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JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

No. of the case	3-4-1-5-05
Date of judgment	13 June 2005
Composition of court	Chairman Märt Rask, members Tõnu Anton, Eerik Kergandberg, Lea Kivi, Ants Kull
Court Case	Petition of the Chancellor of Justice requesting that section 1 of Regulation No 17 of Kuressaare City Council of 27 May 2004 be declared invalid
Hearing	Written proceeding
DECISION	To declare section 1 of Kuressaare City Council Regulation invalid.

FACTS AND COURSE OF PROCEEDING

1. On 27 May 2004 Kuressaare City Council passed Regulation No 17 entitled "Determination of areas where advertising of alcoholic beverages is prohibited" (hereinafter "Regulation"). On 4 October 2004 the Chancellor of Justice made a proposal to Kuressaare City Council that it bring the Regulation into conformity with the Constitution and Advertising Act. Kuressaare City Council discussed the proposal of the Chancellor of Justice on 28 October 2004 and decided not to amend the Regulation. The Chancellor of Justice had a recourse to the Supreme Court for the declaration of invalidity of section 1 of the Regulation.

OPINIONS OF THE CHANCELLOR OF JUSTICE AND THE PARTICIPANTS IN THE PROCEEDING

2. In his petition the Chancellor of Justice is of the opinion that in the formal sense section 1 of the Regulation is in conflict with the first sentence of § 11 and with § 154(1) of the Constitution, to the extent that it prohibits advertising of low-alcohol beverages in proximity to objects referred to in § 13(1) 3) and 4) of Advertising Act (hereinafter "AdvA").

Pursuant to clauses 2) - 4) of § 13(1) of Advertising Act the advertising of low-alcohol beverages is prohibited in or on a building housing a nursery school, school, other educational institution, children's or youth centre or in close proximity thereto; in a stadium, permanent sports arena or gymnasium, or in or on any other building or structure intended for sports, and also in, on, or on the territory of a hospital or other health care facility. Thus, in essence, Kuressaare City Council has passed a *praeter legem* regulation to the extent that it specifies the proximity of a building intended for sports and of a health care facility to be areas subject to alcohol restrictions. Freedom of enterprise and freedom of expression may be restricted only in the cases and pursuant to procedure stipulated by Acts. § 13(4) of Advertising Act, pursuant to which local

governments have the right to determine the areas which are deemed to be in proximity to the structures specified in clauses (1) 2)-4) of this section, constitutes an error of reference to the extent that it refers to clauses 3) and 4) of section (1) of § 13 of AdvA.

disproportionately restricts the freedom of enterprise, established in § 31 of the Constitution, and the right to freedom of expression, arising from § 45(1) of the Constitution, and for that reason section 1 of the Regulation is substantially unconstitutional due to conflict with the principle of proportionality included in § 11 of the Constitution.

In or on the buildings enumerated in clauses 2) - 4) of § 13(1) of AdvA and in proximity to the buildings referred to in clause 2) only, the legislator has regarded the protection of health as a legitimate aim of the restrictions. Thus, the Regulation exceeds the limits of the legitimate aim, to the extent that advertising of low-alcohol beverages is prohibited also in proximity to buildings referred to in clauses 3) and 4) of § 13(1) of AdvA. Neither is the measure established by the local council necessary for the achievement of the more specific aim of the restrictions, - to guarantee that there will be no "reciprocally approving relationship of value judgments" between low-alcohol beverages and the buildings referred to in clauses 2) to 4) of § 13(1) of AdvA. The aim is achievable by a measure less cumbersome on persons, for example by prohibition of advertising of low-alcohol beverages on a smaller area than that of the whole territory of the city of Kuressaare. Neither is the chosen measure proportional in the narrow sense. The "proximity", referred to in clause 2) of § 13(2) of AdvA, can be spoken of when an advertisement of a low-alcohol beverage can be seen and is recognizable from a school window or when exiting school door. If a restriction is imposed on a wider area, the restriction begins to serve other aims, that is - it exceeds the framework of the established aim and has excessive impact. Although a local government is entitled to define the concept of "proximity", there is no doubt that the whole city of Kuressaare is not in "proximity" to the buildings referred to in clause 2) of § 13(1) of AdvA.

