Constitutional judgment 3-4-1-18-07

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-18-07
Date of judgment	26 November 2007
Composition of court	Chairman Märt Rask, members Eerik Kergandberg, Indrek Koolmeister, Ants Kull and Priit Pikamäe.
Court Case	Judgment of the Tallinn Circuit Court of 28 June 2007 declaring clause 1 of "Headings of Estonian Nomenclature of Commodities, under which soft drinks belong", approved by Regulation no 24 of the Minister of Finance of 7 March 1997 unconstitutional.
Date of hearing	Judgment of the Tallinn Administrative Court of 1 June 2007 in administrative matter no 3-07-209.
Persons participating	Alar Urm ,representative of OÜ Kadariku Köögivili, in the hearing Tiit Rebane, representative of the Ministry of Finance, and Lembit Sullakatko, representative of the Tax and Customs Board.
DECISION	**1. To declare that § 2(7) of the Packaging Excise Duty Act in the wording in force from 27 July 2000 until 31 December 2004 was unconstitutional.** **2.To declare that Regulation no 24 of the Minister of Finance of 7 March 1997, approving the "Headings of Estonian Nomenclature of Commodities, under which soft drinks belong", was unconstitutional from 27 July 2000 until 31 December 2004.**

FACTS AND COURSE OF PROCEEDING

1. OÜ Kadarbiku Köögivili is an enterprise engaged in growing and marketing vegetables. In 2004 the private limited company started to produce and market fruit and vegetable juices.

2. By its notice of assessment No 12-5/362 of 11 July 2005 the Põhja Tax and Customs Centre of the Tax and Customs Board determined that OÜ Kadarbiku Köögivili must pay 2 051 522 kroons of excise duty on packaging for the period of taxation of 2004. Pursuant to the reasoning of the notice of assessment the private limited company had sold 495 565 litres of juice bottled in plastic bottles in 2004. Under § 2(7) of the Packaging Excise Duty Act (hereinafter the "PEDA"), in the wording in force from 27 June 2000 until 31 December 2004, and under clause 1 of Appendix to Regulation no 24 of the Minister of Finance of 7 March 1997, issued on the basis of the Act, the juice was a soft drink and it was subject to excise duty on packaging of soft drinks under the PEDA.

3. OÜ Kadarbiku Köögivili filed an action with the Tallinn Administrative Court, applying for the invalidation of the notice of assessment. The complainant argued that the object of taxation had been established by a Regulation, and requested that due to their conflict with § 113 of the Constitution § 2(7) of the PEDA in the wording in force in 2000 and the regulation of the Minister of Finance be not applied

4. By its judgment of 10 November 2006 the Tallinn Administrative Court dismissed the action. The administrative court found that juice should not be under the heading of soft drinks, but as the PEDA in the wording in force in 2000 classified packaging as packaging for alcohol and packaging for soft drinks, the juice packaging was to be classified under packaging for soft drinks. The administrative court did not initiate constitutional review proceedings, because the regulation of the Minister of Finance and § 2(7) of the PEDA in the wording in force in 2000 had become invalid.

5. OÜ Kadarbiku Köögivili filed an appeal with the Tallinn Circuit Court, applying for the annulment of the judgment of the Tallinn Administrative Court.

6. By its judgment of 28 June 2007 the Tallinn Circuit Court satisfied the appeal, and annulled the judgment of the Tallinn Administrative Court of 10 November 2006 and the notice of assessment of the Tax and Customs Board of 11 July 2005. The circuit court declared clause 1 of the Appendix to the Regulation of the Minister of Finance unconstitutional, did not apply it, and delivered its judgment to the Supreme Court.

7. The Constitutional Review Chamber of the Supreme Court requested the Minister of Finance, the Tax and Customs Board, OÜ Kadarbiku Köögivili, the Chancellor of Justice and the Minister of Justice to deliver their opinions on the constitutionality of clause 1 of the Appendix to the Regulation of the Minister of Finance. Subsequent to examination of the written opinions of the participants in the proceeding the Chamber considered it necessary to involve the Riigikogu in the proceeding and to organise an oral hearing of the matter. The Chamber asked the participants in the proceeding to submit further opinions on whether § 2(7) of the PEDA was relevant and constitutional.

