file an appeal with a county court against the decisions of the body which conducted the extra-judicial proceedings, made pursuant to the general procedure. § 16 of the CMP refers only to the person subject to proceedings and the counsel of the person as participants in the proceedings. Thus, the Code of Misdemeanour Procedure provides for no possibility for a person not participating in the proceedings to file an appeal with the county court against a decision of an extra-judicial body, nor does it provide for the jurisdiction of the county court to hear such appeals. The Criminal Chamber of the Supreme Court, too, has so far held that according to § 76(1) of the CMP a person not participating in the proceedings can contest the activities of an extra-judicial body until the body renders its decision, but the person can not – according to § 114(1) of the CMP – contest a decision of the extra-judicial body (see ruling of the Criminal Chamber of the Supreme Court of 14 February 2006 in case no 3-1-1-156-05 – RT III 2006, 8, 68, paragraph 10).

24. The Chancellor of Justice argues in his written opinion that there are still several ways to interpret the valid law in a manner enabling the OAO AIT to contest the decision of the extra-judicial body in a court.

25. First, the Chancellor of Justice is of the opinion that it is possible to hold that as § 16 of the CMP does not define the legal position of an affected third person, the provision is not an exhaustive one, and therefore the OAO AIT could be involved in the misdemeanour proceeding as a third party according to §§ 16(2) and 40¹ of the CCP. The opinion of the Chancellor of Justice concerning this issue differs from the opinion of the Minister of Justice, who argues that §§ 16(2) and 40¹ of the CCP are not applicable in misdemeanour proceedings.

26. § 2 of the Code of Misdemeanour Procedure establishes that unless otherwise provided for in this Code, the provisions concerning criminal procedure apply to misdemeanour procedure, taking into account the specifications arising from misdemeanour procedure. Consequently, a norm of criminal procedure is applicable in misdemeanour proceedings only if the same issue is not regulated by a provision of the Code of Misdemeanour Procedure. The provisions regulating the circle of persons participating in the proceedings are provided for in both the Code of Criminal Procedure and the Code of Misdemeanour Procedure. The second chapter (“Persons Subject to Criminal Proceeding”) of the Code of Criminal Procedure includes §§ 16 and 17. Section 16 (“Bodies conducting proceedings and participants in proceedings”) establishes in the first subsection that proceedings shall be conducted by courts, Prosecutors’ Offices and investigative bodies, and in the second subsection that the suspect or accused, his or her counsel, the victim, the civil defendant and the third party are the participants in a proceeding. The first subsection of § 17 (“Parties to court proceedings”) establishes that a Prosecutor's Office, the accused and his or her counsel and the victim, the

civil defendant and the third party are the parties to a court proceeding. §§ 16 and 17 of the CCP are in force in this wording since 1 February 2007. Before that date a third person was not a participant in proceedings or a party to court proceedings in criminal procedure. The third person as a new participant in proceedings was introduced into criminal procedure by the Money Laundering and Terrorist Financing Prevention Act, the Bailiffs Act, the Penal Code, the Code of Criminal Procedure, the State Legal Aid Act and the Code of Enforcement Procedure Amendment Act (RT I 2007, 2, 7), passed on 13 December 2006. The legal definition of a third person can be deducted from § 40¹(1) of the CCP, which establishes that the body conducting the proceedings may involve a third party in the criminal proceeding if the rights or freedoms of the person which are protected by law may be adjudicated in the adjudication of the criminal matter or in special proceedings.

27. In the Code of Misdemeanour Procedure the participants in the proceedings and parties to court proceedings are defined in Chapter 2 (“Bodies Conducting Proceedings, Participants in Proceedings, Experts, Interpreters, Translators and Parties to Court Proceedings in Misdemeanour Procedure”) Division 2 (“Participants in Proceedings and Parties to Court Proceedings in Misdemeanour Procedure”). As pointed out above, § 16 of the CMP regards the person subject to proceedings and his or her counsel as participants in the proceedings and § 17(1) of the CMP regards the participants in the proceedings and the body which conducted the extra-judicial proceedings as parties to a court proceeding. These provisions were not amended by the Act of 13 December 2006, by which the third person as a participant in the proceedings was introduced into criminal procedure.