3. Kuressaare City Council does not concur with the opinion of the Chancellor of Justice and requests that the petition of the Chancellor of Justice be dismissed.

The regulation has been issued on the basis and within the limits of provision delegating authority, included in § 13(4) of AdvA, Kuressaare City Council has not added supplementary regulation into the norm-creating part. The explanation of the Chancellor of Justice concerning the error of reference in § 13(4) of AdvA can not be considered equal to or amending the wording of a valid Act.

The aim of the restriction is health protection for the purposes of Public Health Act. If, upon determining the alcohol prohibition zone, we confined ourselves to drawing a notional circle of certain radius around the buildings referred to in clauses 2) to 4) of § 13(1) of AdvA, the applicable norm would become but a banner and bearing in mind the smallness of the urban habitat it would lose its content and purpose, as well as the pursued aim upon regulating relationships. This view is supported by the Public Health Act, pursuant to which the protection of health is achieved, inter alia, through the system of local government obligations and local measures. Among the duties of a local government the Public Health Act refers also to organisation of activities aimed at health promotion among the population in the territory of the local government. The discretionary resolution of the local council is purposeful, taking into account the aim of protection of health, established in § 28 of the Constitution, and the need to achieve the efficiency of the restriction in local circumstances. The extensive public interest in the decrease of the abuse of alcohol substantially outweighs the private interest of private undertakings to exhibit advertisements of low-alcohol beverages. As long as the basic principles of national alcohol policy have not been elaborated and the content and purpose of the authority delegated by § 13(4) of AdvA has not been specified, Kuressaare City Council shall persevere with the opinions expressed in its Regulation.

4. The Minister of Justice is of the opinion that section 1 of the Regulation is in conflict with subsections (1) 2) - 4) and section (4) of § 13 of AdvA, and with § 154(1) of the Constitution.

Upon issuing the Regulation Kuressaare City Council has observed the formal and procedural requirements,

but it has exceeded the limits of the provision delegating authority. The provision delegating authority established in § 13(4) of AdvA should be interpreted restrictively. A local government is only entitled to define the concept of proximity to a building referred to in § 13(1)2) of AdvA - a building housing a nursery school, school, other educational institution, children's or youth centre. The error of the legislator upon wording a provision delegating authority can not justify the exceeding of local government authority. Pursuant to § 154(1) of the Constitution a local government, when resolving and managing local issues, shall operate pursuant to law. This means, among other things, that upon implementing a provision delegating authority a local government must proceed from the extent and content of the provision. As Kuressaare City Council has exceeded its authority, section 1 of the Regulation is unconstitutional in the formal sense.

In the substantial sense the imposition of prohibition on advertising infringes a person's right to freedom of enterprise and freedom of expression. It is obvious that upon determining an advertising prohibition zone through different objects the aim of the legislator was to guarantee the persons' right to the protection of health. As a rule, imposition of a prohibition on advertising promotes the guarantee of health protection, and thus the measure is suitable for achieving the aim. Yet, the measure is not necessary. Kuressaare City Council had a possibility to achieve the pursued aim also in a manner less cumbersome on undertakings, by establishing only the buildings enumerated in clauses 2) - 4) of § 13(1), and proximity to buildings referred to in clause 2) of the same section of AdvA as areas wherein advertising is prohibited. It appears from the map of Kuressaare city that the buildings and structures enumerated in clauses 2) - 4) of § 13(4) of AdvA are too dispersed to allow to specify the whole territory of the city as a zone wherein advertising is prohibited. As for the proportionality of the measure in the narrow sense the Minister of Justice concurs with the reasoning of the Chancellor of Justice.

PERTINENT PROVISIONS

5. Section 1 of Regulation No 17 of Kuressaare City Council of 27 May 2004 (KO 2004, 162, 1523) reads as follows:

„1. To specify the whole territory of Kuressaare city as an area in close proximity to buildings referred to in clauses 2) - 4) of § 13(1) of "Advertising Act".

