Constitutional judgment 3-4-1-10-00

3-4-1-10-2000

JUDGMENT
OF THE SUPREME COURT EN BANC
of 22 December 2000

Review of the petition of the Administrative Law Chamber of the Supreme Court to declare clause 17 of the Procedure for Privatisation of Land by Auction partly unconstitutional and clause 49 partly invalid.

The Supreme Court *en banc*,
presided over by Chairman Uno Lõhmus
and composed of members of the Court,
justices Tõnu Anton, Jüri Ilvest, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Ants Kull, Lea Laarmaa, Jaak Luik, Jaano Odar, Jüri Põld, Hele-Kai Remmel, Jüri Rätsep, Harri Salmann, Peeter Vaher and Triinu Vernik,
at its open session of 23 November 2000,
with the representative of the Government of the Republic sworn advocate Jaak Kirikal, acting Chancellor of Justice Aare Reenumägi, and the representative of the Minister of Justice Enno Loonurm appearing,
and in the presence of the secretary to the Chamber Piret Lehemets
reviewed the petition of the Administrative Law Chamber of the Supreme Court of 19 October 2000.

I. FACTS AND COURSE OF PROCEEDINGS

1. On 15 September 1999 limited partnership Vergin Danuques (hereinafter “the limited partnership”) participated in public oral auction organised by the Lääne County Government for the privatisation of a plot of land, having previously paid a deposit of 155 kroons and participation fee of 1000 kroons. The limited partnership did not prove the winner of the auction. The limited partnership submitted a request to the County Government that the deposit and participation fee be returned to it. The County Government returned the deposit but did not return the participation fee, informing the limited partnership that pursuant to clause 49 of the Procedure for Privatisation of Land by Auction the participation fee is not subject to return. The limited partnership submitted an action to the Lääne County Court, asking that clause 17(2) of the Procedure for Privatisation of Land by Auction be declared unconstitutional and be not applied, and that the refusal of the County Government to return the participation fee be declared illegal. The administrative judge did not satisfy the action. The limited partnership appealed against this judgment. The Tallinn Circuit Court did not satisfy the appeal.

2. The limited partnership filed an appeal in cassation against the circuit court judgment with the Supreme Court, asking that the judgment of the circuit court be repealed and a new judgment rendered and that clause

17(2) of the Procedure for Privatisation of Land by Auction be declared to be in conflict with §§ 3, 87(6) and 113 of the Constitution, be not applied, and that the refusal of the County Government to return the participation fee be declared totally illegal. In its judgment of 17 October 2000 in administrative matter no. 3-3-1-32-00 the Administrative Law Chamber of the Supreme Court was of the opinion that this part of clause 17(2)2) of the "Procedure for Privatisation of Land by Auction", approved by the Government of the Republic Regulation no. 268 of 6 November 1996, which establishes an obligation for participants of an auction of land to pay a participation fee of 1000 kroons (in the wording of the procedure in force until 8 March 2000), and the first sentence of clause 49 were in conflict with §§ 87(6) and 3 of the Constitution. Pursuant to § 5(1) of Constitutional Review Court Procedure Act the Administrative Law Chamber of the Supreme Court declared the provisions unconstitutional and did not apply these.

3. On 19 October 2000 the Administrative Law Chamber of the Supreme Court submitted a petition to the Supreme Court *en banc*, requesting that it declare:

1) that this part of clause 17(2)2) of the "Procedure for Privatisation of Land by Auction" (RT I 1996, 78, 1385), approved by the Government of the Republic Regulation no. 268 of 6 November 1996, which establishes an obligation for participants of an auction of land to pay a participation fee of 1000 kroons (in the wording of the procedure in force until 8 March 2000) was unconstitutional;
2) the first sentence of clause 49 of the "Procedure for Privatisation of Land by Auction" (RT I 1996, 78, 1385), approved by the Government of the Republic Regulation no. 268 of 6 November 1996, invalid.

