Constitutional judgment 3-4-1-8-00

3-4-1-8-2000

**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 5 October 2000**

Review of the petition of the Tallinn Circuit Court to review the constitutionality of § 18(1)3) of the Competition Act.

The Constitutional Review Chamber sitting in a panel
presided over by the Chairman of the Chamber Uno Lõhmus
and composed of members of the Chamber,
justices Tõnu Anton, Lea Kivi, Ants Kull and Jüri Põld,
at its open session of 6 September 2000,
with the Minister of Justice Märt Rask, the acting Chancellor of Justice Aare Reenumägi and representative of the Riigikogu Liina Tõnisson appearing,
and in the presence of the secretary to the Chamber Piret Lehemets
reviewed the petition of Tallinn Circuit Court of 30 May 2000.

I. FACTS AND COURSE OF PROCEEDINGS

1. By the Competition Board directive no. 33-k of 24 May 1999, a report concerning administrative offence was prepared due to non-fulfilment of the obligation proceeding from § 18(1)3) of Competition Act by *AS Eesti Telefon*, and a precept was issued to the same company under § 40(6)3) of the Act to observe the obligation proceeding from § 18(1)3) of the same Act in regard to communications construction work, which had not been started yet. The Competition Board is of the opinion that *AS Eesti Telefon* is an undertaking with both natural monopoly and exclusive rights in the market of fixed public telephone network services. Pursuant to § 18(1)3) of the Competition Act, such an undertaking shall purchase things and other construction work and services necessary for the exercise of exclusive rights or a natural monopoly pursuant to the procedure provided for in the Public Procurement Act. An undertaking with natural monopoly or special or exclusive rights, upon pursuing the said activities, must adhere to the procedure provided for in the Public Procurement Act even if it is not a legal person in public law.

2. On 25 June 1999 *AS Eesti Telefon* filed a complaint against the directive of the Competition Board of 24 May 1999 with the Tallinn Administrative Court. The applicant claimed the directive to be illegal in its entirety and § 18(1)3) of the Competition Act to be in conflict with §§ 10, 3, 13 as well as with §§ 31, 32 and 11 of the Constitution. The applicant petitioned that § 18(1)3) be not applied and be declared unconstitutional.

3. The Tallinn Administrative Court, by its judgment of 8 February 2000, annulled the directive of the Competition Board of 24 May 1999. The court argued that “a court can initiate constitutional review if the court is capable of hearing the merits of the case; if it is a defective administrative act that obstructs further hearing, the possibility to initiate constitutional review proceedings is excluded”. This judgment was reviewed by way of appellation by the administrative law chamber of the Tallinn Circuit Court. In its judgment of 17 May 2000 the Tallinn Circuit Court amended the judgment of the Tallinn Administrative Court, added the reasoning of the administrative law chamber concerning the unconstitutionality of § 18(1)3) of Competition Act to the administrative court judgment and amended the decision of the judgment as follows: “Not to apply § 18(1)3) of Competition Act (RT I 1998, 30, 410; 1999, 89, 813) to this administrative matter due to its conflict with § 10 of the Constitution, and to initiate a constitutional review proceeding seeking that the provision be declared invalid."

II. LEGAL MOTIVATION

4. The provision of the Competition Act, not applied by Tallinn Circuit Court, reads as follows:

"§18. Obligations of undertakings with special or exclusive rights or natural monopoly
(1) An undertaking with special or exclusive rights or a natural monopoly shall:
.....
3) purchase things and other construction work and services necessary for the exercise of special or exclusive rights or a natural monopoly pursuant to the procedure provided for in the Public Procurement Act (RT I 1995, 54, 883; 1997, 9, 79).

Justifications of the participants

5. The administrative law chamber of the Tallinn Circuit Court is of the opinion that under the provisions of the Public Procurement Act which regulate tendering procedure, referred to in § 18(1)3) of Competition Act, the contracting authority has to apply for the permission or approval of the Public Procurement Office for performing several procedures. The Public Procurement Office has no competence to exercise control over a contracting authority, if the latter is not a legal person in public law. The activities of such a contracting authority do not constitute public procurement for the purposes of § 3 of Public Procurement Act. As § 18(1)3) of the Competition Act does not prescribe how such an undertaker shall proceed, the provision lacks legal content. A situation where it is impossible to observe law or where an undertaking has to decide which provisions of the Public Procurement Act it has to be guided by, does not conform to the principle of rule of law.

6. The Chancellor of Justice is of the opinion that § 18(1)3) of the Competition Act is in conflict with the principle of rule of law, established by § 10 of the Constitution, due to reasons specified in the judgment of the circuit court.