OPINONS OF THE COURT AND THE PARTICIPANTS IN THE PROCEEDIDNG

8. The Tallinn Circuit Court held that clause 1 of the Appendix to the Regulation was in conflict with §§ 94(2) and 113 of the Constitution. The circuit court argued that the excise duty on packaging – the object of taxation – was determined in § 2(7) of the PEDA in the wording in force in 2000. Through such general terms as "packaging for alcohol" and "packaging for soft drinks" the legislator had determined the cases to which the rates of packaging excise duty, established in the Appendix to the PEDA, were applicable. § 2(7) of the PEDA in the wording in force in 2000 did not authorise the Minister to enumerate as soft drinks all numerical codes of goods, including all beverages, but only soft drinks. By numbering juice among soft drinks the Minister of Finance exceeded the authorisation given by § 2(7) of the PEDA in the wording in force in 2000.

The Circuit Court was of the opinion that numbering juice among soft drinks was arbitrary from the point of view of common understanding as well as scientific approach. In the Estonian Nomenclature of

Commodities (hereinafter the “ENC”), established by Government of the Republic Regulation no 403 of 17 December 2002 and by Regulation no 311 of 11 December 2003, the soft drinks belonged to group 22 “Drinks, alcohol and vinegar”, headings 2201 and 2202; juice, on the other hand, belonged to group 20 “Products processed from vegetables, fruits, berries, nuts or other parts of plants”, heading 2009. By reference to ENC in § 2(7) of the PEDA, in the wording in force in 2000, the legislator had no right to consider, by default, that a juice was a soft drink.

9. The Minister of Finance is of the opinion that the Regulation of the Minister of Finance did not exceed the limits of the definition of soft drinks for the purposes of the PEDA in the wording in force in 2000. The purpose of the PEDA and the Packaging Act is to establish the systems of return, collecting and recovery of packaging and packaging waste, avoiding distortions of competition and guaranteeing the maximum return of packaging and packaging waste. There is no essential reason to subject the packaging of carbonated and non-carbonated soft drinks to different taxation.

The Minister of Finance pointed out that it was for almost five years that the legislator had accepted the definition of soft drinks, established by the Regulation of the Minister of Finance. The intention of the legislator to treat water, lemonade and juice equally as soft drinks, is further supported by the draft of the Packaging Act and the Packaging Excise Duty Act Amendment Act (1043 SE), pursuant to which the headings of commodities, which had been approved by the Regulation of the Minister of Finance, would be established by § 2(7) of the PEDA.

In his additional written opinion the Minister argued that § 2(7) of the PEDA was a relevant provision. Both, the initial wording of § 2(7) of the PEDA, which was in force from 1 March 19997 until 26 June 2000 (hereinafter the “wording of 1997”), and the wording in force in 2000, are relevant provisions. The Minister is of the opinion that neither of the provisions was in conflict with the Constitution. The specification by a Regulation of the definitions used in the Acts does not equal to establishing elements of tax liability.

10. The Tax and Customs Board argued that the Minister of Finance did not exceed the definition of soft drinks as it was used in the PEDA for establishing the tax rate. In its additional written opinion the Tax and Customs Board argued that the 1997 wording of § 2(7) of the PEDA as well as the 2000 wording of § 2(7) of the PEDA were relevant norms and were not in conflict with the Constitution.

11. OÜ Kadarbiku Köögivili was of the opinion that the juice as the object of taxation with packaging excise duty was established by the Regulation of the Minister of Finance. The PEDA authorised the Minister of Finance to treat only soft drinks as soft drinks. In its additional written opinion the OÜ Kadarbiku Köögivili argued that § 2(7) of the PEDA in the wording of 1997 was relevant, because the Minister of Finance issued his Regulation on the basis of this provision. The enactment of § 2(7) of the PEDA in the wording of 2000 repealed the Regulation of the Minister of Finance.