II. LEGAL REASONING

Contested provisions

4. The contested provisions of the Procedure for Privatisation of Land by Auction are the following:

Clause 17(2)2) (in the wording of the procedure in force until 8 March 2000)
"The following has to be proceeded from upon determining the conditions for an auction:
.....
- upon privatisation of land by auction the participation fee equals to 200 kroons in case of privatisation of residential land and 1000 kroons in case of privatisation of other land, a deposit equals to 10 per cent of the starting price of the auction. The participation fee and deposit shall be paid in money to the banc account indicated by the organiser of privatisation. If a participant of the auction is entitled to pay the whole purchase price in privatisation vouchers, it shall reserve a sum equal to deposit in its privatisation vouchers account, in accordance with clauses 30 and 31 of the "Procedure for issue and use of privatisation vouchers" (RT I 1995, 70, 1165), approved by the Government of the Republic Regulation no. 296 of 15 August 1995."

Clause 49:
"Participation fee shall not be returned. The participation fee may be used for covering the expenses related to preparation of privatisation and organisation of an auction of this or other cadastral units. The costs of a local government related to preparation of privatisation of land shall be covered by the organiser of privatisation by agreement with local government."

Justifications of participants

5. The Administrative Law Chamber of the Supreme Court sets out the following justifications to its petition:

1) Clause 17(2)2) of the Procedure for Privatisation of Land by Auction in the wording of the procedure in force until 8 March 2000, approved by the Government of the Republic Regulation no. 268 of 6 November 1996, set the performance of a monetary obligation - payment of participation fee - as a condition for participating in an auction.

2) Non-return of participation fee is regulated by clause 49 of the Procedure for Privatisation of Land by Auction, whereas the limited partnership did not request that this clause be declared unconstitutional.

Nevertheless, this clause was relevant to the administrative matter. That is why the Administrative Law Chamber found no obstacle to examine the constitutionality of this provision when reviewing the appeal in cassation.

3) It proceeds form § 87(6) of the Constitution that the Government of the Republic may issue regulations only under special authorisation by law. Upon issuing a regulation the Government of the Republic may not exceed the authority provided by the norm delegating authority. Clause 1 of the Procedure for Privatisation of Land by Auction (in the wording of the procedure in force until 8 March 2000) provided that the procedure was established under §§ 20(1) and 23(6) of the Land Reform Act. Only § 23(6) of these two provisions can be regarded as a norm delegating authority to the Government of the Republic to provide for the procedure for privatisation of land.

4) Procedure for privatisation of land as such can not include a requirement to pay a participation fee. Neither § 23(6) nor any other provision of the Land Reform Act empower the Government of the Republic to impose a participation fee. Consequently, the participation fee of 1000 kroons, established by clause 17(2)2) of the Procedure for Privatisation of Land by Auction, has been provided for by the Government of the Republic without a legal basis and is thus in conflict with § 87(6) of the Constitution.

5) Pursuant to § 3 of the Constitution the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. This provision means that upon issuing regulations the executive is under the obligation to observe and not to exceed the authority given to it by a delegation norm. By providing for an obligation that participants of privatisation of land by auction must pay participation fee the Government of the Republic has exceeded the powers given by the legislator and has thus violated § 3 of the Constitution.

6) For the purposes of the administrative matter clause 17(2)2) of the Procedure for Privatisation of Land by Auction and the first sentence of clause 49, pursuant to which participation fee is not subject to return, are connected by nature. As clause 17(2)2) of the Procedure for Privatisation of Land by Auction is in conflict with the Constitution, the first sentence of clause 49 of the Procedure for Privatisation of Land by Auction is also in conflict with § 87(6) of the Constitution.

7) Presently, clause 17(2)2) of the Procedure for Privatisation of Land by Auction is in force in its new wording. That is why the Administrative Law Chamber of the Supreme Court requests that the wording which was in force until 8 March 2000 be declared unconstitutional. As for clause 49 the Administrative Law Chamber of the Supreme Court requests that the first sentence thereof be declared invalid.