§ 13 of Advertising Act (RT I 1997, 52, 835; ... RT I 2005, 2, 4) provides as follows:

"(1) The advertising of low-alcohol beverages is prohibited:

1) on television or radio between the hours of 7.00 and 20.00;

2) in or on a building housing a nursery school, school, other educational institution, children's or youth centre or in close proximity thereto;

3) in a stadium, permanent sports arena or gymnasium, or in or on any other building or structure intended for sports;

4) in, on, or on the territory of a hospital or other health care facility;

5) in printed publications which are directed principally at children or young people, or on printed matter containing information published principally for children or young people;

6) in cinemas, museums, theatres and concert halls, with the exception of places within such sites where alcohol is sold.

/.../

(4) Local governments have the right to determine the areas which are deemed to be in proximity to the structures specified in clauses (1) 2)-4) of this section."

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

6. In his petition the Chancellor of Justice has contested the conformity of Kuressaare City Government's regulation with the Constitution in formal as well as substantial sense. As formal conformity with the Constitution of any legislation of general application, infringing upon fundamental rights, is the first prerequisite of the constitutionality of the legislation, the Chamber shall firstly examine the issue of formal conformity of the Regulation with the Constitution (I). For that purpose the Chamber shall address the principle of legality in the context of delegated law-making and shall consider the extent of the provision delegating authority included in § 13(4) of AdvA, and shall form an opinion on whether Kuressaare City Council has, upon issuing the Regulation, adhered to the rules of delegated law-making and defining of blank concepts. Thereafter the Chamber shall assess the necessity to review the substantial constitutionality of the contested regulation (II).

I.

7. The contested Regulation of Kuressaare City Council is a legislation of general application of a local government, restricting the freedom of enterprise established in § 31 of the Constitution and the commercial freedom of expression, covered by the fundamental right to freedom of expression included in § 45 of the Constitution. Legislation of general application restricting fundamental rights is constitutional, if it is in conformity with the Constitution both formally and in the substantial sense.

8. Formal constitutionality means that legislation of general application, restricting fundamental rights, must be in conformity with the requirements of competence, procedure and form, as well as with the principles of determinateness and 'subject to reservation by law'. Pursuant to requirements of competence, procedure and form an act must be issued by a competent body, observing all procedural and formal requirements. These conditions are fulfilled in the present case - Kuressaare City Council is a legislative body of a local government; the Regulation has been issued in conformity with procedural requirements arising from Local Government Organisation Act and it has been published in the Riigi Teataja (State Gazette). Also, the Regulation meets the requirement of determinateness. The regulation is worded with sufficient clarity and it is clear. Yet, the Chamber is of the opinion that the conformity of the Regulation to the principle of 'subject to reservation by law' is problematic.

9. It is the first sentence of § 3(1) of the Constitution that establishes the general principle of reservation by law, pursuant to which the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. Pursuant to this principle an authorisation by the legislator is required for the restriction of fundamental rights by a body ranking lower than the legislator. Pursuant to the principle of legality, specifying the general requirement that reservations be made by law, a regulation issued on the basis of authorisation must be in conformity with the Act delegating the authority. Conformity to the Act means the requirement that the delegated authority be not exceeded and issues not covered by authorisation be not regulated. Thus, it has to be clarified whether Kuressaare City Council, when exercising its right to issue regulations, has remained within the competence determined by the provision delegating authority included in § 13(4) of AdvA.

10. § 13(4) of Advertising Act authorises a local government to determine the areas which are deemed to be in proximity to the structures specified in clauses (1) 2)-4) of this section. Pursuant to § 13(1)2) of the same Act the advertising of low-alcohol beverages is prohibited in or on a building housing a nursery school, school, other educational institution, children's or youth centre or in close proximity thereto. On the other hand, clauses 3) and 4) of § 13(1) of Advertising Act establish that advertising of alcoholic beverages in a stadium, permanent sports arena or gymnasium, or in or on any other building or structure intended for sports, or in, on, or on the territory of a hospital or other health care facility, and unlike § 13(1)2) do not establish prohibition of alcohol in the close proximity to these structures. Thus, for the adjudication of this dispute it shall first be necessary to answer the question of whether the Advertising Act authorises a local government council to determine the proximity to a nursery school, school, other educational institution,

children's or youth centre only, or whether the provision delegating authority established in § 13(4) of AdvA enables to extend the area in which advertising of low-alcohol beverages is prohibited also to areas in close proximity to a stadium, permanent sports arena or gymnasium or a hospital or other health care facility.

