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## Constitutional judgment 3-4-1-1-03

### JUDGMENT OF THE CONSTITUTIONAL REVIEW CHAMBER OF THE SUPREME COURT

<b>No. of the case</b>	3-4-1-1-03
<b>Date of decision</b>	17 February 2003
<b>Composition of court</b>	Chairman Uno Lõhmus, members Tõnu Anton, Ants Kull, Villu Kõve, Jüri Pöld
<b>Court case</b>	Review of constitutionality of clause 47 of the "Procedure for privatisation of land by auction", approved by the Government of the Republic Regulation no. 268 of 6 November 1996.
<b>Basis of proceeding</b>	Judgment of the Tallinn Administrative Court of 31 October 2002 in administrative matter no. 3 1287/2002
<b>Court hearing</b>	Written proceeding
<b>Decision</b>	<b>To declare the third sentence of clause 47 of "Procedure for privatisation of land by auction" invalid to the extent that it establishes an obligation that if the results of an auction are not approved it is always necessary to organise a new auction.</b>

### FACTS AND COURSE OF PROCEEDING

1. Public limited company *Palgimets* participated in privatisation of plots of land located in rural municipality of Kõrgessarre by public written auction. The committee who organised the auction did not take into account the tenders submitted by the OÜ *Palgimets*, considering that the documents submitted did not meet the requirements provided for in "Procedure for privatisation of land by auction" (hereinafter "the Procedure"), approved by the Government of the Republic Regulation no. 268 of 6 November 1996. Pursuant to clause 24(1) of the Procedure an application of a legal person shall specify the name of the person authorised to represent the legal person. The applications of the OÜ *Palgimets* lacked information concerning their representative and the applications did not make it clear who had submitted the applications

on behalf of the public limited company and who had signed the documents. A price offer for the privatisation of one plot of land was not signed.

**2.** The OÜ Palgimets filed a protest with Hiiu county governor against the organisation of the auction, in which it requested that the resolution of the auction committee be repealed and the OÜ Palgimets as the person who made the best offer be approved as the winner of the auction. It was pointed out in the protest that pursuant to § 181(1) of the Commercial Code every member of the management board may represent the private limited company in all legal acts. The auction documents were submitted by the director of the public limited company. As the director had authorised nobody else to represent the OÜ Palgimets, it was not possible to indicate in the application the name of the person authorised to represent the legal person in the privatisation process. The information about the legal representative of the OÜ Palgimets appeared in the extract of commercial register concerning the registration of the OÜ Palgimets, which was appended to the application. The Hiiu county governor satisfied the protest on 15 August 2002 by his order no. 430. By his order no. 431 of 15 August 2002 the county governor did not approve the results of the auction and decided to organise a new auction.

**3.** The OÜ Palgimets contested the order of the Hiiu county governor in the Tallinn Administrative Court. The complainant held that there was no such violation during the auction proceeding which would serve as a ground for not approving the results of the auction. The procedure does not exclude new assessment of tenders after the resolution of a protest and approval of results of an auction. An error of an auction committee in a privatisation proceeding may not result in negative consequences for the person who had made the best offer. The requirement of clause 47 of the procedure to organise a new auction, if the results of the auction are not approved, can be implemented - pursuant to the spirit of the Procedure - only when the nature of the error ascertained during the hearing of a protest was such as to render the ascertaining of the best offer impossible.

If the court, nevertheless, shall find that clause 47 of the Procedure does not allow for discretion, the provision should not be applied because of its conflict with § 11 of the Constitution. The non-approval of the results of an auction, which is imperative when a protest is satisfied, is not always helpful in achieving the aim of ensuring effective and speedy land reform. In the given case the offers submitted, including the offer of the OÜ Palgimets, should have been evaluated anew, and the privatisation procedure should have been completed without organising a new auction. In this way it could have been possible to guarantee the conformity with the aims and principles of ownership reform, land reform and administrative procedure. Clause 47 of the Procedure pursuant to which, if the Procedure is formally violated or if a protest is satisfied, a new auction has to be organised, is unsuitable for achieving these aims.