28. It appears from the aforesaid that the Code of Misdemeanour Procedure provides for a whole and complete regulation to determine the circle of participants in the proceedings, and therefore, under § 2 of the CMP, §§ 16(2) and 401 of the CCP are not applicable in misdemeanour proceedings. The general assembly does not agree with the opinion of the Chancellor of Justice that as the Code of Misdemeanour Procedure does not define the procedural position of a third person, this amounts to an issue not regulated by the Code of Misdemeanour Procedure, which may be adjudicated on the basis of the Code of Criminal Procedure. The fact that “a participant in the proceeding” in misdemeanour procedure is defined more narrowly than in criminal procedure does not mean that the definition of a participant in the proceeding provided for in the Code of Criminal Procedure is applicable also in misdemeanour procedure. Otherwise the regulation of the circle of participants in the proceedings in the Code of Misdemeanour Procedure would be meaningless. In a situation where the Code of Misdemeanour Procedure defines the circle of participants in the proceedings, but the definition does not include a third person, the valid law lacks a sufficient ground for recognising a third person in misdemeanour procedure as a participant in a proceeding.

29. The Chancellor of Justice is of the opinion that § 193(2) of the CMP offers another possibility to interpret the Code of Misdemeanour Procedure in a Constitution-conforming manner, that is to the effect that it would guarantee the OAO AIT the right to contest the decision of the extra-judicial body concerning the confiscation of the motor-coach. The general assembly does not agree with this view. § 193 is in Chapter 16 “Procedure for Adjudication of Appeals Against Court Rulings” of the Code of Misdemeanour Procedure. According to § 189 of the CMP appeals may be filed against a ruling made in the proceedings of a court of the first or second instance or in execution proceedings if contestation of the ruling is not precluded pursuant to § 191 of this Code. § 193 of the CMP regulates the term for filing appeals against court rulings and the second subsection thereof establishes that a person not participating in the proceedings may file an appeal against a court ruling within ten days as of the date on which the person became or should have become aware of the contested ruling. The referred provisions unambiguously indicate that an appeal against a ruling can be filed only against a court ruling concerning a misdemeanour matter, and not against a ruling or a decision of an extra-judicial body. The contesting of the activities or a ruling of an extra-judicial body is regulated by §§ 76 to 80 of the CMP, and the filing of appeals with the court against a decision of an extra-judicial body is regulated in Chapter 12 of the Code of Misdemeanour Procedure. In addition to the fact that the law does not provide for a possibility to file an appeal against the rulings of an extra-judicial body, the procedure for hearing the appeals against rulings is substantively not suitable for contesting the decisions of extra-judicial bodies.

30. The Chancellor of Justice points out that the third possibility through which the OAO AIT could contest the decision of the extra-judicial body concerning the confiscation of the motor-coach is the possibility of having recourse to the administrative court under § 3(1)1) and 2) of the Code of Administrative Court Procedure. The general assembly does not agree with this opinion, either. § 3(2) of the CACP establishes that adjudication of disputes in public law for which a different procedure is prescribed by law does not fall within the competence of administrative courts. The decisions of extra-judicial bodies are contested in the county court pursuant to the procedure provided for in Chapter 12 of the Code of Misdemeanour Procedure. Thus, there exists a special procedure excluding the administrative court procedure. An interpretation to the effect that a person who is not a participant in the proceeding could contest a decision of an extra-judicial body, to the extent that the decision infringes the person's rights and freedoms, in the administrative court, would result in a situation where, depending on the procedural status of an appellant, one and the same legislation of specific application issued by a public authority could be contested in two different courts.

31. One more reason why the general assembly does not agree with the opinion of the Chancellor of Justice that the valid procedural codes can be interpreted in a manner giving a person not participating in the proceedings the possibility to contest decisions of extra-judicial bodies in the courts, is that none of the suggested interpretations would be sufficiently clear to the addressee of the right reading the text of the law. In other words, the recognition of the right of appeal through one of the interpretation possibilities suggested by the Chancellor of Justice would create a situation not meeting the principle of legal clarity (§§ 10 and 13(2) of the Constitution). The lack of legal clarity must not be the price of a Constitution-conforming interpretation. The conditions of and procedure for contesting the decisions of the executive, which restrict the rights of a person, must be established in the text of the law so clearly that every person with ordinary attention could understand it in general terms without assistance or without having to study the judicial practice. The valid Code of Misdemeanour Procedure and the Code of Administrative Court Procedure would not enable a person not participating in the proceedings, whose rights and freedoms are restricted by a decision of an extra-judicial body, to understand with sufficient clarity that he may file an appeal – for the protection of his rights – with the county or administrative court. The general assembly points out that the Supreme Court has regarded the danger of lack of legal clarity as a circumstance precluding the possibility of application of procedural norms on the basis of analogy (judgment of the Constitutional Review Chamber of 8 October 2007 in case no 3-4-1-15-07 – RT III 2007, 33, 263, paragraph 19).

