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JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

No. of the case	3-4-1-16-06
Date of judgment	13 February 2007
Composition of court	Chairman Märt Rask, members, Ants Kull, Julia Laffranque, Priit Pikamäe and Jüri Pöld.
Court Case	Petition of Tallinn Administrative Court to declare section 6 of “Procedure for privatisation of non-residential premises”, approved by the Government of the Republic Regulation No 175 of 18 June 1996, in its entirety and sub-section 9(2) to the extent that it requires that for participation in an auction a copy of a payment document of the auction attendance fee must be submitted to the auction committee, invalid.
Basis of proceeding	Judgment of Tallinn Administrative Court of 29 November 2006 in administrative case No 3-05-922.
Hearing	Written proceeding
Decision	1. To satisfy the petition of Tallinn Administrative Court partially. 2. To declare section 6 of “Procedure for privatisation of non-residential premises” to the extent that it provides for the obligation to pay an attendance fee, sub-section 7(2) to the extent that it establishes a mandatory condition of an auction announcement that it contain information on the amount of and procedure for payment of attendance fee, and sub-section 9(2) to the extent that it requires that for participation in an auction a copy of a payment document of the auction attendance fee must be submitted to the auction committee, unconstitutional and invalid.

FACTS AND COURSE OF PROCEEDING

1. On 22 September 2005 a public oral auction for the privatisation of non-residential premises located at 14 Raua street/8 Kreutzwaldi street, Tallinn, was held. Giggs Kaubanduse OÜ was not allowed to participate in

the public oral auction, because it had not paid the 1000 kroons of attendance fee. The obligation to pay an attendance fee was provided for by the “Procedure for privatisation of non-residential premises”, approved by the Government of the Republic Regulation No 175 of 18 June 1996 (hereinafter “PPNP”).

2. Giggs Kaubanduse OÜ filed an appeal with the elder of Tallinn central district against the prohibition to participate in the auction and against the organisation of the auction, requesting that the auction of non-residential premises of 22 September 2005 be not approved and that it be deemed to be a failure. The Tallinn central district government found the complaint to be unfounded.

3. By Tallinn central district government order No 1105 of 29 September 2005, entitled “Approval of the results of auction (14 Raua street/8 Kreutzwaldi street, private limited company Graland)” the result of the public auction for the privatisation of non-residential premises located at 14 Raua street/8 Kreutzwaldi street was approved. ÜO Graland acquired the right to enter into a contract of purchase and sale.

4. Giggs Kaubanduse OÜ filed an appeal with the Tallinn Administrative Court for the invalidation of the approval of the auction results, for the announcement of a new auction and for the declaration of unconstitutionality and non-application of sections 6, 7 and 9 of the PPNP to the extent that these provide for the obligation to pay an attendance fee.

5. By its judgment of 29 November 2006 in administrative case No 3-05-922 the Tallinn Administrative Court partially satisfied the appeal of Giggs Kaubanduse OÜ, annulling the Tallinn central district government order No 1105 of 29 September 2005 and issuing a precept to Tallinn central district government to declare the auction of non-residential premises of 22 September 2005 to be a failure. The Administrative Court did not satisfy the request of Giggs Kaubanduse OÜ that a precept be issued to the Tallinn central district government to decide to announce a new auction for the privatisation of the non-residential premises. The Tallinn Administrative Court declared unconstitutional and therefore did not apply section 6 of PPNP in its entirety and sub-section 9(2) of the PPNP to the extent that it requires that for participation in an auction a copy of a payment document of the auction attendance fee must be submitted to the auction committee, and on the basis of § 25(10) of the Code of Administrative Court Procedure and § 4(3) of the Constitutional Review Court Procedure Act, forwarded the judgment to the Supreme Court for the commencement of a constitutional review proceeding.

JUSTIFICATIONS OF THE ADMINISTRATIVE COURT AND PARTICIPANTS IN THE PROCEEDING

6. The Administrative Court found that section 6 of the PPNP in its entirety and sub-section 9(2) thereof to the extent that it establishes the obligation to pay an attendance fee, were in conflict with § 3(1), § 87(6) and § 113 of the Constitution.