8) As the obligation to pay participation fee was established by the Government of the Republic without pertinent authorisation and is thus in conflict with § 87(6) and with § 3 of the Constitution, the Administrative Law Chamber did not find it necessary to examine the arguments that imposition of participation fee is also in conflict with § 113 of the Constitution.

6. According to the written opinion of the representatives of the Government of the Republic, sworn advocates Aare Tark and Jaak Kirikal, the petition of the Administrative Law Chamber of the Supreme Court is not justified for the following reasons:

1) Refusal to return participation fee may be regarded as “another legal act” for the purposes of § 65 of the General Principles of the Civil Code Act. The Administrative Law Chamber had no competence to review a complaint against the refusal to return the participation fee which had already been paid.

2) § 3(2)2) of the Code of Administrative Procedure, which was in force when the first instance court examined the case, provided that an administrative court was not competent to review complaints against legislative acts which have to be adjudicated pursuant to procedure established by constitutional review court procedure.

3) The Administrative Court must not have expressed the conclusion not to satisfy the claim of the limited

partnership to declare the act unconstitutional in the decision part of its judgment. The court should have done this in the reasoning of the judgment. It would not have been possible to appeal against such conclusion of the court.

4) The contested provisions of the governmental regulations were issued *praeter legem* under the authority-delegating norm of § 23(6) of the Land Reform Act. The procedure for privatisation of land by auction does not create new law.

5) Privatisation of land by auction is by nature an act in civil law. The state as a subject of civil law relationships is entitled to determine the conditions of transactions. Participation fee for participation in a public auction is a means to cover the expenses of an auction.

7. The Chancellor of Justice in his written opinion does not support the petition of the Administrative Law Chamber of the Supreme Court to declare clause 17(2)2) of the Procedure for Privatisation of Land by Auction party unconstitutional. The Chancellor of Justice partially supports the petition to declare the first sentence of clause 49 of the Procedure invalid, namely the sentence providing for non-return of participation fee should be declared invalid insofar as it provides that participation fee shall not be returned to persons who did not prove purchasers and insofar as the participation fee paid by the purchaser exceeds the actual expenses of the auction. The Chancellor of Justice is of the following opinion:

1) § 23(6) of the Land Reform Act authorises the government to establish the procedure for privatisation of land. The content, extent and purpose of the authorisation must be derived from § 23 of the Act in its entirety. § 23(5) imposes the expenses of an auction on the purchaser. As these expenses have been imposed on the purchaser by law, the government could specify the procedure for the covering of the expenses of privatisation by the purchaser. The government can not impose on entitled subjects of privatisation financial obligations which are not provided by law.

2) According to clause 49 of the Procedure for Privatisation of Land by Auction the participation fee shall not be returned and may be used for registering this or other cadastral units. The government had no legal ground to put an obligation to cover the expenses of an auction on those persons who proved not to be purchasers.

3) By law, the obligation to cover the expenses of an auction is imposed only on the purchaser. If the non-returned participation fee exceeds actual costs of the act, the government has, by its regulation, imposed financial obligations on the purchaser, which have not been established by law. Thus, the first sentence of clause 49 of the Procedure for Privatisation of Land by Auction is in conflict with § 87(6) of the Constitution and § 3 to the extent that it provides for (a) non-return of the amount of participation fee that exceeds actual costs, and for (b) non-return of participation fee to those participants of the auction who did not prove purchasers.

8. The Minister of Justice, in his written opinion, is of the opinion that privatisation of land by auction is an act in private law. The ground for participation fee as a financial claim must be established by law. Participation fee is by nature the closest to state fee. § 23(6) of the Land Reform Act, which authorises the government to establish the procedure for privatisation, does not contain authorisation to impose participation fee as a necessary condition for participation in privatisation.