32. Differently from the Chancellor of Justice, the Tax and Customs Board argues that a person not participating in the proceedings has no right to contest in the court a decision of an extra-judicial body, by which the confiscation of the person's property is adjudicated. Nevertheless, in such a situation a person not participating in the proceeding has other possibilities for judicial protection of his rights. The general assembly is of the opinion that this view of the appellant in cassation is not serious in the legal sense. None of the measures suggested in the opinion of the Tax and Customs board would guarantee the OAO AIT a possibility for effective judicial protection of the right of ownership.

33. First, the appellant in cassation argues that even before making a decision in the matter the extra-judicial body had informed the OAO AIT by its letter of the intention to confiscate the motor-coach, and thus the OAO AIT could have contested the activities of the extra-judicial body pursuant to the procedure provided for in §§ 76 to 80 of the CMP during the period between the preparation of the misdemeanour report in regard to S. Mulyar and the decision of the extra-judicial body. Nevertheless, it remains unclear in the written opinion of the Tax and Customs Board, how the OAO AIT could have contested or prevented the confiscation of the motor-coach pursuant to the procedure established in §§ 76 to 80 of the CMP in a situation where there was no decision on the confiscation of the motor-coach. Pursuant to the appeal procedure provided for in §§ 76 to 80 of the CMP it is possible to contest until the decision of an extra-judicial body the activities of the body which violate the person's rights and freedoms. This appeal procedure does not enable to contest, in advance, the intention – of which the person has become aware of an extra-judicial body to adopt a procedural decision in the future, which may violate the person's rights and freedoms. The procedure for contesting the activities of an extra-judicial body does not enable the court to render a preliminary ruling on the lawfulness of the intended activities of an extra-judicial body.

Consequently, the OAO AIT did not have a possibility to achieve, by an appeal to be filed pursuant to §§ 76 to 80 of the CMP, that the court review the lawfulness of the extra-judicial body's decision on confiscation, not yet made.

34. The appellant in cassation further justifies its argument that the right of appeal was guaranteed to the OAO AIT by the fact that the company could have contested in the administrative court the seizure of the motor-coach in the course of customs controls. The general assembly points out that the seizure of a motor vehicle in the course of customs controls and the confiscation thereof are two different issues the prerequisites of lawfulness of which are not overlapping. The opinion of the administrative court on the legality of the seizure of the motor-coach would have said nothing about the lawfulness of the confiscation of the motor-coach. Not every time when the Tax and Customs Board has a legal ground for the seizure of a transport vehicle in the course of customs controls is there a ground for the confiscation of the transport vehicle. Naturally, the administrative court who is hearing an appeal against the seizure of a transport vehicle can not give an opinion on the confiscation of the transport vehicle. Consequently, the opinion of the appellant in cassation, that for the OAO AIT the possibility of contesting the seizure of a transport vehicle compensates for the lack of the possibility to file an appeal against the extra-judicial body's decision on confiscation, is unfounded.

35. In addition to the foregoing the appellant in cassation argues that the OAO AIT can effectively protect its right of ownership by way of civil court procedure. In this context the Tax and Customs Board makes a reference to the ruling of the Civil Chamber of the Supreme Court of 9 December 1996 in case no 3-2-1-130-96 (RT III, 2, 10), and to § 85(2) of the Penal Code.

