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## Constitutional judgment 3-4-1-4-02

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

<b>No. of the case</b>	3-4-1-4-02
<b>Date of judgment</b>	10 April 2002
<b>Composition of chamber</b>	Chairman Uno Lõhmus, members Tõnu Anton, Lea Kivi, Ants Kull, Jüri Pöld
<b>Court case</b>	Petition of the Tallinn Administrative Court to declare clause 4.6 of "Rules for trading in markets and streets" approved by the Tallinn City Council Regulation no. 43 of 10.12.1998, the Tallinn Centre district Government order no. 386 of 31.03.1995 and the elder of the Tallinn Centre district order no. 123 of 28.03.2000 invalid because of conflict thereof with §§ 3(1), 31, 113 and 154(1) of the Constitution.
<b>Date of court session</b>	27 March 2002
<b>Persons participating at session</b>	Representative of the Chancellor of Justice Aare Reenumägi and representative of the Minister of Justice Jaanus Ots
<b>Resolution</b>	<p><b>1. To declare that the Tallinn Centre district Government order no. 386 of 31 March 1995 "Rates of charge for sales premises in the open street on the territory of Centre district" was unconstitutional.</b></p> <p><b>2. To declare the elder of the Tallinn Centre district order no. 123 of 28 March 2000 "Rates of charge for sales premises in the open street on the territory of Centre district" invalid.</b></p> <p><b>3. To declare clause 4.6 of "Rules for trading in markets and streets" approved by the Tallinn City Council Regulation no. 43 of 10 December 1998 invalid.</b></p>

## **FACTS AND COURSE OF PROCEEDINGS**

**1.** By orders no. 42 of 14 February 2000 and no. 226 of 15 March 2001 the elder of the Tallinn Centre district issued trading licences to the AS Liaania for trading in the open street and established the rates of charge for sales premises. The following were referred to as the legal basis for passing these orders: resolution of the Tallinn City Council of 27 May 1993 "Principal functions of local government in city districts" and the Tallinn City Council Regulation no. 43 of 10 December 1998 "Approval of rules for trading in markets and streets". In addition, the Government of the Tallinn Centre district order no. 386 of 31 March 1995 "Rates of charge for sales premises in the open street on the territory of Centre district" was referred to as the legal basis for the order of 14 February 2000; whereas orders no. 123 and 129 of the elder of the Tallinn Centre district of 28 March 2000 were referred to as the legal basis for the order of 15 March 2001. By the elder of the Tallinn Centre district order no. 129 of 28 March 2000 the rates of charges for trading in the open street on the territory of the Tallinn Centre district were established, including in regard to the AS Liaania. The following were referred to as the legal basis for this order: the referred legislation of the Tallinn City Council and the elder of the Tallinn Centre district order no. 123 of 28 March 2000 "Rates of charge for sales premises in the open street on the territory of Centre district".

**2.** The AS Liaania submitted an action with Tallinn Administrative Court, requesting that the court ascertain partial unlawfulness of the orders of the elder of the Tallinn Centre district by which trading licence was issued and rates of charge were established for sales premises, and requesting that the damage caused by unlawful administrative legislation be compensated for. The complainant argued that the referred orders have unlawfully imposed on him financial obligations. The complainant requested that the court do not apply and declare unconstitutional clause 4.6 of "Rules for trading in markets and streets" (hereinafter "the Rules") approved by the Tallinn City Council Regulation no. 43 of 10 December 1998, the Government of the Tallinn Centre district order no. 386 of 31 March 1995 and the elder of the Tallinn Centre district order no. 123 of 28 March 2000.

**3.** According to clause 4.6 of the Rules a seller in the open street has to pay for the sales premises, the advertisements posted by himself and for the services provided to him pursuant to established procedure. The complainant argued that this clause constituted a restriction of the freedom to engage in enterprise. Such a restriction is in conflict with the Constitution, because in accordance with § 31 of the Constitution the conditions and procedure for the exercise of the right to engage in enterprise may be provided by law.