Opinion of the Supreme Court *en banc*

I.

9. At the court session the representative of the Government of the Republic disputed the competence of the Supreme Court *en banc* to examine the petition of the Administrative Law Chamber. He claimed that pursuant to § 9(3) of the Constitutional Review Court Procedure Act the Supreme Court en banc is competent to review a petition only if at least one of the justices of the Constitutional Review Chamber has a dissenting opinion. The disputed petition was transferred directly to the Supreme Court en banc.

The Supreme Court *en banc* does not agree with the opinion of the representative of the Government of the Republic. The competence of the Supreme Court en banc arises from the Constitution. Pursuant to the second sentence of § 149(3) of the Constitution the Supreme Court is the court of constitutional review. Thus, the Constitution does not prescribe how constitutional review is exercised in the Supreme Court. If a petition for the review of constitutionality of a legislation is submitted by a Chamber of the Supreme Court, it is essential for the authority of the judgment that all justices of the Supreme Court take part in the rendering of the judgment.

10. A court can initiate constitutional review only if the disputed legislation is pertinent to resolving a case. Proceeding from § 15(1) of the Constitution and § 5(1) of the Constitutional Review Court Procedure Act a court shall declare a legislation unconstitutional and shall not apply it if the court, upon adjudicating the case, comes to a conclusion that applicable law or other legislation is in conflict with the Constitution. The provision the constitutionality of which is reviewed by the court of constitutional review must be decisive for the outcome of the case.

The Supreme Court *en banc* was convinced that clause 17(2)2) of the Procedure for Privatisation of Land by Auction (in the wording in force until 8 March 2000) and the first sentence of clause 49 were applicable for hearing the complaint of limited partnership Vergin Danuques, because these provisions influenced the outcome of the case.

II.

11. As for the argument that privatisation of land by auction is by nature an act in civil law, the Supreme Court *en banc* is of the following opinion. It is true that according to the first sentence of § 6(3) of the General Principles of the Civil Code Act the state participates in civil law relationships as a legal person in public law. In such instances, as a rule, the same rules and principles of private law apply to the activities of state as are applicable to all subjects of civil law. Thus, for determining contractual terms in private law relationships no special authority, proceeding from law, is required. Determination of contractual terms in private law relationships is a tender or an invitation to tender, by which or inspired by which a contract shall be entered into. Even if an intent or invitation is prepared in the form of a regulation of the executive, this does not constitute a regulation subject to the principles of public law. Privatisation of state assets is not carried out on private law basis, instead it is carried out in the course of ownership reform.

12. Pursuant to § 2 of the Principles of Ownership Reform Act the purpose of ownership reform is to restructure ownership relations in order to ensure the inviolability of property and free enterprise, to undo the injustices caused by violation of the right to ownership and to create the preconditions for the transfer to a market economy. § 3(2) of the same Act establishes privatisation as a form of ownership reform. § 32 defines privatisation as transfer of property in state or municipal ownership in the course of ownership reform for a charge or without charge into the ownership of other persons as a result of which the owner of the property changes.

13. Land reform is regulated by the Land Reform Act. According to § 4 of the Act land reform is a part of ownership reform. § 2 prescribes the objective of land reform - based on the continuity of rights of former owners and the interests of current land users that are protected by law, to transfer relations based on state ownership of land into relations primarily based on private ownership of land, and to establish preconditions for more effective use of land.

14. It proceeds from the objectives established by § 2 of the Principles of Ownership Reform Act and § 2 of the Land Reform Act that ownership reform was undertaken in public, i.e. in general interests. Ownership reform is a specific task of the state in building up a rule of law state and a market economy. The relationships emerging in the course of ownership reform can not be compared to civil law relationships of the owner upon the use and disposal of his property outside ownership reform. During ownership reform

sharp conflicts of interests are resolved. This involves exercise of state power until a decision is made concerning the fate of a specific object of ownership reform. Public law as a part of legal order is meant to regulate specific relationships which go alongside with the exercise of public power. Thus, the part of valid law which regulates privatisation of land in state ownership by auction is a part of legal order belonging to public law. As the relationships pertaining to privatisation of land by auction are of public law character, they call for solutions under public law. In order to ensure the protection of individual and collective rights, exercise of public law must be subjected to much stricter rules and principles than private law commerce based on freedom of person.