**4.** In its judgment of 31 October 2002 in administrative matter no. 3-1287/2002 the Tallinn Administrative Court repealed the order of the Hiiu county governor and declared unconstitutional and did not apply clause 47 of the Procedure. In addition the court issued a precept to the Hiiu county governor for new assessment of the offers made in privatisation procedure and for making a new decision.

## **JUSTIFICATIONS OF THE COURT AND PARTICIPANTS**

### **Justifications of the administrative court**

**5.** The Tallinn Administrative Court is of the opinion that clause 47 of the Procedure contains an imperative norm, which allows those, who apply the norm, no discretion upon deciding whether to approve or not to approve the results of an auction. In this regard the norm infringes the complainant's right to purposeful and efficient administrative procedure upon privatisation of land. Development of enterprise, using the purposeful and efficient administrative procedure guaranteed by law, is a way of free self-realisation of persons and is guaranteed by fundamental right to free self-realisation, organisation and procedure (§§ 13, 14 and 19 of the Constitution). Clause 47 of the Procedure may also infringe the right to engage in enterprise, protected by § 31 of the Constitution.

The principle, established in clause 47 of the Procedure, that a formal violation of the auction procedure or satisfaction of a protest automatically result in a new auction, is inadvisable, as this measure is not conducive to achieving the objectives established in § 5(2) of the Administrative Procedure Act (hereinafter "the APA"). That is why clause 7 of the Procedure is disproportional and in conflict with § 11 of the Constitution to the extent that it does not allow, upon privatisation, to choose legal consequences in the case the procedure of auction has been formally violated or if a protest has been satisfied for formal reasons. The organiser of an auction has no possibility to consider whether to approve the results of the auction or not to approve the results and to organise a new auction.

### **Justifications of participants in the proceeding**

**6.** The representative of the petitioner agrees with the reasoning of the Tallinn Administrative Court, pursuant to which clause 47 of the Procedure is in conflict with the Constitution. Furthermore, he is of the opinion, that clause 47 of the Procedure is in conflict with the principle of clarity of law, proceeding from § 13 of the Constitution – i.e. in the case clause 47 of the Procedure is construed to give rise to the right of discretion of the organiser of privatisation upon approval or non-approval of the results of an auction.

**7.** The Hiiu county governor is of the opinion that clause 47 of the Procedure is an imperative norm, which nevertheless does not restrict the freedom of enterprise. A person who has decided to participate in an auction organised for the privatisation of land must reckon with the possibility that the results of the first auction may not be approved. If the organiser of an auction has made a mistake in implementing a rule or considers that an offer does not meet the requirements, it is fair to conduct the whole procedure from the beginning. In this way the rights and freedoms of all participants are guaranteed. It is impossible to provide a list of all violations which are formal and in the case of which the results of an auction could still be approved. If an administrative authority were empowered to evaluate violations, it could result in complaints of subjectivity and possible procedural abuses. Clause 47 of the Procedure is not in conflict with the Constitution.

**8.** The Chancellor of Justice points out that § 14 of the Constitution gives rise to a general right to organisation and procedure. Upon privatisation of land by auction a procedural norm must ensure efficient privatisation of land in conformity with the condition provided for in § 22(3) of the Land Reform Act (hereinafter "the LRA") - at a public or closed auction, a contract of sale shall be entered into with the person who agrees with the established conditions of sale and offers the highest purchase price. It is not necessary not to approve the results of an auction and to organise a new auction if it is possible to eliminate the violation within the proceeding and it is still possible, at the same auction, after the satisfaction of a protest, to re-evaluate the offers and to ascertain the person who agrees with the sale conditions and offers the highest purchase price. The Chancellor of Justice agrees with the opinion of the Tallinn Administrative Court that the imperative requirement of clause 47 of the Procedure to organise a new auction is unsuitable. Such a measure violates the requirement arising from § 14 of the Constitution that a procedure for the right of privatisation of land must be in conformity with the substantive content of the right.