7. The Minister of Justice is also of the opinion that § 18(1)3) of the Competition Act is in conflict with § 10 of the Constitution. To apply this provision of the Competition Act to persons who are not legal persons in public law would violate the principle of legality of administration, because the Public Procurement Office is not competent to exercise supervision over such persons. One of the essential characteristics of a democratic rule of law state is the observance of the principle of legality of administration. § 18(1)3) of the Competition Act refers to the Public Procurement Act, which does not regulate the activities of persons who are not legal persons in public law. Consequently, such persons can not fulfil the obligation imposed by § 18(1)3) of the Competition Act, because the Public Procurement Act does not provide for a pertinent procedure.

8. The representative of the Riigikogu argues that the contested provision was intended to protect the interests of consumers through suppression of prices, and the representative is of the opinion that neither a contracting authority, a tenderer, the Public Procurement Office nor the Competition Board are given unambiguous instructions. This is why the Act has to be amended.

Opinion of the Chamber

9. § 18(1)3) of the Competition Act obligates an undertaking with special or exclusive rights or a natural monopoly to purchase things and other construction work and services necessary for the exercise of special or exclusive rights or a natural monopoly pursuant to the procedure provided for in the Public Procurement Act. For the purposes of § 1(2) of the Public Procurement Act this procedure is the public procurement procedure, and under § 8 of the same Act procurement contracts are entered into on the basis of open tenders or, in the cases provided for in the Act, using two-stage tendering procedure, negotiated tendering procedure or single source public procurement.

10. Pursuant to the public procurement procedure, a contracting authority may reject all tenders with the permission of the Public Procurement Office (§ 30(1) of the Public Procurement Act). Pursuant to the same procedure a contracting authority shall submit a public procurement declaration to the Office within ten days after termination of the public procurement tendering procedure (§ 34(2) of the Public Procurement Act). In certain cases, a single source procurement is permitted after receipt of consent from the Public Procurement Office (§ 53(2) of the Public Procurement Act). These obligations extend to undertakings specified in § 18(1)3) of the Competition Act.

Pursuant to the Public Procurement Act the issues related to public procurement and not to the protection of competition are within the competence of the Public Procurement Office (see e.g. § 10). There is no provision in the Competition Act to the effect of extending the competence of the Public Procurement Office.

Consequently, the Public Procurement Office has no authority to receive public procurement declarations from or to give consent for a single source public procurement or for rejecting all tenders to subjects specified in § 18(1)3) of the Competition Act.

11. Under § 30(6) of the Public Procurement Act the Public Procurement Office is required to cancel a tendering procedure if a contracting authority violates the procedure for public procurement. At the same time, the Public Procurement Office has no competence to fulfil this obligation if a contracting authority is a subject specified in § 18(1)3) of the Competition Act.

12. Pursuant to § 34(1) of the Competition Act it is the Competition Board who supervises the implementation of the Act and who, under § 35(1) of the Act, is competent to perform all acts assigned to it by the Act and to take measures to protect competition. Thus, the supervision of the Competition Board also includes supervision over whether subjects specified in § 18(1)3) of the Competition Act observe the procedure for public procurement. A declarative right to exercise supervision in itself does not give rise to the competence to issue a permit to reject all tenders, to receive public procurement declarations from a contracting authority, to consent to a single source public procurement or to cancel a tendering procedure if a contracting authority violates the procedure for public procurement. The competence necessary to perform these acts can not be derived from § 35(1) of the Competition Act, pursuant to which the Competition Board is competent to perform all acts assigned to it by the Competition Act and to take measures to protect competition. Namely, § 18(1)3) of the Competition Act does not impose an obligation on the Competition Board to perform acts proceeding from the Public Procurement Act. A conclusion to the contrary would violate the requirement of legality of public administration, as the competence and authority of the Competition Board must be determined by law with sufficient precision.

13. Consequently, neither the Public Procurement Office nor the Competition Board have the competence to perform acts specified in the Public Procurement Act in regard to an undertaking with special or exclusive rights or a natural monopoly. This situation leaves an undertaking uncertain as to how it should act, because it is impossible to fully observe the procedure for public procurement and because it is unclear which of its acts would be lawful. Consequently, § 18(1)3) of the Competition Act is ambiguous and does not conform to the principle of legal clarity, proceeding from § 13(2) of the Constitution. Pursuant to this constitutional provision the law shall protect everyone from the arbitrary exercise of state authority.

14. According to § 3(1) of the Competition Act the Act is applied to safeguard competition between persons who participate or intend to participate in a market. Thus, § 18(1)3) of the Competition Act has to be read in the light of this purpose. Consequently, the provision of the Competition Act is intended to regulate a market to safeguard competition in the cases when an undertaking with a special or exclusive right or a natural monopoly purchases things and services necessary for the exercise of special or exclusive rights or a natural monopoly. The Tallinn Circuit Court has not examined whether the public procurement procedure is a suitable and necessary measure to safeguard competition and whether it is justified as a restriction on the right to engage in enterprise, established by § 31 of the Constitution. That is why the Chamber shall not express its opinion on this issue.