15. § 20(1) of Land Reform Act stipulates: "Land which is not returned on the basis of this Act, which is not retained in state ownership pursuant to § 31 of this Act or which is not transferred into municipal ownership pursuant to § 25 of this Act, is subject to privatisation." From this provision proceeds a duty of the state to privatise the land which is not retained in state ownership or which is not transferred into local government ownership. Pursuant to § 31 land to be retained in state ownership is the land which is retained in state ownership in public interests, land which is necessary for the performance of public tasks of state, which is necessary for state companies or which is necessary for performance of duties imposed on the state by law. This is an obligation in public law.

16. § 21^1(1) of the Land Reform Act imposes an obligation on local governments to determine the size and boundaries of the land to be privatised. Also, §§ 23^1(1) and 23^2(1) impose, upon privatisation of land, an obligation on rural municipality or city government, i.e. on a body of a legal person in public law. §§ 23^1(4) and 23^2(4) stipulate that complaints filed against the decisions of rural municipality or city governments shall be resolved by rural municipality or city councils. This, too, is regulatory framework in public law.

17. The Procedure for Privatisation of Land by Auction itself confirms the public law nature of privatisation of land by auction. A tender at a civil law auction constitutes an expression of will for entering into a contract. A contract is considered to have been entered into upon acceptance of tender. Upon privatisation of land, on the other hand, pursuant to clause 46 the procedure protests are resolved after auction. After that the results of auction are confirmed by the organiser of auction (county governor) by his resolution (clause 45). This is an administrative act which establishes the purchaser and general conditions of privatisation. Only after the resolution of the county governor a private law purchase and sale contract is entered into between the state and the purchaser with the aim of implementing the decision to privatise.

18. Thus, the whole process of privatisation of land by auction until the purchase and sale contract is entered into, is regulated by a public law procedure.

III.

19. Pursuant to § 4(3) of the Constitutional Review Court Procedure Act the Supreme Court shall review the conformity of legislation with the Constitution and the law only to the extent requested in the petition. The Administrative Law Chamber found that some provisions of the Procedure for Privatisation of Land by Auction were in conflict with § 87(6) and with § 3 of the Constitution. The Supreme Court *en banc*considers it necessary also to review the conformity of these provisions to § 113 of the Constitution, which does not mean exceeding the limits of the petition. Under the constitutional review court procedure it is forbidden to review the constitutionality of the legislation or the provisions the review of which has not been petitioned. The Supreme Court may and must review the lawfulness of the contested norms proceeding from the entirety of the norms and the spirit of the Constitution.

20. § 113 of the Constitution stipulates: "State taxes, duties, fees, fines and compulsory insurance payments shall be provided by law." The wording of § 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 § 113. § 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.

21. As for taxes, the conclusion that taxes may only be imposed by Acts adopted by the *Riigikogu* is further confirmed by § 106(1) of the Constitution, pursuant to which issues regarding taxation shall not be submitted to a referendum and by § 110, which prohibits the President to amend or repeal by a decree the laws which establish state taxes. The existence of § 113 and its relations with other provisions of the Constitution show the importance that was attached to the parliamentary form of imposing financial obligations of public law during the preparation of the Constitution.

22. The aim of § 113 of the Constitution is to allow only the legislator to restrict fundamental rights of persons by imposing an obligation to pay state taxes and to guarantee that state taxes are not imposed in violation of this provision. This provision gives rise to individual subjective right against the state.