11. Kuressaare City Council has interpreted the provision delegating authority established in § 13(4) of AdvA to the effect that it includes the authorisation to establish a prohibition of advertising of low-alcohol beverages in the areas in proximity to all structures enumerated in clauses 2) - 4) of § 13(1) of AdvA. The Chancellor of Justice, on the other hand, is of the opinion that the provision delegating authority, established by § 13(4) of AdvA, should be interpreted to the effect that a local government is authorised to issue regulations to define the concept of close proximity to the structures referred to in clause 2) of § 13(1) only. Pursuant to the petition of the Chancellor of Justice § 13(4) of AdvA constitutes on error of reference to the extent that it refers to clauses 3) and 4) of § 13(1). That is why, in the opinion of the Chancellor of Justice, Kuressaare City Council, upon applying clauses 3) - 4) of § 13(1) of AdvA, has issued a formally unconstitutional *praeter legem* regulation. The Chamber does not agree with this view of the Chancellor of Justice, and considers it necessary, for the purposes of defining the content of the provision delegating authority, included in contested section 13(4) of AdvA, to find out the will of the legislator upon issuing such norm delegating authority.

12. The initial wording of § 16(5) of the draft Advertising Act (hereinafter "draft") provided that local governments have the right to impose restrictions on advertising beers and low-alcohol beverages in proximity to territories referred to in 4) - 6) of subsection (1) of the section. The initial wording of clauses 4) - 6) of § 16(1) deemed such territories to be stadiums and permanent sports arenas, gymnasiums or any other building or structure intended for sports (clause 4); hospitals or other health care facilities and the territories thereof (clause 5); child-care institutions, schools and other educational institutions and the territories thereof, as well as other places and events visited mainly by persons under 18 years of age (clause 6). At the second reading of the draft in the Riigikogu on 16 April 1996 the representative of the Economic Affairs Committee, which had introduced the draft, pointed out that subsection (5) of section 16 was introduced into the draft so that "a local government could decide how far from schools, health care institutions and structures intended for sports outdoor advertising is allowed" (*M. Pärnoja. Second reading of draft Advertising Act (246 SE). Stenograph of VIII Riigikogu, 16 April 1996 - <http://web.riigikogu.ee/ems/stenograms/1996/04/t96041612.htm> [1]*). Although the initial wording of the Draft Advertising Act and the presently valid wording of the Act differ as to advertising restrictions of low-alcohol beverages, the preparatory documents of the draft do not indicate that the will of the legislator had changed during legislative proceedings. The Chamber is of the opinion that on the basis of the preparatory documents of the draft it is possible to argue that when drafting the provision delegating authority of the Advertising Act the legislator indeed wanted to give local governments the right to decide how far from educational, sports and health care structures the advertising of low-alcohol beverages should be allowed.

13. On the basis of the aforesaid the Chamber is of the opinion that the provision delegating authority, included in § 13(4) of AdvA, which is the basis of the contested Regulation of Kuressaare City Council, entitles a local government to determine areas deemed to be in close proximity to the structures referred to in clauses 2) - 4) of subsection (1) of the same section, to which the prohibition of advertising is extended. First of all, clauses 2) - 4) of the referred subsection establish a prohibition of advertising of low-alcohol beverages in and on the buildings referred to in these clauses. In clause 2) this prohibition zone is extended to areas in close proximity to buildings housing child-care and educational institutions, and in clause 4) to the territory of a health care facility. In the prohibition zone referred to in clauses 2) - 4) the advertising of alcoholic beverages is already anyhow prohibited by law and a local government may not restrict the prohibition. § 13(4) of Advertising Act entitles a local government to extend the prohibition established in (1) 2) - 4) of the same section to areas in proximity of structures referred to in clauses 2) - 4). Thus, concerning child-care and educational institutions, a local government may extend the prohibition on advertising to areas close to these institutions, and concerning health-care institutions to areas close to these, and concerning buildings and structures intended for sports to area close to such buildings or structures.