**4.** The orders of the Government and the elder of the Tallinn Centre district have imposed rates of charge for trading in the open street and a charge of 50 kroons for the issuance of a sales permit. In the opinion of the complainant these constitute two separate financial obligations. Imposition of rates of charge amounts to imposition of taxes. The charge for issuance of a sales permit is a levy. In accordance with § 113 of the Constitution state obligations in public law shall be provided by law. Pursuant to § 157 of the Constitution imposition of financial obligations presumes the existence of legislation with the force of law. As neither the Government nor the elder of the Tallinn Centre district have the competence to impose taxes or levies without a legal basis, then irrespective of how these financial obligations are called in their legislation, the legal acts related to rates of charge and charges for issuance of permits are unconstitutional.

**5.** The Tallinn Administrative court satisfied the complaint of AS Liaania. The court did not apply and declared unconstitutional clause 4.6 of "Rules for trading in markets and streets" approved by the Tallinn City Council Regulation no. 43 of 10 December 1998, the Tallinn Centre district Government order no. 386 of 31 March 1995 and the elder of the Tallinn Centre district order no. 123 of 28 March 2000 because of the conflict thereof with §§ 3(1), 31, 113 and 154(1) of the Constitution.

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

### **Justifications of the petitioner**

**6.** The Tallinn Administrative Court is of the opinion that imposition of rates of charge for trading in the open street and collecting a charge for issuance of trading licences restricts the freedom to engage in enterprise provided by § 31 of the Constitution. The obligation to pay a charge for trading in the open street is a condition for engaging in enterprise. Such an obligation may be imposed by law or on the basis of law if the latter contains a pertinent norm delegating authority.

In accordance with § 11(3) of the Consumer Protection Act (hereinafter “the CPA”), in order to safeguard the consumer rights provided for in the Consumer Protection Act, the Government of the Republic shall establish the general rules for trading in markets and streets (hereinafter “the General Rules”). On the basis of the General Rules local governments have the right to establish the implementing procedure for trading in markets and streets based on local conditions. And the Tallinn City Council established such Rules. The Tallinn City Council had the right to specify in the Rules what had been provided by the Consumer Protection Act and by the General Rules, but it did not have the right to establish trading charges, not provided by law.

The court did not agree with the opinion of the complainant that the charge for trading is essentially a tax, because the trading charge does not have the characteristics of a tax established by clause 2(1)1) of the Taxation Act. The court argues that the charge for trading in streets is essentially a service fee in public law for the arrangement of trading in streets. The objective of establishing such a charge was to distribute and control a limited public resource - sales premises. The service provided by a local government consists in preparation of sales premises and carrying out preparatory work necessary for trading. A local government may impose a service fee in public law if the law contains a pertinent norm delegating authority. In this case there was no such norm.

A charge for issuance of a sales permit is a levy. The purpose of a levy is that expenses of a concrete act performed by a local government shall be covered by the person interested in the act. According with § 113 of the Constitution all financial obligations in public law shall be provided by law. There is no law providing a charge for issuance of permits to trade in streets.

According to §§ 154(1) and 3(1) of the Constitution all local issues shall be resolved by local governments pursuant to law, i.e. there is a requirement of legality. If a legislation of general application passed by a local government, resolving local issues within the competence of the local government, is in conflict with the law or the Constitution, such a legislation of general application is illegal irrespective of the fact that it resolves local issues, not national issues. Imposition of a financial obligation in public law is not a local issue which a local government could decide on without a provision of law delegating authority. There is no such provision.

### **Justifications of persons concerned**

**7.** The Tallinn City Council is of the opinion that the charge a seller pays for a sales premise in the open street is a rental charge. Clause 4.6 of the Rules essentially coincides with what has been provided by the Commercial Lease Act. In accordance with § 6(1) of the Commercial Lease Act a rental charge shall be determined by a commercial lease contract. Provided that the Commercial Lease Act is in conformity with the Constitution, clause 4.6 of the Rules can not be unconstitutional.

**8.** The Government of the Tallinn Centre district is of the opinion that a charge for trading in streets is a rental charge. The orders of the Government and the elder of the Tallinn Centre district were passed to implement the Regulations of the Tallinn City Council.

**9.** The Chancellor of Justice agrees with the administrative court that imposition of rates of charge for trading in streets and collection of charge for issuance of trading permits restricts the freedom to engage in enterprise. The norm delegating authority - § 11(3) of the Consumer Protection Act - does not give the right to impose a charge for trading. The charge for trading can not be regarded as an element of implementation

procedure for trading in markets and streets established by a local government.