36. The general assembly is of the opinion that the reference to the ruling of the Supreme Court of 9 December 1996 is not relevant in the context of this misdemeanour matter. In the ruling in case no 3-2-1-130-96 the Supreme Court held that the person whose property was seized within a criminal proceeding concerning another person, can protect his property by filing an action against the person who is assumed to be the owner of the seized property which actually belongs to the former, and against the person who claims compensation for damage caused by a criminal offence by way of civil action within a criminal proceeding. Consequently, the referred ruling addresses a situation where an extra-judicial body has seized property, assuming that it belongs to the accused, and a third person claims that the seized property belongs to him instead. This is an action of a third person for the release of property from seizure, which the valid law regulates in § 222 of the Code of Enforcement Procedure. On the basis of such an action the court adjudicates a dispute in private law concerning the ownership of property, and does not give an opinion on the earlier seizure as an act in public law. There is no dispute in this matter about the fact that the motor-coach belongs to the OAO AIT and not to S. Mulyar who had committed the misdemeanour. Thus, there is no dispute over the owner of the motor-coach, i.e. a dispute to be adjudicated by way of civil procedure. In the proceeding of an action it is not possible to contest the decision of the Tax and Customs board to confiscate, under § 94(4) of the CA, the motor-coach belonging to the OAO AIT as a third person. It is so because this is a dispute arising from a relationship in public law, and according to the second sentence of § 1 of the Code of Civil Procedure such disputes are not adjudicated by way of civil court procedure. It does not appear from the written opinion of the Tax and Customs Board, either, against whom and which claim the OAO AIT should file by way of action procedure in the present situation so that the result of the satisfaction of the action would be the return of the confiscated motor-coach.

37. The reference to § 85(2) of the Penal Code, made by the appellant in cassation, pursuant to which, in the case of confiscation, the rights of third persons remain in force and the state shall pay compensation to third persons, except in the cases provided for in §§ 83(3) and (4), 83¹(2) and 83²(2) of this Code, is irrelevant. The addressee of a decision on confiscation, i.e. the person to whom the decision is addressed and who is assumed to be the owner of the confiscated object used to commit an offence, the object of the offence, or assets acquired through offence, can not be regarded to be a third person for the purposes of § 85(2) of the PC. § 85(2) of the PC regulates, e.g. a situation where upon confiscation of property it is erroneously assumed that it belongs to the offender or another person in regard to whom there is a ground to confiscate the property under the grounds provided for in §§ 83(3), 83¹(2) or 83²(2) of the PC. If, in such a case, it also

becomes apparent that in regard to the owner of the property the grounds for confiscation of property from a third person provided for in §§ 83(3) and (4), 83¹ (2) and 83² (2) of the PC do not exist, the state shall return the confiscated assets to the actual owner or shall pay compensation to the latter. The person who is the addressee of a decision on confiscation, like the OAO AIT in this misdemeanour matter, can have no right of claim under § 85(2) of the PC. The interpretation to the effect that first the extra-judicial body can confiscate the property of a third person and thereafter the person in regard to whom the decision on confiscation was made could claim, under § 85(2) of the PC, the return of the confiscated property or compensation for the value thereof, would be manifestly unreasonable.

38. For the above reasons the general assembly is of the opinion that the law does not give the OAO AIT a possibility to have a recourse to the court to contest the confiscation of the motor-coach belonging to it. That is why, next, the constitutionality of the procedural law is to be reviewed.

II.

39. The OAO AIT as a person not participating in the proceeding wishes to contest in the court the decision of the extra-judicial body of 28 March 2007 to the extent that it concerns the confiscation of the company's motor-coach as a transport vehicle specifically reconstructed with a view to committing a violation of the customs rules, with the use of which S. Mulyar had committed a violation of customs rules. For the reasons set out in part I of this judgment the OAO AIT can not, under the valid law, contest the confiscation of its transport vehicle in the court, because it has no right to file an appeal against a decision of a body conducting extra-judicial proceedings.

40. As the OAO AIT can not contest the referred decision, and as the transport vehicle was confiscated within a misdemeanour proceeding, the general assembly deems the Code of Misdemeanour Procedure relevant to the extent that it does not provide for a possibility to file an appeal against a decision of an extra-judicial body by which a transport vehicle is confiscated from a person who is not a participant in the proceeding. In the present case the right of appeal of the OAO AIT is precluded by § 114(1)(2) of the CMP, pursuant to which only the participants in the proceedings, i.e. the person subject to the proceedings and his counsel (§ 16 of the CMP), have the right to file an appeal against a decision of an extra-judicial body made by way of the general procedure. According to § 118(2)(2) of the CMP the court must refuse to hear an appeal filed against a decision of an extra-judicial body by a person who has no right of appeal under § 114(1) of the CMP. Consequently, § 114(1)(2) of the CMP does not permit the persons not referred in it – including a person not participating in the proceeding whose transport vehicle was confiscated by a decision of an extra-judicial body – to contest the decision of the extra-judicial body in the court.