12. The Chancellor of Justice argued that the Regulation of the Minister of Finance was unconstitutional. In the additional written opinion the Chancellor of Justice was of the opinion that in addition to the Regulation also § 2(7) of the PEDA in the wording of 2000 was relevant. The wording of 2000 of § 2(7) of the PEDA infringes upon the freedom to engage in enterprise as established in § 31 of the Constitution, as well as upon the fundamental ownership right as established in § 32 of the Constitution, whereas the infringement of the general taxation right, arising from § 113 of the Constitution, is of the primary importance. The Chancellor of Justice argues that the norm delegating authority, included in § 2(7) of the PEDA in the wording of 2000, did not meet the formal requirements of the first sentence of § 3(1), of § 94(2) and § 113 of the Constitution.

13. The Minister of Justice is of the opinion that juice can not be considered a soft drink, and thus the Regulation of the Minister of Finance exceeded the limits of the norm delegating authority and is in conflict with § 3(1) and § 94(2) of the Constitution. § 2(7) of the PEDA in the wording of 2000 authorised the Minister of Finance to explain what was to be understood under soft drinks, whereas the definition was not to exceed the usual meaning. The Minister argued that despite the few individual cases where the term soft drink is in fact used as a synonym of the term non-alcoholic beverage, the legislation in force at the material

time of the dispute as well as the common usage generally differentiated between soft drinks and juice. As the excise duty has been imposed by legislation ranking lower than Acts – in this case by a regulation and this has been done exceeding the delegated authority, the Regulation is also in conflict with § 113 of the Constitution. In his additional written opinion the Minister of Justice argued that § 2(7) of the PEDA in the wording of 2000 was a relevant norm, yet it was not in conflict with the Constitution.

14. The Constitutional Committee of the Riigikogu argues in its written opinion that § 2(7) of the PEDA is a relevant provision, containing a norm delegating the executive an authority and an obligation. The Committee was of the opinion that neither § 2(7) of the PEDA nor the Regulation of the Minister of Justice were unconstitutional.

CONTESTED PROVISIONS

15. § 2(7) of the PEDA in the wording in force from 27 July 2000 until 31 December 2004 (the 2000 wording of the PEDA) provided as follows:

"For the purposes of this Act:

[…]

7) "soft drink" means a beverage as defined by the numerical codes of goods established by the Minister of Finance pursuant to the Estonian Nomenclature of Commodities (hereinafter ENC)."

16. "Headings of Estonian Nomenclature of Commodities, under which soft drinks belong", approved by Regulation no 24 of the Minister of Finance of 7 March 1997, in force from 1 December 1998 until 17 March 2005, read as follows:

Soft drinks	Headings of Estonian Nomenclature of Commodities
1. Non-fermented fruit and vegetable juices not containing added spirits (incl. grape must), whether or not containing added sugar or other sweetening matter	2009
2. Waters, incl. natural and artificial mineral waters and carbonated waters, not containing added sugar or other sweetening matter or flavour, except ice and snow	2201
3. Waters, incl. mineral and carbonated waters containing added sugar or other sweetening matter or flavour, and other non-alcoholic beverages, except fruit and vegetable juices under heading 2009 of Estonian Nomenclature of Commodities	2202

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

17. First, the Chamber shall form an opinion on which provisions are relevant for this constitutional review court procedure (I). Thereafter the Chamber shall ascertain the existence of the infringement of the sphere of protection of § 113 of the Constitution (II) and shall render its opinion on the constitutionality of the relevant provisions (III).

I.

18. Pursuant to the first sentence of § 14(2) of the Constitutional Review Court Procedure Act the provision the constitutionality of which is examined by the Supreme Court by way of concrete norm control must be

relevant. Only the norms having decisive importance for the adjudication of the matter are relevant in the constitutional review procedure.

19. The Tallinn Circuit Court and the Tallinn Administrative Court reviewed the legality and substance of the notice of assessment of the Tax and Customs Board of 11 July 2005. The courts had to decide whether the Tax and Customs Board had been correct when requiring that OÜ Kadarbiku Köögivili pay the excise duty on packaging for soft drinks, for the reason that in 2004 the private limited company had sold juice bottled in plastic bottles.