The Chancellor of Justice disagrees with the opinion of the administrative court that charge for trading is a service fee in public law. § 11 of the Consumer Protection Act establishes the protection of consumers as a national issue. In accordance with clauses 5 and 6 of the General Rules passed by the Government of the Republic on the basis of § 11(3) of the CPA, the issuing of trade permits by a local government to those who hold sales premises in markets and streets, is a function in public law of a local government. Performance of a public law function imposed by the state on a local government (issuance of trade permits) does not constitute a provision of services.

The characteristics of the charge for issuance of a trading licence are similar to those of a levy, because this is a charge for performing a specific act (issuing a document) in public law relationships. The sphere of protection of § 113 of the Constitution embraces all financial obligations in public law. This means that all financial obligations in public law shall be provided by parliamentary Acts.

Clause 4.6 of the Rules is in conflict with the principle of legal clarity proceeding from § 13(2) of the Constitution. Clause 4.6 of the Rules obligates those who sell in streets pay for sales premises pursuant to prescribed procedure, but it is unclear, which procedure is being born in mind.

**10.** The Minister of Justice is of the opinion that the orders of the Government and the elder of the Tallinn Centre district constitute legislation of general application, although in the form of orders. According to § 57(4) of the Local Government Organisation Act a city district government and elder do not have the right to pass legislation of general application. Thus, the aforementioned orders are in conflict also with §§ 3(1) and 154(1) of the Constitution.

The Minister of Justice agrees with the opinion of the administrative court that collection of charge for issuance of a trading permit is a restriction of the freedom to engage in enterprise provided by § 31 of the Constitution, which may be imposed solely by law. The Minister of Justice is of the opinion that the charge collected for sales premises in street should be regarded as a tax and the charge for issuing a sales permit as a levy.

The Consumer Protection Act did not regulate issuance of trading licences by a local government. This obligation was imposed by a local government by clause 5 of the General Rules, passed by the Government of the Republic on the basis of § 11(3) of the CPA. This amounts to the performance of a national function by a local government. A legal basis for this can be derived from § 521(3) of the Commercial Code. But as all payments in public law have to be imposed only by law, the orders of the Government and the elder of the Tallinn Centre district imposing financial obligations are in conflict with § 113 of the Constitution.

According to clause 4.6 of the Rules those who sell in streets must pay for the sales premises, the advertising posted by them and for the services provided to them pursuant to prescribed procedure. This provision is not in conflict with § 113 of the Constitution, because it delegates no authority to impose financial obligations. As clause 4.6 of the Rules does not specify which procedure is being born in mind, the provision is in conflict with the principle of legal clarity, proceeding from § 13(2) of the Constitution.

### **Legislation not applied and declared unconstitutional**

**11.** The Tallinn Administrative Court did not apply and declared unconstitutional the following legal acts:

1. Order no. 368 of the Government of the Tallinn Centre district of 31 March 1995 "Rates of charge for sales premises in the open street on the territory of Centre district":

"1. To impose the following rates of charge for sales premises in the open street on the territory of the Tallinn Centre district as of 1 April 1995:

1.1 for stands, pavilions, trailers per 1 square metre;

for benches for the sale of flowers per one sales premise;  
for open-air cafes per one seat 40 kroons per month;

1.2 upon sale of petrol per one filling place 1000 kroons per month;

1.3 for stalls, service premises 200 kroons per month;

2. The Government of Centre district committee on service issues shall have the right to increase the rate of charge for sales premises as follows:

2.1 up to 50 times in the protected area of the Old City and around shopping and servicing centres;

2.2 up to 5 times in sales premises selling petrol.

3. To impose a charge for short-term (up to 30 days) sales premises on the territory of the Tallinn Centre district as of 1 April 1995 as follows:

3.1. domestic flowers, fruits and vegetables up to 40 kroons per day

3.2 imported flowers, fruits and vegetables up to 80 kroons per day

3.3 foodstuffs up to 200 kroons per day

3.4. industrial goods up to 300 kroons per day

4. If a trading or servicing place is located on private land, the committee on service issues of the Government of the Tallinn Centre district shall have the right to decrease the minimum tariff up to two times.