III.

41. The confiscation of a motor-coach as a movable infringes the ownership right of the OAO AIT as the owner of the motor-coach (§ 32 of the Constitution). Thus, the OAO AIT wishes to file an appeal with the court with the aim of protecting the company's fundamental right of ownership. According to the first sentence of § 15(1) of the Constitution everyone whose rights and freedoms are violated has the right of recourse to the courts. The Supreme Court has asserted the importance of gapless protection of the right of recourse to the courts, pointing out also that §§ 13, 14 and 15 of the Constitution give rise to the right to an effective remedy (see ruling of the general assembly of the Supreme Court of 22 December 2000 in case no 3-3-1-38-00 – RT III 2001, 2, 14, paragraphs 15 and 19; and judgment of the general assembly of 17 March 2003 in case no 3-1-3-10-02 – RT III 2003, 10, 95, paragraph 17). The right to judicial protection established in §§ 13, 14 and 15 of the Constitution includes both the right of a person whose rights and freedoms are violated to file an action with a court as well as the duty of the state to provide for an appropriate judicial procedure for the protection of fundamental rights that is fair and guarantees effective protection to persons (see rulings of the Constitutional Review Chamber of the Supreme Court of 9 May 2006 in case no 3-4-1-4-06 – RT III 2006, 19, 174, paragraph 9; of 17 January 2007 in case no 3-4-1-17-06 – RT III 2007, 3, 20, paragraph 2; of 4 April 2007 in case no 3-4-1-8-07 – RT III 2007, 15, 114, paragraph 6; of 17 May 2007 in case no 3-4-1-11-07 – RT III 2007, 21, 170, paragraph 4). In the ruling of the general assembly of 22

December 2000 in case no 3-3-1-38-00 (paragraph 19) it is explained with a reference to the *Klass et al v. Germany* judgment of the European Court of Human Rights of 6 September 1978 that effective remedy must be guaranteed to everyone who claims that his rights and freedoms have been violated. The European Court of Human Rights has stated that if a person alleges that his or her convention rights have been violated, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress (see *Klass and others v. Germany*, paragraph 64; *Kudla v. Poland*, judgment of 26 October 2000, paragraph 157; *Hasan and Chaush v. Bulgaria*, judgment of 26 October 2000, paragraph 96).

42. For the above reasons and to the extent relevant in the present case, i.e. to the extent that it does not enable a person who is not participating in the proceedings to file an appeal against a decision of an extra-judicial body, made by way of general procedure, by which a transport vehicle of the person not participating in the proceeding was confiscated, § 114(1)2) of the CMP infringes the right of OAO AIT to have a recourse to the courts if its rights and freedoms are violated, provided for in the first sentence of § 15(1) of the Constitution.

43. In relation to the fundamental right referred to in the first sentence of § 15(1), the Constitution does not refer to any conditions for the restriction of this fundamental right. Consequently, this is a fundamental right not subject to restrictions by the law, and the restrictions of which can only be justified by other fundamental rights or constitutional values (see ruling of the general assembly of the Supreme Court of 28 April 2004 in case no 3-3-1-69-03 – RT III 2004, 12, 143, paragraph 28). Bearing in mind the aforesaid, it is necessary for the assessment of constitutionality of the infringement of the first sentence of § 15(1) of the Constitution – referred to in paragraph 42 above – to ascertain first which fundamental rights or constitutional values the legislator aimed to protect by precluding by § 114(1)2) of the CMP the possibility of a person not participating in the proceedings to contest a decision of an extra-judicial body, made by way of general procedure, by which a transport vehicle belonging to the person not participating in the proceeding was confiscated. Only after the aim of the restriction of the first sentence of § 15(1) of the Constitution has become clear, and it is proved that this aim in itself is permissible as a justification of a restriction of a fundamental right, it will become possible to review whether the infringement described in paragraph 42 of this judgment as a measure for the achievement of the referred aim is, for the purposes of § 11 of the Constitution, a suitable, necessary and reasonable one. A restriction of fundamental rights which lacks a clear aim or which has been established to serve an aim not arising from the Constitution, is in conflict with the Constitution and the proportionality thereof can not be controlled (see also judgment of the Constitutional Review Chamber of the Supreme Court of 10 May 2002 in case no 3-4-1-3-02 – RT III 2002, 14, 157, paragraphs 15 to 17).