Clause 47 of the Procedure is in conflict with §§ 11 and 14 of the Constitution, because it creates a disproportional obstacle of procedural character to the realisation of the right to privatise land. The contested provision should be declared invalid to the extent that it does not allow the organiser of privatisation to exercise discretion.

**9.** The Minister of Justice is of the opinion that in addition to efficient and purposeful administrative procedure a person has also the right to lawful and fair result of procedure, which can also be derived from §§ 13 and 14 of the Constitution. The requirement that an administrative procedure must be performed lawfully is not an absolute one. The result of a procedure should not be declared invalid merely because of a violation of a procedural norm, if the violation did not affect the decision of the matter on its merits and there is no other prevalent interest for making such a negative decision. An opposite view would be in conflict with the principle of procedural economy, established in § 58 of the Constitution.

The Minister of Justice thinks that the suitability of a restriction must be assessed bearing in mind the objective of establishing the requirement that a procedure be performed lawfully. The objective is to guarantee a person's right to a lawful result of a procedure. Strict sanctions for the violation of procedural norms is a measure suitable for the achievement of the objective, as this helps to avoid possible doubts as to how a violation of a procedural norm affects the substantial lawfulness of a decision. Yet the measure established in clause 47 of the Procedure is not necessary. The objective of guaranteeing the correctness of the result of a procedure is achievable by a measure less burdensome on the persons participating in the procedure. The right to assess the possible results of a violation can be given to those who implement the right.

Clause 47 of the Procedure should be declared to be in conflict with § 11 of the Constitution to the extent that it does not allow those who implement the Regulation to exercise discretion upon approving the results of an auction.

### **The legislation not applied and contested**

**10.** Clause 47 of the Procedure for privatisation of land by auction (RT I 1996, 78, 1385; 2001, 49, 273) reads as follows:

"47. The results of an auction shall not be approved if the procedure for auction has been violated or if the organiser of privatisation, on the basis of clause 46 of this procedure, decides to satisfy a protest. The organiser of privatisation shall justify the decision not to approve the results of an auction in writing. If the results of an auction are not approved, a new auction shall be organised."

### **OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER**

#### **I.**

**11.** The administrative court declared clause 47 of the Procedure unconstitutional in its entirety. The Constitutional Review Chamber is of the opinion that the third sentence of clause 47 of the Procedure is relevant to the adjudication of the administrative matter. The fact that the county governor did not approve the results of the auction is not contested in the administrative matter (first sentence of clause 47). Neither is the requirement that the organiser of privatisation shall justify the non-approval of the results of an auction in writing (second sentence of clause 47) contested. What is contested is the decision of the county governor to organise a new auction. The decision of the county governor to organise a new auction was based on the third sentence of clause 47 of the Procedure, pursuant to which an inevitable consequence of a decision not to approve the results of an auction is the organisation of a new auction. That is why the Supreme Court is of the opinion that the third sentence of clause 47 of the Procedure is of decisive importance in the administrative matter and the Chamber considers it a relevant provision.

**12.** The administrative court found that clause 47 of the Procedure violated the fundamental rights to free self-realisation, organisation and procedure, established in §§ 13, 14 and 19 of the Constitution. Bearing in mind that in the administrative matter the third sentence of clause 47 of the Procedure is of decisive importance, the Supreme Court shall first check the conformity thereof with § 14 of the Constitution.

Pursuant to § 14 of the Constitution the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments. This means, among other things, that public authority shall establish rules of administrative procedure. Although § 14 of the Constitution has been worded objectively, it also gives rise to subjective rights, including the general fundamental right to organisation and procedure (*see judgment of the Supreme Court en banc of 28 October 2002 in case no. 3-4-1-5-02, RT III 2002, 28, 308, paragraph 30*).