The Administrative Court is of the opinion that by imposing an obligation on the participants of public auctions of non-residential premises to pay an auction attendance fee the Government of the Republic has exceeded the authority delegated by the legislator, thus violating § 3 of the Constitution. Also, the referred provisions of the “Procedure for privatisation of non-residential premises” are in conflict with § 87(6) of the Constitution, as § 5(6) of the Privatisation of Non-Residential Premises Act (hereinafter “PNPA”), which can be regarded as a norm delegating authority, authorises the Government of the Republic to establish the procedure for the privatisation of non-residential premises and for the determination and amendment of the starting price, but neither § 5(6) of the PNPA nor any other provision of the Act authorise the Government of the Republic to establish an attendance fee.

As the Government of the Republic has established the obligation to pay an attendance fee without having been delegated the authority to do so, the court did not consider it necessary to examine the allegations of the appeal that the imposition of the attendance fee was also in conflict with § 113 of the Constitution.

7. The Ministry of Economic Affairs and Communications, speaking on behalf of the Government of the

Republic, underlines in its opinion that under § 3 and § 87(6) of the Constitution only intra legem regulations, conforming to the objective, content and limits expressed in a norm delegating authority, are permitted in Estonian legal order. The legislator delegated the authority to establish a procedure for more precise regulation of the privatisation of non-residential premises to the Government of the Republic, because the provision for a detailed regulation of privatisation is not in conformity with the principle of optimality of abstraction of Acts. Pursuant to § 113 of the Constitution the executive may impose financial obligations on the basis of pertinent authorisation by the legislator. Pursuant to the judicial practise of the Supreme Court, upon establishing financial obligations by legislation having lesser legal force than those of parliamentary Acts the relevant Acts must provide for at least the upper and lower limits of financial obligations. Section 6 of the “Procedure for privatisation of non-residential premises” provides for the upper limit of attendance fee (up to 2% of the starting price but not more than 1000 kroons), the concrete fee is fixed by the subject obligated to organise privatisation. As the attendance fee is used for covering the auction expenses, it can not be considered to be a tax.

8. Giggs Kaubanduse OÜ is of the opinion that in regard to attendance fee sections 6, 7 and 9 of the PPNP are not in conformity with § 5(6) of the PNPA, which is the basis for issuing the “Procedure for privatisation of non-residential premises” and a norm delegating authority, and is, thus, in conflict with § 3(1), § 87(6) and § 113 of the Constitution. Pursuant to the judicial practice of the Supreme Court § 113 of the Constitution imposes a parliamentary reservation in regard to financial obligations in public law.

9. Pursuant to the opinion of the Tallinn City Government and Tallinn central district government section 6 and sub-section 9(2) of the PPNP are constitutional, as the Government of the Republic has imposed the referred norms on the basis of an authority-delegating norm included in an Act.

On the basis of § 3(1) and § 87(6) of the Constitution the Government of the Republic is entitled to issue regulations on the basis of and for the implementation of law. Pursuant to § 5(1) of the Privatisation of Non-Residential Premises Act the non-residential premises shall be privatised by public auctions, organised by obligated subjects of privatisation. An announcement containing information about the non-residential premises to be privatised, the starting price thereof, the time and place of auction and guarantees necessary for participation in the auction must be published in the press and in at least one national daily newspaper at least one month before the holding of an auction. This provision is specified by section 6 of the PPNP by establishing that upon privatisation of non-residential premises by an auction the obligated subject of privatisation shall determine the amount of attendance fee and of security. Thus, the Government of the Republic has been authorised to impose guarantees necessary for participation in an auction, attendance fee being one of these.