44. Neither the Code of Misdemeanour Procedure, the drafting documents thereof, nor other sources reveal an express aim in the light of which a person not participating in the proceedings has been deprived of the right to contest a decision of a body conducting extra-judicial proceedings, by which a transport vehicle belonging to the person was confiscated. The general assembly came to the conviction that the extending of the restriction arising from § 114(1)2) of the CMP to the appeals such as this is not intentional and is caused by the fact that upon formulating the wording of the restriction of the right of appeal, provided for in § 114(1)2) of the CMP, the situation under discussion was overlooked. This view is further supported by the fact that during the legislative proceeding of the draft of the Act passed on 13 December 2006 (972 SE, The X Riigikogu), which introduced the third person into the circle of participants in the proceeding in criminal procedure, the legislator recognised the necessity of judicial protection of a person who is not an offender and whose property is confiscated. In the explanatory letter to the referred draft the following was pointed out, among other things: “The valid Code of Criminal Procedure does not regulate the involvement of a person who is not a suspect or an accused, in the proceedings, although the Penal Code establishes a ground for adjudicating the confiscation of property of such a person. [...] Substantially, the owner of the property subject to confiscation resembles a civil defendant, who is an independent participant in the proceedings according to § 39 of the CCP. That is why a third person as a new participant in the proceedings is introduced into the Code of criminal Procedure.” The documents concerning the legislative proceeding of draft 972 SE do not reveal that the legislator has formed an opinion on recognising a third person as a

participant in the proceedings in misdemeanour procedure and has excluded this on purpose. In the written opinions submitted within this constitutional review case the Riigikogu Committees and the Minister of Justice have expressed the opinion that similarly with criminal procedure a third person should be regarded as a participant in the proceedings also in misdemeanour procedure. These opinions of the participants in this proceeding as well as the amendments introduced by the Act of 13 December 2006 support the conclusion that the restriction of the right of filing an appeal with the court, arising from § 114(1)2) of the CMP, to the extent that it precludes the OAO AIT's access to the court, is not meant to serve an aim set by the legislator.

45. For the above reasons the general assembly holds that the infringement of the first sentence of § 15(1) of the Constitution, referred to in paragraph 42 of this judgment, has no aim. That is why it is necessary to declare that § 114(1)2) is in conflict with the first sentence of § 15(1) of the Constitution to the extent that it does not allow a person who is not a participant in the proceedings to file an appeal with the county court against a decision of an extra-judicial body, made by way of general procedure, by which a transport vehicle of the person not participating in the proceeding is confiscated.

46. As the Code of Misdemeanour Procedure is in conflict with the Constitution to the extent referred to in the previous paragraph of this judgment, the Tartu County Court had the right to hear the appeal of the OAO AIT against the decision of the Tax and Customs Board of 28 March 2007 on the merits. The general assembly agrees with the opinion expressed in the ruling of the Criminal Chamber of 14 January 2008, that alongside with the hearing on merits of the appeal of the OAO AIT the county court ought to have initiated a constitutional review court proceeding. Nevertheless, the failure to initiate a constitutional review proceeding in the present case can not be regarded as an omission requiring the annulment of the county court judgment and preventing the Supreme Court from giving an opinion on the county court's decision to satisfy the appeal of the OAO AIT.

IV.

47. Next, on the basis of the appeal in cassation of the Tax and Customs Board, the general assembly shall give an opinion on the county court's decision to annul the decision of the extra-judicial body of 28 March 2007 to the extent by which the motor-coach of the OAO AIT was confiscated under § 94(4) of the CA.

48. In the present case there is no dispute over the fact that S. Mulyar had used the motor-coach, belonging to the OAO AIT which had been specifically reconstructed with the view to committing a violation of customs rules – as the means of committing an act which can be qualified as a misdemeanour under § 73(1) of the Customs Act. § 94(4) of the CA establishes that the extra-judicial body or a court may confiscate a means of transport which has been specifically reconstructed with a view to committing a violation of the customs rules and which has been used as the means of or as an aid to committing a violation of the customs rules. At the same time, it is the General Part of the Penal Code that establishes the grounds for confiscation (§ 83). At the time of commission of the act with which S. Mulyar is charged the wording of the Penal Code permitted the confiscation of the means of committing an intentional offence, which does not belong to the offender, only if the person to whom the means of committing the offence belonged at the time of commission of the offence has, at least through recklessness, aided in the use of the means for the commission or preparation of the offence (§ 83(3)1) of the PC), or has acquired the means knowingly in order to avoid confiscation (§ 83(3)2) of the PC).