5. To impose a charge of 50 kroons for issuance of a sales permit as of 1 April 1995.

6. The charges determined by the committee on service issues on the basis of this order shall be transferred to the bank account of the Government of Centre district.

7. To guarantee separate accounting of receipts in the accounting documentation of the Government of Centre district. To allow settlement by bank transfer and in cash.

8. To consider order no. 3 of the Government of the Tallinn Centre district of 01.09.1993 as having become invalid."

2. Order no. 123 of the elder of the Tallinn Centre district of 28 March 2000 "Rates of charge for sales premises in the open street on the territory of Centre district":

"On the basis of resolution of Tallinn City Council of 27.05.1993 "Principal functions of local government in city districts", and the Tallinn City Council Regulation no. 43 of 10.12.1998 "Approval of the rules for trading in markets and streets"

1. To impose the following rates of charge for sales premises in the open street on the territory of the Tallinn Centre district per month as of 1 April 2000:

1.1. stand/pavilion (1 m<sup>2</sup>),

benches for selling flowers (1.2 metres) 60 kroons

1.2. poster board 300 kroons

1.3 ice-cream stall 600 kroons

1.4 pedlary (per pedlar) 100 kroons

1.5 service premise 200 kroons

1.6 premise for selling spruces 400 kroons

1.7 selling of fuel, per filling place 1200 kroons

1.8 other sales premise 100 kroons

2. To impose a charge for short-term (up to 30 days) sales premises in the streets and at public events on the territory of the Tallinn Centre district per day as of 1 April 2000 as follows:

2.1. one sales premise 50 kroons

3. The committee on service issues of the Government of the Tallinn Centre district shall have the right to increase the rate of charge for a sales premise:

3.1 up to two 15 times on the protected area of the Old City and around shopping and servicing centres

3.2 up to 5 times in sales premises selling fuel

3.3 up to 10 times for short-time sales premises in streets and at public events

4. To impose a charge of 50 kroons for issuance of a sales permit as of 1 April 2000.

5. The rates of charge per sales premise determined by the committee on service issues shall be transferred to the bank account of the Government of Centre district.

6. To declare clauses 1 to 7 of the Tallinn Centre district Government order no. 386 of 31.03.1995 invalid.

7. The order shall take effect as of adoption."

3. Clause 4.6 of "Rules for trading in markets and streets" established by the Tallinn City Council Regulation no. 43 of 10 December 1998:

"Those who sell in streets are under the obligation to pay for the sales premise, advertising posted by them and for the services provided to them pursuant to prescribed procedure."

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

### **I.**

**12.** According to § 7 of the Local Government Organisation Act (hereinafter "the LGOA"), a local government may pass the following legislation: council and government regulations (legislation of general application) and council resolutions and government orders (legislation of specific application). Legislation of city districts is dealt with by § 57 of LGOA. According to § 57(4) city district governments and city district elders do not have the right to pass legislation of general application. § 57(5) provides that city elders may, within the limits of their authority and for the performance of their functions, issue orders as legislation of specific application and directives for the organisation of the internal operations of the government.

**13.** Although two of the disputed legal acts have been issued in the form of orders of city district government and city district elder, these constitute legislation of general application. The disputed orders establish rates of charge for sales premises in streets depending on the type of a premise. Also, these provide that the committee on service issues of the Government of the Tallinn Centre district shall have the right to increase the rates of charge on the basis referred to in the order. Also, a charge for the issue of sales permits has been imposed. The disputed orders of the city district government and city district elder are legal acts containing generally applicable rules of conduct - norms that create rights and obligations for a non-specified circle of persons. Thus, these constitute legislation of general application. The Constitutional Review Chamber is of the opinion that the disputed acts of the city district government and the city district elder constitute legislation of general application which, on the basis of § 152(2) of the Constitution and § 4(1)4) of the Constitutional Review Court Procedure Act, are subject to constitutional review.

**14.** The first sentence of § 3(1) and § 154(1) of the Constitution give rise to the requirement of legality, which means that legislation of a local government must be in conformity with the law. The disputed orders of the Government and the elder of the Tallinn Centre district are not in conformity with the Local

Government Organisation Act, because the government of a city district and the elder of a city district do not have the right to pass legislation of general application. That is why the Tallinn Centre district Government order no. 386 of 31 March 1995, and the elder of the Tallinn Centre district order no. 123 of 28 March 2000 are in conflict with the first sentence of § 3(1) and with § 154 (1) of the Constitution.