10. The Chancellor of Justice is of the opinion that section 6 of PPNP and sub-section 9(2) thereof to the extent that these norms establish the obligation to pay an attendance fee of an auction, are in conflict with § 87(6), § 3(1) and § 113 of the Constitution and with the provisions of § 5(6) of the PNPA and § 90(1) of the Administrative Procedure Act (hereinafter “APA”).

The Government of the Republic can issue regulations on the basis of and for the implementation of law in strict accordance with the authority delegated by the legislator, specifying the content, obligation and legal limits of the authorisation. § 5(6) of the Privatisation of Non-Residential Premises Act provides for the Government of the Republic authority to establish the procedure for privatisation of non-residential premises, which does not include the right to impose an attendance fee for participation in an auction. In regard to the provisions of section 6 and sub-section 9(2) the “Procedure for privatisation of non-residential premises” amounts to a praeter legem regulation, because it has been issued for the regulation of the relations that were not regulated by the Privatisation of Non-Residential Premises Act. Subsequently, the Regulation is not in conformity with § 87(6) and § 3(1) of the Constitution and with § 90(1) of the APA. The auction attendance fee, related to the covering of auction expenses, provided for in section 6 and sub-section 9(2) of the “Procedure for privatisation of non-residential premises” belongs to the financial obligations in public law, not enumerated in § 113 of the Constitution, which can be imposed only by legal acts passed by the Riigikogu in the form of laws, that is, in the present case, by the Privatisation of Non-Residential

Premises Act. The fee for covering the auction expenses is not in conformity with § 5(3) of the APA, because an administrative authority may charge fees for the performance of procedural acts only in the cases and in the amount prescribed by law.

The Chancellor of Justice is of the opinion that in the interest of legal clarity also sub-section 7(2) of the PPNP to the extent that it establishes that information on the amount of and payment procedure of attendance fee is an obligatory condition of an auction announcement, should be declared unconstitutional and invalid.

11. The Minister of Justice is of the opinion that section 6 of the PPNP to the extent that it entitles the obligated subjects of privatisation to determine an auction attendance fee, and sub-section 9(2) to the extent that it requires that for participation in an auction a copy of a payment document of the auction attendance fee must be submitted to the auction committee, are in conflict with § 3(1) and § 87(6) of the Constitution. Pursuant to § 3(1) and § 87(6) of the Constitution the executive power may act only if it has been authorised by law to do so. The Privatisation of Non-Residential Premises Act has not authorised the Government of the Republic to establish either auction attendance fees or the procedure for determining these, thus the referred fee is unconstitutional.

As the provisions of the “Procedure for privatisation of non-residential premises” are, due to the lack of authority-delegating norm, in formal conflict with the Constitution, the Minister of Justice did not consider it necessary to analyse the substantial constitutionality of the provisions in regard to § 113 of the Constitution.

CONTESTED PROVISIONS

12. The “Procedure for privatisation of non-residential premises”, approved by the Government of the Republic Regulation No 175 of 18 June 1996, provides as follows:

“Section 6. An obligated subject shall determine the amounts of auction attendance fee and financial security. The attendance fee may amount up to 2% of the starting price but not more than 1000 kroons, the amount of financial security may be up to 10% of the starting price. The auction attendance fee and financial security shall be paid in cash. The auction attendance fee shall belong to the obligated subjects and shall be used for covering the expenses of holding the auction.

Section 7, sub-section 2. An announcement shall set out the following information:

[...]

3) the amounts of auction attendance fee and financial security and the procedure of payment thereof;

[...]

Section 9, sub-section 2. For participation in an auction the following must be submitted to the auction committee:

[...]

2) copies of payment documents of the auction attendance fee and financial security;

[...]”

OPINION OF THE CHAMBER

13. For adjudicating the matter the Constitutional Review Chamber shall first analyse whether the norms contested by the Tallinn Administrative Court are relevant (I), assessing at the same time whether section 6 in its entirety and sub-section 7(2) of the “Procedure for privatisation of non-residential premises” are

relevant. Thereafter the Chamber shall resolve the petition of the Tallinn Administrative Court requesting the declaration of unconstitutionality and invalidity of section 6 of the “Procedure for privatisation of non-residential premises” in its entirety and sub-section 9(2) thereof, giving also an opinion on sub-section 7(2) of the PPNP (II).