The Tax and Customs Board had relied upon clause 1 of the Appendix to Regulation no 24, where the Minister of Finance had approved heading no 2009 of the ENC as a heading of soft drinks. Heading 2009 included also fruit and vegetable juices. Consequently, it followed from clause 1 of the Appendix to the Regulation of the Minister of Finance, that fruit and vegetable juices were soft drinks for the purposes of the PEDA. It was on the aforesaid that the Tax and Customs Board based its conclusion that OÜ Kadarbiku Köögivili had failed to pay excise duty on packaging for soft drinks.

The court's legal opinion on the assessment notice of the Tax and Customs Board should be dependent on the unconstitutionality or constitutionality of clause 1 of the Appendix to Regulation of the Minister of Finance. Thus, clause 1 of the Appendix to Regulation of the Minister of Finance is of decisive importance for the outcome of the case and is relevant.

20. In order to guarantee legal clarity also those provisions that are tightly connected to the contested norm and may cause ambiguity as to the legal situation, must be considered relevant (see Constitutional Review Chamber of the Supreme Court judgment of 13 February 2007, in matter no 3-4-1-16-06 – RT III 2007, 6, 43, § 18). The Chamber is of the opinion that for the purposes of guaranteeing legal clarity a norm related to a contested norm has to be regarded as relevant even when the court is reviewing the constitutionality of legal regulation that has already been repealed.

It proceeds from § 94(2) of the Constitution that a minister is entitled to issue regulations on the basis of and for the implementation of law. Pursuant to § 90(1) of the Administrative Procedure Act regulations may be issued only on the basis of Acts, and in accordance with the limits, concept and objective of the provision delegating authority. Thus, a prerequisite of constitutionality of a regulation is the existence of a provision delegating authority which is set out in an Act. If the provision delegating authority is unconstitutional, a regulation issued on the basis thereof is unconstitutional, too.

21. Regulation no 24 of the Minister of Finance was in force on the basis of § 2(7) of the PEDA. The regulation was in force, unamended, from 1 December 1008 until 17 March 2005. The Regulation was declared invalid by Regulation No 23 of the Minister of Finance of 3 March 2005, entitled "Nomenclature of soft drinks in accordance with Council Regulation (EEC) 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff", and entered into force on 18 March 2005.

During the validity of the Regulation § 2(7) of the PEDA was amended twice. The original wording of § 2(7) of the PEDA was in force from 1 March 1997 until 26 July 2000 (the 1997 wording of the PEDA). On 27 July 2000 the amended wording of § 2(7) of the PEDA entered into force and remained in force until 31 December 2004 (the 2000 wording of the PEDA). On 1 January 2005 the presently valid wording of § 2(7) of the PEDA entered into force (the 2005 wording of the PEDA).

22. To ascertain the relevant provision delegating authority, the Chamber shall determine the authority-delegating provision on the basis of which the Regulation was valid during the period that served as the basis for the notice of assessment. The Tax and Customs Board issued the notice of assessment on 11 July 2005, determining the excise duty on packaging for the period of taxation of 2004. Consequently, during the period of taxation the regulation was based on the 2000 wording of § 2(7) of the PEDA, which was in force from 27 July 2000 until 31 December 2004.

If the 2000 wording of § 2(7) of the PEDA is unconstitutional, so would be the Regulation of the Minister of Finance, and the court should have assessed the notice of assessment of the Tax and Customs Board differently than in case of constitutionality of the provision delegating authority. The Chamber is of the opinion that the 2000 wording of § 2(7) of the PEDA is a provision of decisive importance and is relevant.

Arising from the period of validity of the relevant provision delegating authority, Regulation no 24 of the Minister of Finance is also relevant during the period from 27 July 2000 until 31 December 2004.

II.