23. The Supreme Court *en banc* points out that in its judgment of 23 March 1998 in constitutional review case no. 3-4-1-2-98 in regard to customs duties the Constitutional Review Chamber held that imposition of customs duty and delegation of the authority to impose tax rates to the Government of the Republic by the Customs Tariffs Act was in conflict with § 113 of the Constitution. The Chamber found that it was allowed to impose the maximum and minimum rates by law and to allow the government, on the basis of a norm delegating relevant authority, to impose concrete tax rates.

24. In the present case it has to be decided whether participation fee is more close to a fee or a tax. State fee is a pay for an act of public law performed or a document issued by the state. The difference of it from a tax lies in the fact that the person who pays the fee shall in return get a favour in the form of an act performed or a document issued. The objective of a fee is compensation for the costs incurred by the state in performing a concrete act by the person interested in the act. A tax, on the other hand, is a financial obligation imposed on taxpayers for the performance of public law functions, which is subject to indisputable performance without direct compensation thereof.

25. It may appear at first glance that the contested participation fee meets the characteristics of fee. Actually, participation fee is more close to a tax. This can be concluded from clause 49 of the Procedure for Privatisation of Land by Auction. Pursuant to this provision a participation fee is not meant for the preparation of a concrete auction. Participation fees can be used to cover the expenses of the preparation and auction of one particular or any other cadastral unit, that is for more general performance of public law land reform. In reality it is obvious that at least a part of the expenses of privatisation of a plot of land are covered from the participation fees collected at earlier auctions. Acts aimed at privatisation of a plot of land start even before participation fees of a specific auction are paid in. Pursuant to clause 49 of the procedure participation fee shall not be returned even to those tenderers who did not prove the winner. Thus, the person who paid participation fee but did not become the winner gets no direct compensation. In essence a participation fee is a tax, imposed in the interests of land reform on persons who wish to take part in privatisation of land by auction.

As the participation fee imposed by governmental regulation is substantially a tax, the imposition thereof by a regulation is in conflict with § 113 of the Constitution.

IV.

26. Clause 17(2)2) of the Procedure for Privatisation of Land by Auction, when imposing the participation fee of 1000 kroons, is also in conflict with § 87(6) and § 3(1) of the Constitution.

27. Clause 1 of the Procedure for Privatisation of Land by Auction (in the wording of the procedure in force until 8 March 2000) stated that the procedure was established under §§ 20(1) and 23(6) of the Land Reform Act. § 20(1) stipulates: “Land which is not returned on the basis of this Act, which is not retained in state ownership pursuant to § 31 of this Act or which is not transferred into municipal ownership pursuant to § 25

of this Act, is subject to privatisation." § 23(6) stipulates: "Land is privatised pursuant to the procedure established by the Government of the Republic." Of the two provisions § 23(6) can be regarded as the norm delegating authority.

28. Pursuant to § 3(1) of the Constitution the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. Thereby the Constitution has established the requirement of law (positive legality), meaning that authority of law is required for the exercise of executive power. It is especially important to fulfil this requirement in the cases when the activities of the executive impose obligations on persons or restrict their rights.

29. § 87(6) of the Constitution, which establishes that the government shall issue regulations and orders on the basis of and for the implementation of law, serves the same purpose. Upon applying this provision, the Constitutional Review Chamber has constantly underlined in its judgments the Government of the Republic may issue regulations only if there is a norm in a law delegating relevant authority. The Supreme Court *en banc* is of the same opinion.

30. It proceeds from § 87(6) of the Constitution that the government may issue a regulation only on the basis of an authority-delegating norm in a law. The government, when issuing a regulation, must not exceed the authority delegated by a norm and must not impose by its regulation what the delegation norm does not authorise it to impose. It is essential to observe the delegation norm when the precondition for exercising a right is a prior performance of financial obligations.