49. Differently from the appellant in cassation the general assembly is of the opinion that § 94(4) of the CA is not a special norm in regard to § 83 of the PC, and does not constitute an independent ground for confiscation. The substantive law bases for the confiscation of a transport vehicle, which has been specifically reconstructed with a view to committing a violation of customs rules, as a means of committing an offence, are established in § 83 of the PC. § 94(4) of the CA only establishes the jurisdiction of a body conducting extra-judicial proceedings to adjudicate the confiscation of a transport vehicle used for the violation of customs rules and specifically reconstructed for that purpose, as a certain type of means of committing an offence.

50. According to § 83 of the Penal Code the court is, as a rule, competent to confiscate the means of commission of an offence and the direct object of offence. By way of exception § 83(6) of the PC establishes that in the cases provided for in subsections (1), (2) and (4) of the same section, the object used to commit a misdemeanour or the substance or object which was the direct object of a misdemeanour may be confiscated by the extra-judicial body prescribed by law. Thus, in order that an extra-judicial body could decide on the confiscation of a direct object of a misdemeanour or an object used to commit a misdemeanour, the law must contain a norm delegating relevant authority. The substance of § 94(4) of the CA is to authorise the extra-judicial body referred to in subsection (2) of the same section – the Tax and Customs Board to decide whether to confiscate, on the basis of the grounds provided for in § 83(1) or 3) of the PC, a vehicle of transport specifically reconstructed with the view to committing a violation of customs rules which has been used as the means of or as an aid to committing a violation of the customs rules. Nevertheless, the Tax and Customs Board as an extra-judicial body has not right to decide, in relation to violations of customs rules, on the confiscation of other means used to commit misdemeanour, and thus the confiscation of such objects must be decided by the court.

51. The wording of § 94(4) of the CA does not clearly reveal an exemption from § 83 of the PC, i.e. the intent of the legislator to preclude the taking into account of § 83 of the PC upon the confiscation of means of transport which has been specifically reconstructed with a view to committing a violence of the customs rules. The mere fact, that unlike the first sentence of § 94(3) of the CA which provides for the competence of the Tax and Customs Board to decide on the confiscation of a direct object of a misdemeanour established in §§ 73 to 76 of the CA, § 94(4) of the CA does not contain a reference to § 83 of the PA, does not allow to conclude that § 94(4) constitutes an independent ground for confiscation. To substantiate the meaning of § 94(4) of the CA it is not sufficient to be confined to the systematic argument of interpretation. What is also to be born in mind is which of the possible interpretation alternatives of § 94(4) of the CA would best suit the general values of the legal order, especially the constitutional requirements. The general assembly is of the opinion that there is no reasonable ground to presume that the aim of § 94(4) of the CA is to create a possibility to confiscate a vehicle of transport, which has been specifically reconstructed with a view to committing a violation of the customs rules and used for that purpose, from a person who does not have even a remote connection to the commission of the offence, required by § 83(3) of the PC.

52. For the above reasons the general assembly agrees with the opinion of the county court that a vehicle of transport, specifically reconstructed with a view to committing a misdemeanour consisting in the violation of the customs rules, and which does not belong to the offender, can be confiscated only if any of the grounds provided for in § 83(3) of the PC exists. The appellant in cassation has not contested the conclusion of the county court that no facts have been established in the matter proving that the OAO AIT had, at least through recklessness, aided in the use of the motor-coach for the commission of the offence by S. Mulyar (§ 83(3)1) of the PC in the wording in force until 31 January 2007). Neither has it been established that the OAO AIT has acquired the motor-coach in order to avoid confiscation thereof (§ 83(3)2) of the PC in the wording in force until 31 January 2007). Consequently, there is no ground in substantive law for the confiscation of the motor-coach of the OAO AIT. The judgment of the county court concerning the annulment of the decision of the extra-judicial body and the return of the motor-coach to the OAO AIT is legal and justified.

V.