**13.** The Constitutional Review Chamber admits that the Land Reform Act and the Procedure establish procedural norms for privatisation of land by auction. But the rules of administrative procedure must meet

certain requirements. The text of the Constitution does not enumerate such requirements and the meaning to these requirements must be furnished with the help of general principles of law, especially those of administrative law.

## II.

**14.** Pursuant to § 10 of the Constitution the principles of a state based on democracy and rule of law are valid in Estonia. This means that in Estonia are valid those general principles of law that are recognised in the European legal space (*Judgment of the Constitutional Review Chamber of the Supreme Court of 30 September 1994 in case no. III-4/A-5/95 - RT I 1994, 66, 1159*). Also, in the field of administrative law in the European legal space the general principles of law are accepted. Principles of administrative law constitute a generalisation of rules valid in different branches of administrative law, which are expressed in different sources of law in different countries (e.g. in codified codes of administrative procedure, specific laws, judicial practice).

In the European legal space the following principles are recognised as principles of administrative law: legal certainty, legitimate expectation, proportionality, non-discrimination, right to be heard in administrative procedure, right to procedure within a reasonable time, effectiveness and efficiency. More and more often several principles of administrative law - central principles of good administration - have found recognition as constitutional principles. The principles of good administration have been inserted in black and white into several constitutions. For example, pursuant to § 21(2) of the Constitution of Finland provisions concerning the publicity of proceedings, the right to be heard, the right to receive a reasoned decision and the right of appeal, as well as other guarantees of a fair trial and good governance shall be laid down by an Act. § 31(2) of the Spanish Constitution requires efficient and economical use of public resources.

**15.** Article 41 of one of the most recent international documents on fundamental rights - the European Union Charter of Fundamental Rights - directly refers to the right to good administration. The Charter puts an obligation on the European Union institutions and bodies to handle the affairs of persons impartially, fairly and within reasonable time. Pursuant to the Charter the right to good administration includes, inter alia, the right to have access to a person's file, right to be heard, the obligation of the administration to give reasons for its decisions and the right to compensation for damage caused by an administrative agency.

The Charter of Fundamental Rights of the European Union is not yet legally binding on Estonia, but - as it is also expressed in the preamble of the Charter - it is based, inter alia, on the constitutional tradition and the principles of democracy and the rule of law, common to the member states of the European Union. The principles of democracy and the rule of law, as well as other general principles and values of law valid in the European legal space, are also valid in Estonia.

**16.** The analysis of the principles recognised in the European legal space leads to the conclusion that § 14 of the Constitution gives rise to a person's right to good administration, which is one of the fundamental rights.

## III.

**17.** In Estonia the principles of good administration have been accepted both in administration and in judicial practice. The principles of administration have also been established in the Code of Administrative Court Procedure, which entered into force on 1 January 2000, in the Administrative Procedure Act, which entered into force on 1 January 2002 and in special laws. Thus, for example, § 5(2) of the Administrative Procedure Act establishes that administrative procedure shall be purposeful, efficient and straightforward and conducted without undue delay, avoiding superfluous costs and inconveniences to persons. Pursuant to § 3(2) of the same Act the principle of proportionality is implemented in administrative procedure - administrative acts and measures shall be appropriate, necessary and proportionate to the stated objectives.

**18.** Pursuant to § 112(2) of the Administrative Procedure Act this Act applies to administrative procedure regulated by a specific Act if so prescribed by the specific Act. The Administrative Procedure Act

Amendment and Implementation Act supplemented more than one hundred specific Acts containing administrative procedure provisions with a provision pursuant to which the Administrative Procedure Act shall apply to the administrative procedure regulated in those Acts, taking into account the peculiarities of pertinent Acts. No such amendment was made to the Land Reform Act. Irrespective of this the administrative procedure during land reform must be in conformity with the principles of administrative law, which - inter alia - proceed from the right to good administration established in § 14 of the Constitution and from general principles of law and constitutional principles.