I.

14. Pursuant to the first sentence of § 14(2) of the Constitutional Review Court Procedure Act the provision the constitutionality of which is assessed by the Supreme Court by way of concrete norm control must be relevant. Pursuant to the Supreme Court judicial practice a norm is relevant if it is of decisive importance for the adjudication of a matter. A norm is of a decisive importance when in the case of unconstitutionality of the norm a court should render a judgment different from that in the case of constitutionality of the norm (see judgment of the general assembly of the Supreme Court of 4 November 2005 in case No 3-1-1-24-05 – RT III 2005, 39, 379, § 16; judgment of 17 June 2005 in case No 3-4-1-2-05 – RT III 2005, 24, 248, § 25). Only a norm that has been applied in regard of a person and which actually regulates a disputed relation or a situation, can be regarded as relevant (see judgment of the Constitutional Review Chamber of the Supreme Court of 2 November 2006 in case No 3-4-1-8-06 – RT III 2006, 40, 337, § 17).

15. The Tallinn central district government announced a public oral auction and fixed the attendance fee thereof to be 1000 kroons, which the complainant failed to pay. As the payment of the attendance fee and submission of a proof thereof were prerequisites for participating in the auction, Giggs Kaubanduse OÜ was not permitted to participate in the auction held on 22 September 2005.

In the case of unconstitutionality and invalidity of the contested provisions of the “Procedure for privatisation of non-residential premises” the Tallinn central district government order No 1105 of 29 September 2005 had been issued in violation of the procedure for auctions. In the case of invalidity of relevant provisions of the “Procedure for privatisation of non-residential premises” Giggs Kaubanduse OÜ could have been able to participate in the public oral auction and the result of the auction might have been different.

16. Section 6 of the “Procedure for privatisation of non-residential premises” regulates the payment of two different payments by participants in an auction, namely the attendance fee and the financial security. Of the two the complainant has contested the obligation to pay an attendance fee. Giggs Kaubanduse OÜ was not permitted to participate in the public oral auction because it had not paid the attendance fee. At the same time the financial security had been paid, and in regard to this Giggs Kaubanduse OÜ has not contested pertinent regulation of the “Procedure for privatisation of non-residential premises”. Subsequently, section 6 of PPNP is not relevant to the extent that it regulates the obligation to pay a financial security and the amount thereof. Thus, the Constitutional Review Chamber does not agree with the opinion of the Tallinn Administrative Court as to the relevance of section 6 of the PPNP in its entirety.

17. Section 6 of the “Procedure for privatisation of non-residential premises” is relevant to the extent that it entitles an obligated subject to determine the amount of auction attendance fee, and sub-section 9(2) is relevant to the extent that it requires that for participation in an auction a copy of a payment document of the auction attendance fee must be submitted to the auction committee.

18. Although the Administrative Court has not requested that the Supreme Court declare invalid sub-section 7(2) of the PPNP, this requirement was included in Giggs Kaubanduse OÜ’s appeal to the Administrative Court. The Constitutional Review Chamber is of the opinion that section 6, sub-section 7(2) and sub-section 9(2) of the PPNP, to the extent that they establish the requirement to pay an attendance fee of a public oral auction of non-residential premises, should be regarded as an integral regulation, which provides for the right of the obligated subject of privatisation to determine the amount of attendance fee and the obligation to communicate the amount and procedure for payment of the fee in its announcement, as well as for the obligation of a participant in the auction to pay the attendance fee and to provide documentary proof of the

payment. Thus, in the present case, both section 6 and sub-section 9(2) of the “Procedure for privatisation of non-residential premises”, regulating the payment of attendance fee, and sub-section 7(2) regulating the communication of the amount and procedure for payment of the attendance fee in an auction announcement, are deemed to be relevant.