53. For the above reasons and proceeding from §§ 14(3) and 15(1)2) of the Constitutional Review Court Procedure Act the general assembly declares § 114(1)2) of the CMP, to the extent that the provision does not allow a person who is not a participant in the proceedings to file an appeal with the court against a decision made under § 73(1) of the CMP by way of general procedure, by which a transport vehicle belonging to the person not participating in the proceeding is confiscated, unconstitutional. Proceeding from § 174(1) and (3) of the CMP the general assembly, adjudicating the appeal of the OAO AIT against the decision of the Tax and Customs Board of 28 March 2007, upholds the conclusions of the judgment of the Tartu County Court of 9 August 2007, and substitutes the reasoning of the judgment concerning the creation of the OAO AIT's

right to file an appeal by the reasoning set out in paragraphs 14 to 46 of the Supreme Court judgment. The appeal in cassation of the Tax and Customs Board is to be dismissed.

DISSENTING OPINION
of justices Henn Jõks, Ants Kull, Eerik Kergandberg, Lea Laarmaa,
Jaak Luik, Tambet Tampuu and Peeter Jerofejev
to the judgment of the general assembly of the Supreme Court
in misdemeanour matter no 3-1-1-88-07

1. We argue that there was no ground to declare § 114(1)2) of the CMP partly unconstitutional and invalid.

The valid law gives a person not participating in the proceedings sufficient possibilities to file an appeal against a decision of an extra-judicial body made in a misdemeanour proceeding, by which the person's transport vehicle is confiscated. The relevant right of a person not participating in the proceedings arises, in our opinion, from the following.

2. § 2 of the Code of Misdemeanour Procedure establishes that unless otherwise provided for in this Code, the provisions concerning criminal procedure apply to misdemeanour procedure, taking into account the specifications arising from misdemeanour procedure.

The general assembly argues in paragraph 44 of the judgment that a person not participating in the proceedings has been deprived of the right to contest a decision of an extra-judicial body by which the person's transport vehicle is confiscated, not because it had been so intended but because the situation under discussion was overlooked. This opinion gives rise to a logical conclusion that the Code of Misdemeanour Procedure does not provide for the right of appeal of a third person not participating in the proceedings differently than this has been provided in the Code of Criminal Procedure. In such a situation, under § 2 of the CMP, the provisions of the Code of Criminal Procedure are to be applied. According to § 16(2) and § 40¹ (1) of the CCP a third person may be involved in the criminal proceeding if the rights or freedoms of the person which are protected by law may be adjudicated in the adjudication of the criminal matter or in special proceedings. According to § 40²(1)2) of the CCP the third person has the right to appeal against decisions taken in criminal proceeding. Proceeding from § 2 of the CMP a third person has the same right also in a misdemeanour proceeding.

3. If it is found, nevertheless, that what is set out in the previous paragraph still does not guarantee a person not participating in the proceedings the right of appeal, § 2 of the CCP should be proceeded from, in our opinion. Pursuant to this provision the sources of criminal procedural law are, inter alia, the Constitution (clause 1)) and decisions of the Supreme Court in issues which are not regulated by other sources of criminal procedural law but which arise in the application of law (clause 4)). The Code of Misdemeanour Procedure does not provide differently as regards the sources of law on misdemeanour procedure.

Consequently, the right of a person not participating in the proceedings to file an appeal with the court against a decision of an extra-judicial body on the confiscation of the vehicle of transport belonging to the person arises from § 15(1) of the Constitution, the first sentence of which establishes that everyone whose rights and freedoms are violated has the right of recourse to the courts. This is what the general assembly has probably found in paragraphs 42, 43 and 53 of the judgment. Yet, for some reason the majority of the general assembly has not considered the Constitution as a source of the law on misdemeanour procedure.

But if it is argued that the Constitution, too, gives a person not participating in the proceedings no right to file an appeal against a decision on the confiscation of the person's transport vehicle, we can not but agree with the opinion of the general assembly that the failure to grant the right of appeal was not a conscious choice of the legislator, that this constitutes a gap. This gap can be overcome, with legal clarity, by the Supreme Court in its decision under § 2(4) of the CCP.

4. The explanation set out in paragraph 31 of the judgment that the guaranteeing of the possibility of a person not participating in the proceedings to file an appeal against a decision of an extra-judicial body through the interpretation of procedural codes would not be sufficiently clear to the addressees of law, is not convincing. This possibility was clear to the Tartu County Court when it rendered the judgment of 9 August 2007, and it would have become even more clear to all addressees of law, had the Supreme Court accepted in its judgment the interpretation of the county court recognising the right of appeal under discussion.

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