#### IV.

**19.** Pursuant to § 2 of the Land Reform Act the objective of land reform is to transform relations based on state ownership of land into relations primarily based on private ownership of land. The Land Reform Act provides for privatisation of land as one means of achieving the objective. Privatisation of land is an administrative procedure, during which land is transferred for or without charge into the ownership of persons in private law.

Pursuant to § 22(3) of the Land Reform Act, on the basis of the results of a public auction, a contract of sale shall be entered into with the person who agrees with the established conditions of sale and offers the highest purchase price. § 23(6) of the same Act delegates the right to establish the procedure for privatisation of land to the Government of the Republic. The Government of the Republic has, by Regulation no. 268 of 6 November 1996, approved "The procedure for privatisation of land by auction". Upon privatisation of land by auction, the winner of the auction is the participant in the auction who offered the highest purchase price (clause 43 of the Procedure).

**20.** The efficiency of privatisation of land as a procedure can be evaluated from several aspects. For the participants in the procedure the efficiency of privatisation of land by auction means that a concrete plot of land which is the object of auction is privatised to the person who offered the highest purchase price at the auction organised for the privatisation of that plot of land. Whereas the procedure must be conducted within reasonable time, avoiding superfluous costs and inconveniences to persons.

#### V.

**21.** Pursuant to clause 47 of the Procedure the results of an auction shall not be approved if the procedure for auction has been violated or if the organiser of privatisation satisfies a protest submitted concerning the privatisation. Pursuant to the third sentence of clause 47, if the results of an auction are not approved, a new auction shall be organised.

The objective of this regulatory framework is to ensure the objectivity and clarity of procedure. The Chamber is of the opinion that this objective is acceptable from the point of view of good administration.

**22.** Viewing the efficiency of privatisation of land by auction as a procedure from the point of view of the participants in the procedure it must be admitted that the provisions of clause 47 of the Procedure may result in total inefficiency of the procedure. Namely, the third sentence of clause 47 of the Procedure requires that if a protest is satisfied a new auction must be organised irrespective of whether it is necessary bearing in mind the nature of the protest or the objective of the privatisation procedure. If the organiser of privatisation is of the opinion that an act of the auction committee upon excluding a person from the auction was not lawful and that the documents submitted by a person wishing to participate in the auction met the requirements or contained minor and easily removable deficiencies, the non-approval of the results of the auction may be justified, but not the organisation of a new auction. If it is possible, on the basis of existing documents and offers, to ascertain correctly the participant who has offered the highest purchase price, who agrees with the established conditions of sale, it is not necessary to organise a new auction. Clause 47 of the Procedure does not give the organiser of privatisation this discretion. For those who participate in the procedure the organisation of a new auction means the conclusion of the initial procedure without a result.

## VI.

**23.** On the basis of the aforesaid the Chamber is of the opinion that the third sentence of clause 47 of the Procedure disproportionately restricts the right to good administration proceeding from § 14 of the Constitution. The requirement that it is always necessary to organise a new auction if the results of an auction are not approved, is not indispensable for the achievement of the objectives of privatisation of land by auction. The objective of privatisation of land by auction can be achieved by measures less burdensome on the participants of the procedure. Thus, it is not in conformity with the principle of proportionality that the organiser of privatisation has no discretion to decide on the necessity of organising a new auction.

The Supreme Court declares the third sentence of clause 47 of the Procedure unconstitutional and invalid to the extent that it establishes an obligation that if the results of an auction are not approved it is always necessary to organise a new auction.

**24.** The Chamber points out that although pursuant to the Land Reform Act Amendment Act, effective as of 1 January 2003, free land can no longer be privatised by written public auction, this restriction is not valid in a situation where the continuation of a procedure is necessary for the execution of a court judgment.

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