The necessity to declare invalid also sub-section 7(2) of the “Procedure for privatisation of non-residential premises” was pointed out by the Chancellor of Justice, who justified it with the principle of legal clarity (see also judgment of the Supreme Court of 15 December 2005 in constitutional review case No 3-4-1-16-05 – RT III 2006, 1, 2, §§ 22-24). The Constitutional Review Chamber of the Supreme Court is of the opinion that the Chancellor of Justice has correctly pointed out that should the Supreme Court find that there is no sufficient ground in the valid law for the imposition of an attendance fee of a public auction, sub-section 7(2) of the PPNP may, in practice and in regard to the amount and procedure for payment of an auction attendance fee, prove to allow different interpretations, including the one pursuant to which the provision could be used as a basis for imposition of attendance fees. The norm under discussion does not create certainty as to the valid legal order and it would be misleading, because even if the attendance fee itself were to be declared invalid, the reading of the “Procedure for privatisation of non-residential premises” could give an impression that the payment of an attendance fee has, nevertheless, been provided for by some legal act and the amount and procedure for payment thereof must be communicated in an auction announcement. Thus, in the interest of legal clarity in the present case sub-section 7(2) of the PPNP must be examined, too.

II.

19. § 3(1) of the Constitution establishes the principle that the powers of the state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. Pursuant to § 87(6) of the Constitution the Government of the Republic may issue regulations on the basis of and for the implementation of law, that is on the basis of an authority-delegating norm established in an Act. Pursuant to § 90(1) of the Administrative Procedure Act a regulation may be issued only upon existence of a provision delegating authority which is set out in an Act, and in accordance with the limits, concept and objective of the provision delegating authority.

20. § 5 of the Privatisation of Non-Residential Premises Act provides for the organisation of privatisation. Pursuant to the Privatisation of Non-Residential Premises Act (§ 5(6)) the privatisation of non-residential premises, the procedure for the determination and amendment of starting price shall be established by the Government of the Republic. Thus, § 5(6) of the PNPA contains an authorisation to the Government of the Republic to establish the procedure for the privatisation of non-residential premises.

It can be derived from section 6, sub-section 7(2) and sub-section 9(2) of the “Procedure for privatisation of non-residential premises” that auctions organised by obligated subjects of privatisation for the privatisation of non-residential premises are not for free, proceeding from which the participants have an obligation to cover the expenses of organising an auction.

21. Pursuant to the Constitution the executive is authorised to issue only regulations that specify an Act, that is intra legem regulations. To enable the executive to issue an act of general application an Act must set out a norm delegating pertinent authority, specifying the administrative agency competent to issue an act as well as the clear objective, content and limits of the authority delegated to the agency (judgment of the Constitutional Review Chamber of the Supreme Court of 20 December 1996 in case No 3-4-1-3-96 – RT I 1997, 4, 28, part III of the judgment). Upon issuing a regulation it is of special importance to adhere to the norm delegating authority when a prior fulfilment of a financial obligation is established as a precondition for the exercise of some rights (judgment of the general assembly of the Supreme Court of 22 December 2000 in case No 3-4-1-10-2000 – RT III 2001, 1, 1, § 30).

22. Although by § 5(6) of the PNPA the legislator has authorised the Government of the Republic to establish the procedure for the privatisation of non-residential premises, this authorisation does not include the right to impose an auction attendance fee. As far as the regulation established by section 6, sub-section

7(2) and sub-section 9(2) is concerned the “Procedure for privatisation of non-residential premises” amounts to a *praeter legem* regulation and has been issued to regulate relations not prescribed by the Privatisation of Non-Residential Premises Act. This amounts to an independent regulation, upon the imposition of which the Government of the Republic has exceeded the limits of the authority-delegating norm established in § 5(6) of the PNPA.