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

24. The purpose of § 113 of the Constitution is to achieve a situation where all financial obligations in public law are imposed by legislation adopted only by the Riigikogu in the form of parliamentary Acts. The existence of § 113 and its relations with other provisions of the Constitution show the importance that was attached to the parliamentary form of imposing financial obligations in public law during the preparation of the Constitution (see the general assembly of the Supreme Court judgment of 22 December 2000, in matter no 3-4-1-10-00 – RT III 2001, 1, 1, § 20 and 21).

§ 113 of the Constitution gives rise to the requirement that all elements of tax law relationship shall be determined by law and that it is prohibited to delegate to the executive the right to decide on individual elements of tax law relationship. The rights and obligations of a tax-payer must arise directly from the Taxation Act (the Constitutional Review Chamber of the Supreme Court judgment of 23 March 1998, in matter no 3-4-1-2-98 – RT I 1998, 31/32, 432).

25. § 113 of the Constitution gives rise to a subjective right of a person against the state (the general assembly of the Supreme Court judgment of 22 December 2000, in matter no 3-4-1-10-00 – RT III 2001, 1, 1, § 22), which can be called the general fundamental tax right.

26. An Act infringes on the sphere of protection of § 113 of the Constitution if it authorises the executive to determine an element of tax law relationship. A regulation infringes on the sphere of protection of § 113 of the Constitution if it determines an element of tax law relationship.

27. The 2000 wording of § 2(7) of the PEDA provided as follows: “soft drink” means a beverage as defined by the numerical codes of commodities established by the Minister of Finance pursuant to the Estonian Nomenclature of Commodities (hereinafter ENC).” On the basis of this the Minister of Finance provided in the Appendix to Regulation no 24, that soft drinks were drinks under headings 2009, 2201 and 2202 of the ENC. Under Government of the Republic Regulation no 403 of 17 December 2002 “Nomenclature of Estonian Commodities” heading 2009 included fruit and vegetable juices (non-fermented fruit and vegetable juices not containing added spirits, whether or not containing added sugar or other sweetening matter); heading 2201 included waters (incl. natural and artificial mineral waters and carbonated waters, not containing added sugar or other sweetening matter or flavour, except ice and snow), and heading 2202 included waters and other non-alcoholic drinks (incl. mineral and carbonated waters containing added sugar or other sweetening matter or flavour, and other non-alcoholic beverages, except fruit and vegetable juices under heading 2009).

The legislator authorised the Minister of Finance to identify the headings including the drinks that could be treated as soft drinks for the purposes of the PEDA. It was necessary to define soft drinks in order to subject the packaging of these drinks to excise duty on packaging. The Appendix to the 2000 wording of the PEDA

established separate rates of excise duty on the packaging for soft drinks and the packaging for alcohol.

The fact that the Regulation of the Minister of Finance coupled certain drinks with the definition of soft drinks of the PEDA (through the headings of the ENC) brought about a legal consequence – these drinks were subjected to excise duty on packaging for soft drinks. That is why the Chamber is of the opinion that by authorising the Minister of Finance to define soft drinks under the 2000 wording of § 2(7) of the PEDA the legislator authorised the Minister to establish the object of taxation by excise duty on packaging for soft drinks. Exercising the authority delegated by the legislator the Minister of Finance established, in Regulation 24, the object of taxation by excise duty on packaging for soft drinks.

28. The Chamber does not agree with the opinion of the Minister of Finance that the legislator itself had determined the object of taxation in § 2(7) of the PEDA in the wording of 2000, and had authorised the Minister of Finance to merely specify the term. Pursuant to an earlier interpretation of the Constitutional Review Chamber of the Supreme Court the delegation of the right to establish obligations in public law to the executive may be permissible on the condition that this is prompted by the nature of the financial obligations and that the legislator determines the extent of discretion (the Constitutional Review Chamber of the Supreme Court judgment of 19 December 2003, in matter no 3-4-1-22-03 – RT III 2004, 2, 14, § 19).