14. The interpretation to the effect that local governments are entitled to extend the area of prohibition of

advertising of low-alcohol beverages to all areas in the proximity of structures referred to in clauses 2) - 4) of § 13(1), is supported by the fact that otherwise § 13(4) would lose all meaning to the extent that it authorises a local government to determine the areas which are deemed to be in proximity to the structures specified in § 13(1) 2)-4) of AdvA. It is not reasonable to presume that the legislator authorises local governments to determine the areas in proximity to these structures without the prohibition of advertising on low-alcohol beverages being related to it.

15. Nevertheless, the Chamber points out that § 13(4) of AdvA does not give rise to an obligation of a local government to extend the prohibitions established in subsections (1) 2) - 4) of the same section. Neither does a local government, upon imposing the restriction, have to do it to the maximum extent allowed. When acting on the basis of a provision delegating authority, a local government has to decide on whether the extension of prohibitions is justified and what is the meaning of the blank concept of "area in proximity to". When defining the term "area in proximity to" a local government is, no doubt, bound by rules governing defining of blank concepts. If a local government does not adhere to these rules, a regulation of that local government may prove to be unconstitutional irrespective of the view that § 13(4) of AdvA authorises local governments to determine areas close to structures referred to in § 13(1) 2) - 4) of AdvA as areas wherein advertising of low-alcohol beverages is prohibited.

16. 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. Thus, the "area in proximity to" the structures referred to § 13(1)2) - 4) of AdvA, which is deemed to be a zone wherein advertising of low-alcohol beverages is prohibited, must be defined through the purpose of the provision delegating authority, that is, we should endeavour to find out the aim of the legislator upon authorising the local governments to determine the areas deemed to be in proximity to the objects referred to in § 13(1)2) - 4) for the purpose of imposition of restrictions on advertising low-alcohol beverages.

17. Neither the explanatory letter to draft Advertising Act nor the Riigikogu stenographs explain the aim of the restrictions on advertising. The Chancellor of Justice is of the opinion that the general aim of the restrictions established in § 13(1) 2) - 4) of AdvA is the protection of public health, yet he points out that as the legislator has not imposed a total prohibition on advertising of low-alcohol beverages and has instead bound it to certain objects or proximity thereto, the aim of the restrictions established in § 13(1) 2) - 4) of AdvA is to guarantee that there will be no "reciprocally approving relationship of value judgments" between low-alcohol beverages and the buildings referred to in these provisions. The Chamber concurs with the Chancellor of Justice in that the prohibition of advertising of low-alcohol beverages on educational, health-care and sports structures and in proximity thereof must guarantee that it will not be possible to associate the institutions engaged in educating and intended for restoration and fostering (public) health with advocating consumer habits damaging to health.

At the second reading of the draft in the Riigikogu on 13 May 1997 the representative of the Economic Affairs Committee, which had introduced the draft, pointed out the following: "In regard to low-alcohol beverages the out-door advertising of which is not prohibited, we found that depending on a concrete city or other settlement, depending on the location of a school or a hospital, the distance in which the out-door advertising of alcoholic beverages could affect for example children or anybody else may be different. That is why this can not be regulated by law, instead it is reasonable to give this to the competence of a local council or a city or rural municipality government" (*M. Pärnoja. Continuation of the second reading of draft Advertising Act. Stenograph of VIII Riigikogu, 13 May 1997 - <http://web.riigikogu.ee/ems/stenograms/1997/05/t97051314.htm> [2]*). Thus, what needs to be answered is the question of the distance from educational, health-care and sports structures within which the restrictions on advertising low-alcohol beverages still serve the aim of preventing the so called approving relationship.