**15.** Clauses 1 to 7 of the Tallinn Centre district Government order no. 386 of 31 March 1995, i.e. the substantive part of the order of the Government of Centre district, were declared invalid by clause 8 of the elder of the Tallinn Centre district order no. 123 of 28 March 2000. That is why the Constitutional Review Chamber can not declare the Tallinn Centre district Government order no. 386 of 31 March 1995 invalid and the court confines itself to ascertaining the unconstitutionality of the legal act.

## **II.**

**16.** According to clause 4.6 of the Rules approved by the Tallinn City Council Regulation those who sell in streets have the obligation to pay for a sales premise pursuant to prescribed procedure. It is left unspecified who should provide the procedure. Clause 4.6 of the Rules does not directly give rise to the obligation to pay a charge for a sales premise in streets. If there was no procedure established under this provision and if there was no legislation of specific application determining the charge to be paid by a concrete seller in street for a sales premise, the trader would have no obligation to pay.

The Constitutional Review Chamber is of the opinion that the procedure referred to in clause 4.6 of the Rules was established by the disputed orders of the Government and the elder of the Tallinn Centre district. This is indicated by clause 1.3 of the Rules, in accordance with which it is the city district Government that shall arrange trading in streets. This is also indicated by the fact that clause 3.1 the previous legislation of Tallinn City Government regulating trade in streets, namely of "Rules for trading in markets and streets" approved by Regulation no. 1 of 26 January 1995, provided directly that those who sell in streets have the obligation to pay for a sales premise pursuant to the procedure established by the government of the city district. As rates of charge for sales premises for trading in the open street on the territory of the Tallinn Centre district have not been imposed by any other legislation than the two disputed orders of the Government and the elder of the Tallinn Centre district, and as the order of the elder of the Tallinn Centre district refers to the Rules as the legal basis for the order, the Constitutional Review Chamber regards clause 4.6 of the Rules as the basis for collecting charges for sales premises for trading in streets. The Chamber is of the opinion that clause 4.6 of the Rules is a provision pertinent to the resolution of the dispute.

## **III.**

**17.** According to the first sentence of § 31 of the Constitution Estonian citizens have the right to engage in enterprise. This right shall also extend to legal persons (§ 9(2) of the Constitution). Enterprise as an independent activity aimed at earning profit includes trading in streets. Collecting a charge for a sales premise in the open street restricts enterprise. Thus, collecting of the charge constitutes an interference with the right to engage in enterprise. Clause 4.6 of the Rules served as the basis for interference with the right to engage in enterprise guaranteed by § 31 of the Constitution.

**18.** According to the second sentence of § 31 of the Constitution the conditions and procedure for the exercise of the freedom to engage in enterprise may be provided by law, consequently, this right may be restricted by law. The law need not describe in detail every restriction, but it must set the framework, within which the executive power shall specify pertinent provisions of law (see judgment of Constitutional Review Chamber of 17 March 1999 in case no. 3-4-1-1-99 -- RT 1999, 9, 89, paragraph 14).

The Constitutional Review Chamber points out that the freedom to engage in enterprise is a fundamental right to which reservations may be made by law. This implies, *inter alia*, that a restriction on enterprise imposed by a local government must have a legal basis.

§ 11(3) of the Consumer Protection Act authorises the Government of the Republic, in order to safeguard the consumer rights provided for in this Act, to establish the general rules for trading in markets and streets. In accordance with the Act the local governments have the right, on the basis of the General Rules, to establish the implementing procedure for trading in markets and streets based on local conditions. Clause 1.1 of the Rules indicates that the Rules regulate trading in the open street in Tallinn on the basis of the Consumer Protection Act and the General Rules. The Consumer Protection Act does not provide for imposition of a charge for sales premises in the open street as a means of safeguarding the consumer rights and does not give local governments the right to impose such a charge. This right is not given and can not be given to local governments by the General Rules, either. Consequently, clause 4.6 of the Rules unlawfully interferes with a fundamental right guaranteed by § 31 of the Constitution and is thus in conflict with the Constitution.

Uno Lõhmus

Chief Justice of the Supreme Court

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