The Chamber could not establish any necessity, arising from the nature of excise duty on packaging, that would justify the delegation of the authority to determine the object of taxation to the executive power. The legislator itself was in the position to determine the headings of the ENC subsuming soft drinks subject to excise duty on packaging for soft drinks. The Chamber considers it necessary to point out that the draft of the Packaging Act and the Packaging Excise Duty Act Amendment Act (1043 SE) had been in the legislative proceeding of the tenth composition of the Riigikogu. Pursuant to the draft the headings of commodities, which had previously been approved by the Regulation of the Minister of Finance, would be established by § 2(7) of the PEDA. The explanatory letter to the draft stated the following: “ Pursuant to § 2(7) of the valid Packaging Excise Duty Act it is the Minister of Finance who shall determine the headings of nomenclature of commodities belonging to soft drinks. As these amount to tax law restrictions, it would be more correct to provide the definition of soft drinks in the Packaging Excise Duty Act.” By the expiry of the term of the tenth composition of the Riigikogu in March 2007, draft no 1043 SE was withdrawn from the legislative proceeding.

29. The Chamber is of the opinion that the legislator had failed to sufficiently define the extent of the authority delegated to the Minister of Finance, so that it would meet the requirements of § 113 of the Constitution. The wording of the PEDA did not reveal the intention of the legislator upon defining soft drinks – which were the drinks that the legislator wanted to be regarded as soft drinks. The ENC in force at the time of enacting the provision delegating authority, that is in 2000, did not use the term “soft drinks”. Neither are drinks defined as soft drinks in the presently valid ENC (approved by Government of the Republic Regulation no 403 of 17 December 2002).

The use of the term “soft drink” in the PEDA does not sufficiently define the object of taxation. Even if we were to understand that soft drink is any “refreshing drink”, the term is till too wide to reveal the will of the legislator as to the packaging of which drinks is to be subjected to excise duty. The Chamber is of the opinion that soft drink is a blank concept, which must be defined within the context of the PEDA. “A blank concept is a legislative tool the legislator uses when it withdraws from issuing detailed instructions in the text of law and delegates the authority to specify a norm to those who implement the law. As blank concepts are created by the legislator, these have to be defined with the help of the guidelines and aims expressed by the legislator” (the Constitutional Review Chamber of the Supreme Court judgment of 13 June 2005, in matter no 3-4-1-5-05 RT III 2005, 23, 233, § 16). Consequently, in this context one can not be guided by the common usage or the usage of the term in other Acts, but by the wording and purpose of the PEDA.

30. In 1996, when the PEDA was passed, the legislator wanted to differentiate between packaging for alcohol and packaging for soft drinks. The rates of excise duty on packaging for alcohol were established in clause 1 of the Appendix to the PEDA, and on packaging for soft drinks in clause 2 of the Appendix to the

PEDA. Although the rates of excise duty were the same for both types of packaging, the excise duty on packaging for alcohol entered into force on 1 March 1997. The entry into force of the excise duty on packaging for soft drinks was postponed, under § 14 of the PEDA, until 1 December 1998. The explanatory letter to the PEDA pointed out the following: “The excise duty on packaging shall fist be applied to the packaging for alcohol. The taxation of packaging for other commodities is planned in a later stage, so that the potential payers of excise duty would have the possibility to start recovery of packaging to avoid subjection to excise duty.”

The aforesaid indicates that the aim of the legislator was to subject packaging for drinks to excise duty, at the same time drawing a line between alcohol and other drinks, and that the term “soft drink” was introduced to label other drinks.

31. The Chamber shall also analyse § 2(7) of the 1997 wording of the PEDA, because it is on the basis of this norm delegating authority that the Minister of Finance originally issued Regulation no 24. § 2(7) of the PEDA in the 1997 wording stipulated as follows:
“soft drink” means a soft drink pursuant to the Estonian Nomenclature of Commodities (hereinafter ENC). The Minister of Finance shall determine the headings of the ENC to which soft drinks shall belong.”