The Privatisation of Non-Residential Premises Act, providing in its § 5(1) that an obligated subject of privatisation shall organise the privatisation of non-residential premises by a public auction, the announcement of which shall set out, *inter alia*, the information about the guarantees required for participation therein, does not mean that the obligated subjects of privatisation have unlimited freedom upon creating guarantees necessary for privatisation. The obligated subjects of privatisation are restricted by the norm delegating authority in § 5(6) of the PNPA.

23. That is why section 6 of the PPNP, to the extent that it entitles an obligated subject to determine an auction attendance fee, sub-section 7(2) establishing that a mandatory requirement of an announcement of a public auction is that it contain information about the amount and procedure for payment of an auction attendance fee, and sub-section 9(2), to the extent that it requires that for participation in an auction a copy of a payment document of the auction attendance fee must be submitted to the auction committee, are in conflict with § 3(1) and § 87(6) of the Constitution.

24. § 113 of the Constitution establishes that state taxes, duties, fees, fines and compulsory insurance payments shall be provided by law. In this connection the general assembly of the Supreme Court, in its judgment of 22 December 2000 in case No 3-4-1-10-2000 (RT III 2001, 1, 1, § 20) has found the following: “The wording of Article 113 includes state taxes, duties, fees, fines and compulsory insurance payments. In fact, the sphere of protection of this provision is much wider. The provision attempts to enumerate, as precisely as possible, all financial obligations of public law. The Supreme Court *en banc* is of the opinion that all financial obligations of public law, irrespective of how these are named in different pieces of legislation are within the sphere of protection of Article 113. Article 113 is aimed at achieving a situation where all financial obligations of public law are imposed by legislation adopted only by the Riigikogu in the form of parliamentary Acts.”

25. The auction attendance fee related to covering of the expenses of holding of an auction, set out in section 6 and sub-section 9(2) of the “Procedure for privatisation of non-residential premises”, is one of the financial obligations not directly enumerated in § 113 of the Constitution.

As proceeding from the reservation established in § 113 of the Constitution a fee for the performance of duties in public law may be accepted only when it has been provided for by an Act, a financial obligation in public law – in the present case the auction attendance fee – may not be established by legislation ranking lower than Acts.

Although the Constitutional Review Chamber of the Supreme Court has found the following: “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, for example by establishing the minimum and maximum fees or the principles of calculating the amounts of fee by law” (judgment of the Constitutional Review Chamber of the Supreme Court of 19 December 2003 in case No 3-4-1-22-03 – RT III 2004, 2, 14, § 19), the present case does not amount to a similar situation. The Privatisation of Non-Residential Premises Act provides for, in § 5(6), by way of a single authorisation, the right to establish the procedure for privatisation of non-residential premises, for determination and amendment of starting price and does not provide for the right to establish concrete upper and lower limits of attendance fees.

If the legislator considers it necessary that the participants in auctions cover the expenses related to organisation of privatisation of non-residential premises, this financial obligation in public law should be set out in the Privatisation of Non-Residential Premises Act.

26. Thus, section 6 of the PPNP to the extent that it entitles the obligated subjects to determine an auction attendance fee, sub-section 7(2) establishing that a mandatory requirement of an announcement of a public auction is that it contain information about the amount and procedure for payment of an auction attendance fee, and sub-section 9(2), to the extent that it requires that for participation in an auction a copy of a payment document of the auction attendance fee must be submitted to the auction committee, are also in conflict with § 113 of the Constitution.

27. The Constitutional Review Chamber of the Supreme Court satisfies the petition of the Tallinn Administrative Court in part, and declares section 6 of the “Procedure for privatisation of non-residential premises”, to the extent that it establishes the obligation to pay an attendance fee, sub-section 7(2) to the extent that it establishes that a mandatory requirement of an announcement of a public auction is that it contain information about the amount and procedure for payment of an auction attendance fee, and sub-section 9(2), to the extent that it requires that for participation in an auction a copy of a payment document of the auction attendance fee must be submitted to the auction committee, unconstitutional and invalid.

Märt Rask, Ants Kull, Julia Laffranque, Priit Pikamäe, Jüri Pöld

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