31. It appears from § 23(6) of the Land Reform Act that the legislator has authorised the Government of the Republic to establish by its regulation the procedure for privatisation of land by auction. It does not follow from this provision that the government has competence to impose a participation fee on those participating in privatisation of land by auction. Procedure for privatisation of land, by nature, may not contain a requirement to pay a participation fee. For the purposes of § 23(6) of the Land Reform Act the words "procedure for privatisation of land" mean the procedure for decision-making related to privatisation of land, that is the set of acts aimed at the selection of the purchaser and at checking the circumstances necessary for decision on privatisation and at preparation of the decisions by other ways. In order to achieve the objectives of administrative procedure it is possible, within a procedure, to impose on persons participating in the procedure an obligation to participate in procedural acts and submit evidence and other obligations, the performance of which is necessary for the right decision, also to impose formal requirements to acts. Imposition of a financial obligation of public law exceeds the limits of a procedure, because it is not necessary for making a decision on privatisation.

32. The first sentence of § 23(5) of the Land Reform Act provides that land is privatised at the expense of the purchaser. Constitutionality of participation fee can not be justified by this provision. This provision means that a plot of land is privatised at the expense of the purchaser with whom the purchase and sale contract is entered into. The purchaser has to cover the actual costs of privatisation. As the costs of privatisation of each plot of land are individual, the organiser of privatisation must determine such costs separately for each plot of land. A regulation pursuant to which participation fee is fixed irrespective of the actual costs of privatisation and the costs are imposed on not only the purchaser but also on all participants of the auction, is not in conformity of the objectives of the first sentence of § 23(5) of the Land Reform Act, which presupposes individual regulation.

33. The right to establish the procedure for privatisation does not include a right to determine to what extent the costs of an auction shall be covered. Nevertheless, the procedure has to regulate how the purchaser shall cover the costs of an auction. The manner of covering the costs may be determined by the organiser of privatisation, if the government has not established it by a regulation.

34. For the purposes of issuing regulations § 3(1) of the Constitution contains an obligation for the executive power to observe and not to exceed the competence given to it by a delegation norm. The Government of the Republic, upon imposing an obligation on persons participating in auction to pay a participation fee, has

exceeded the competence given to it by the legislator and has thus violated § 3(1) of the Constitution.

35. Clause 17(2)2) and the first sentence of clause 49 of the Procedure for Privatisation of Land by Auction, which excludes the return of unconstitutionally collected participation fee, are interrelated by nature. As clause 17(2)2) is in conflict with § 87(6) and § 3(1) of the Constitution, the first sentence of clause 49, too, is in conflict with these constitutional provisions.

36. Clause 17(2)2) of the Procedure for Privatisation of Land by Auction is presently in force in a new wording. That is why the Supreme Court *en banc* can admit that the wording of the provision in force until 8 March 2000, to the extent that it imposed the participation fee of 1000 kroons, was unconstitutional. The first sentence of clause 49 of the procedure has not been amended and is to be declared invalid.

37. Pursuant to § 20(1) of the Constitutional Review Court Procedure Act the judgments made by way of constitutional review procedure enter into force on the day of pronouncement. Thus, the judgments have no retroactive force.

Proceeding from §§ 4(1)4) and 19(1)2) of the Constitutional Review Court Procedure Act **the Supreme Court *en banc* has decided:**

1. To satisfy the petition of the Administrative Law Chamber of the Supreme Court.
2. To declare that the part of clause 17(2)2) of the Procedure for Privatisation of Land by Auction, approved by the Government of the Republic Regulation no. 268 of 6 November 1996, which imposed on participants of auction a participation fee of 1000 kroons (in the wording of the procedure in force until 8 March 2000), was unconstitutional.
3. To declare the first sentence of clause 49 of the Procedure for Privatisation of Land by Auction, approved by the Government of the Republic Regulation no. 268 of 6 November 1996 invalid.

The judgment is effective as of pronouncement, is final and is not subject to further appeal.

Uno Lõhmus
Chief Justice of the Supreme Court