Neither at the time when the PEDA was passed, that is on 19 December 1996, nor at the time when it entered into force, that is 1 March 1997, the ENC had been established by legislation of general application. The ENC was first established by the Government of the Republic Regulation no 20 of 19 January 1999 Approval of the procedure for administration and maintenance of the Estonian Nomenclature of Commodities and other nomenclatures established under the Estonian Nomenclature of Commodities and the Customs Act and other Acts. The Regulation entered into force on 13 February 1999, although, pursuant to clause 3 of the Regulation, the ENC was implemented as of 1 January 1999. The Government of the Republic Regulation was issued on the basis of § 23(2) and (4) of the Customs Act, which was passed on 17 December 1997 and entered into force on 19 January 1998.

Until 1999 the nomenclature of commodities was regulated by an internal act of the Customs Board. The Government of the Republic Regulation no 72 of 16 March 1993 “Introduction of single nomenclature of commodities” imposed the duty on the Customs Board to introduce, beginning from 1 April 1993, the Estonian Nomenclature of Commodities and to organise the management thereof (safekeeping of samples, up-dating and disseminating the nomenclature) (clauses 4 and 5 of the Regulation). The Nomenclature was to be based on the International Convention on the Harmonized Commodity Description and Coding System and “The Combined tariff and statistical nomenclature of the European Economic Community”, approved by Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff. The EEC nomenclature did not employ the term soft drink.

32. The 1997 wording of § 2(7) of the PEDA entitled the Minister of Justice to define soft drinks through the headings of the ENC. The ENC had not been enacted on the level of legislation of general application; the ENC, subsequently enacted, did not employ the term soft drink. Consequently, it can not be concluded that at the time the PEDA was passed and the term soft drink was introduced the legislator had a clear understanding of which drinks constitute soft drinks.

§ 2(7) of the PEDA in the wording of 2000 was enacted by the Packaging Excise Duty Act Amendment Act. The explanatory letter to the draft (404 SE) of the Packaging Excise Duty Act Amendment Act explained the reasons for the amendments as follows: “§ 2(7) defines soft drinks as drinks pursuant to the Estonian Nomenclature of Commodities (the ENC). Yet, the ENC does not set out a definition of soft drink, instead it is possible, under the ENC, to determine the headings of commodities, the drinks under which shall be regarded as soft drinks. That is why a proposal has been made to specify the term “soft drink”.”

33. Pursuant to the explanatory letter to the PEDA the purpose of enacting the PEDA was to protect the environment against pollution created by used packaging, as well as to incite the producers, users and importers to recovery of packaging to get relief from excise duty. Thus, the purpose of the PEDA was to

create the system of return, collection and recovery of packaging and packaging waste to protect the environment.

From the perspective of the protection of the environment it makes no difference what a packaging contains. What is important is the material, size and possibilities of recovery of the packaging. Pursuant to the valid wording of the PEDA (the wording of 2005) packaging is subject to taxation not on the basis of its content but on the basis of the material and weight thereof.

34. On the basis of the aforesaid the Chamber is of the opinion that when enacting § 2(7) of the PEDA in the wording of 2000 the legislator left it for the Minister of Finance to decide which drinks should be numbered as soft drinks and should, thus, be subject to excise duty on packaging. The wording of the provision delegating authority required merely that a soft drink must be “a drink” and correspond to the numerical codes of goods in the ENC. Thus, § 2(7) of the PEDA in the wording of 2000 left it for the Minister of Finance to decide, for example, whether to exclude some drinks from under the term “soft drink”. The legislator failed to delimit the authority delegated to the Minister of Finance in a manner conforming to the requirements of § 113 of the Constitution.

The Chamber is of the opinion that § 2(7) of the PEDA in the wording of 2000, as well as Regulation no 24 of the Minister of Finance, infringed upon the sphere of protection of § 113 of the Constitution. § 2(7) of the PEDA in the wording of 2000 authorised the Minister of Finance to determine the objects of taxation subject to excise duty on packaging, and the Minister of Finance determined, by its regulation, the object of taxation by excise duty on packaging.

III.

35. The first sentence of § 11 of the Constitution permits the infringement of fundamental rights solely in accordance with the Constitution. This means that each infringement of a fundamental right must meet all constitutional requirements.