18. The Chamber does not consider it possible, in principle, to determine a universal minimum distance, in the case of which the association of advertising of low-alcohol beverages with the educational, health-care

and sports structures referred to in § 13(1) 2) - 4) of AdvA would be precluded. A local government has an extensive right of discretion to determine the areas deemed to be in proximity to such structures. Nevertheless, the Chamber considers it necessary to interfere in such cases when it is manifest that upon imposing restrictions on advertising of low-alcohol beverages the limits of the aim set by the legislator - to preclude the so called approving relationship between educational, health-care and sports structures and advertising of low-alcohol beverages - have been violated.

19. The Chamber is of the opinion that when prohibiting the advertising of low-alcohol beverages on the whole administrative territory of the local government unit the local government has manifestly violated the limits of the provision delegating authority, established in § 13(4) of AdvA. The term "area in proximity to" can not be defined in a manner which results in absolute prohibition on advertising low-alcohol beverages in a local government unit. § 13(4) clearly indicates at the will of the legislator not to authorise local governments to prohibit the advertising of low-alcohol beverages on the whole territory of a local government unit. A restriction on freedom of enterprise and freedom of commercial speech as extensive as this one under discussion would have required a clear permission by law. Secondly, it appears from the map of Kuressaare city, included in the materials of the case, that although educational, health-care and sports structures are dispersed over the city of Kuressaare, there are still areas on the administrative territory of the city which can by no means be deemed to be in proximity to these structures.

20. In its explanations Kuressaare City Council points out that if the city council started to draw circles of notional radius around educational, health-care and sports structures, the applicable norm would become but a slogan and that bearing in mind the smallness of Kuressaare city and community the norm would lose its content and purpose and thus also the desired aim of regulating the relationship.

Although the aspiration of Kuressaare City Council is understandable, it does not render nonexistent the fact that on the basis of the afore conclusions the legislator has wanted to restrict the advertising of low-alcohol beverages only to the extent that would preclude association of advocating low-alcohol beverages with educational, health-care and sports structures. Kuressaare City Council can not independently extend the aims set by the legislator or the restrictions of fundamental rights necessary for achieving the aims. Upon exercising the competence arising from the provision delegating authority a local government has to bear in mind the need to balance different interests, values and rights, as well as the proportionality of restrictions imposed on fundamental rights by legislation issued on the basis of delegated authority.

21. The development of health policy, including alcohol policy, is essentially a national task. In its judgment of 20 December 1996 the Constitutional Review Chamber has pointed out that as the national alcohol policy is related to exercise of fundamental rights and freedoms, alcohol policy should be regulated by legislation ranking as parliamentary Acts (*judgment of Constitutional Review Chamber of 20 December 1996, in matter NO 3-4-1-3-96 [3] - RT I 1997, 4, 28, VI*). If the legislator had wanted to leave the development of alcohol policy up to local governments to the extent expressed in the explanations of Kuressaare City Council, the legislator would have authorised local governments to determine the areas where low-alcohol beverages are prohibited. And yet the legislator confined itself to authorising local governments to determine the areas which can be deemed to be in proximity to educational, health-care and sports structures.

22. On the basis of the aforesaid, section 1 of the Regulation of Kuressaare City Council, determining the whole territory of Kuressaare city as the area where advertising of low-alcohol beverages is prohibited, has been issued exceeding the limits of the provision delegating authority and in conflict with the principle of legality included in the first sentence of § 3(1) of the Constitution. The Chamber shall declare section 1 of the Regulation invalid.

II.

23. In his petition the Chancellor of Justice is of the opinion that the prohibition of advertising of low-alcohol beverages, established by the Regulation of Kuressaare City Council, constitutes an unnecessary and disproportionate and thus substantially unconstitutional restriction of freedom of enterprise and freedom of

commercial expression. Pursuant to the petition the unconstitutionality of the regulation lies in the fact that the restriction imposed by the Regulation exceeds the framework of the aim established by the legislator. The Chamber is of the opinion that deviation from the legislator's aim consists first and foremost in violating the provision delegating authority, that is, in violation of the requirement of formal constitutionality.

As the contested Regulation is, for the reasons explained above, in formal conflict with the Constitution, the Chamber does not consider it necessary to assess the substantial constitutionality of the Regulation.

Märt Rask, Tõnu Anton, Eerik Kergandberg, Lea Kivi, Ants Kull

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