An infringement of a fundamental right must be constitutional in the formal and substantive senses (see the Constitutional Review Chamber of the Supreme Court judgment of 13 June 2005, in matter no 3-4-1-5-05 – RT III 2005, 23, 233, § 7). Formal constitutionality means that legislation of general application, restricting fundamental rights, must be in conformity with the requirements of competence, procedure and from, as well as with the principles of determinateness and “subject to reservation by law” (see the Constitutional Review Chamber of the Supreme Court judgment of 13 June 2005, in matter no 3-4-1-5-05 – RT III 2005, 23, 233, § 8). The requirement of formal constitutionality of an infringement of a fundamental right must not be underestimated, because the formal constitutional requirements serve the purpose of protection of fundamental rights and freedoms.

36. Pursuant to the first sentence of § 3(1) of the Constitution the powers of the state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. The first sentence of § 3(1) of the Constitution establishes the general principle of reservation by law (see the general assembly of the Supreme Court judgment of 22 December 2000, in matter no 3-4-1-10-00 – RT III 2001, 1, 1, § 28; the Constitutional Review Chamber of the Supreme Court judgment of 13 June 2005, in matter no 3-4-1-5-05 – RT III 2005, 23, 233, § 9). The reservation by law principle delimits the competence of the legislative and executive powers. The enactment of laws is the right and the obligation of the legislator. Pursuant to § 65 1) of the Constitution the Riigikogu shall pass laws.

The Constitution does not preclude the legislator from delegating its legislative powers to the executive. Yet, the general principle of reservation by law prohibits the legislator to authorise the executive to do what the legislator is obliged to do under the Constitution. § 113 of the Constitution requires that the legislator establish all financial obligations is public law.

37. It also arises from the general principle of reservation by law that the executive power may be exercised if this is authorised by law (see the general assembly of the Supreme Court judgment of 22 December 2000, in matter no 3-4-1-10-00 – RT III 2001, 1, 1, § 28). Pursuant to this principle the restriction of fundamental rights by bodies ranking lower than the legislator requires the delegation of authority by the latter (the Constitutional Review Chamber of the Supreme Court judgment of 13 June 2005, in matter no 3-4-1-5-05 – RT III 2005, 23, 233, § 9). The same aim is served by § 94(2) of the Constitution, pursuant to which a minister shall issue regulations on the basis and for the implementation of law. Proceeding from the principle of reservation by law a regulation issued on the basis of an unconstitutional norm is in conflict with the Constitution.

38. The Chamber has ascertained that § 2(7) of the PEDA in the wording of 2000 authorised the Minister of Finance to determine the object of taxation by excise duty on packaging and infringed upon the sphere of protection of § 113 of the Constitution. The Chamber is of the opinion that such an infringement of the general fundamental tax right is in formal conflict with the first sentence of § 3(1) and with § 113 of the Constitution. The Chamber shall confine itself to the establishment of formal unconstitutionality and shall not review the material constitutionality of the provision.

On the basis of § 15(1)5) of the Constitutional Review Court Procedure Act the Chamber declares that § 2(7) of the Packaging Excise Duty Act, in the wording in force from 27 July 2000 until 31 December 2004, was in conflict with the first sentence of § 3(1) and with § 113 of the Constitution.

39. The Chamber has established, that in Regulation 24 the Minister of Finance determined the object of taxation by excise duty on packaging and infringed upon the sphere of protection of § 113 of the Constitution. The Chamber is of the opinion that the infringement of the general fundamental tax right, arising from the Regulation of the Minister of Finance, is in formal conflict with the first sentence of § 3(1) and with § 113 of the Constitution. The Regulation of the Minister of Finance was based on an unconstitutional provision delegating authority. A regulation issued on the basis of an unconstitutional norm is in formal conflict with the first sentence of § 3(1) and with § 94(2) of the Constitution. Having established the formal unconstitutionality of the Regulation the Chamber does not consider it necessary to review the material constitutionality of the Regulation.

The Chamber is of the opinion that the Minister of Finance Regulation no 24 of 7 March 1997 was, at the material time – that is from 27 July 2000 until 31 December 2004 – in conflict with the first sentence of § 3(1), with § 94(2) and with § 113 of the Constitution.