15. For the reasons specified in paragraphs 11 and 12 of this judgment § 18(1)3) of the Competition Act is in conflict with the principle of legal clarity. As the principle of legal clarity proceeds from § 13(2) of the Constitution the contested provision of the Competition Act is in conflict with § 13(2) of the Constitution.

Proceeding from § 152(2) of the Constitution and from § 19(1)2) of the Constitutional Review Court Procedure Act, **the Constitutional Review Chamber of the Supreme Court has decided:**

To declare § 18(1)3) of the Competition Act invalid.

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

U. Lõhmus
Chairman of the Constitutional Review Chamber

DISSENTING OPINION

of justice Uno Lõhmus

Unfortunately, I can not agree with the opinion of my learned colleagues that § 18(1)3) of the Competition Act must be declared invalid.

The constitutional review case was triggered by the complaint of *AS Eesti Telefon* filed with an administrative court. *Eesti Telefon* disputed an administrative act of the Competition Board, which states that *Eesti Telefon* had ignored the rule prescribed by § 18(1)3) of the Competition Act (hereinafter "the CoA"), as being an undertaking with a natural monopoly and exclusive right it did not purchase communications construction work pursuant to procedure provided for by the Public Procurement Act (hereinafter "the PPA"). *Eesti Telefon* claimed that the PPA does not apply to legal persons in private law and thus the company can not be regarded a contracting authority for the purposes of the PPA. Furthermore, § 18(1)3) of the CoA is in conflict with the principle of society based on rule of law, proceeding from § 10 of the Constitution, and with §§ 3 and 13 of the Constitution, because the referred provision of the CoA can not be implemented without arbitrary exercise of state authority, as it restricts free enterprise and inviolability of property.

I. Admissibility of the petition

Pursuant to Constitution, the Supreme Court exercises both abstract and direct, i.e. concrete norm control. The President of the Republic and the Chancellor of Justice are entitled to raise issues of constitutionality of positive law before the Supreme Court. Direct or concrete norm control is exercised when a court of general jurisdiction or an administrative court has to apply a legal provision which it considers to be unconstitutional. This means that before a court makes a decision not to apply a law or other legislation and to petition the Supreme Court, it has to be convinced that the law or other legislation is applicable to the dispute or to the review of legality of an administrative act, and that any other solution is excluded. § 15(1)

of the Constitution defines such legislation as relevant, the Constitutional Review Court Procedure Act (hereinafter “the CRCPA”) as applicable (§ 5). Consequently, neither the Constitution nor the CRCPA empower courts of general jurisdiction or administrative courts to initiate abstract norm control.

As I see it, the Tallinn Circuit Court initiated abstract norm control, as the contested norm was not decisive for the review of the administrative act. The Tallinn Administrative Court invalidated the directive of the Competition Board due to violation of formal requirements. The court stated that the initiation of constitutional review was excluded because the court could not examine the merits of the case. The circuit court did not agree with this conclusion and wrote in its judgment that § 18(1)3) of the CoA was a relevant provision and the court should have assessed the claims of the applicant as to the unconstitutionality thereof. Subsequently, by way of pure abstract norm control, the court analysed the compatibility of § 18(1)3) of the CoA to the principle of rule of law and came to the conclusion that the provision is not applicable because of its conflict with § 10 of the Constitution. In this case the Constitutional Review Chamber of the Supreme Court declared it acceptable for a court of general jurisdiction or an administrative court to initiate abstract norm control and thus the Chamber blurred the line between admissibility and inadmissibility of petitions. It is true that this approach is understandable to a certain extent. When the administrative authority eliminates the deficiencies of form of the administrative act the problem of constitutionality of § 18(1)3) of the CoA may rise again upon examining the merits of the complaint. Nevertheless, I can not agree with extending the powers of abstract norm control to courts of general jurisdiction and administrative courts.

II. On legal clarity in general

The circuit court regarded § 18(1)3) of the CoA to be in conflict with § 10 of the Constitution because :”A situation where it is impossible to observe law or where an undertaking has to decide which provisions of the Public Procurement Act its has to be guided by, does not conform to the principle of rule of law”. The majority of the Chamber is of the opinion that § 18(1)3) of the CoA does not conform to the principle of legal clarity, proceeding from § 13(2) of the Constitution. It is very welcome that the Supreme Court gives a wider interpretation to § 4(3) of the CRCPA, which regulates the extent of review of petitions, because this is the only way for the Supreme Court to efficiently fulfil the function of a guardian of the Constitution.

This is for the first time that the Chamber refers to the principle of legal clarity, apparently furnishing it with an independent meaning. The Supreme Court has earlier recognised several essential principles, such as the principles of proportionality, legal certainty, legitimate expectations, but there is a danger that these principles will have a life of their own and that courts will no longer try to establish which fundamental right or freedom is violated by a legal provision or procedure. It happens rather often that courts, upon reviewing the constitutionality of a legal provision or a procedure, do not refer to a specific fundamental right or freedom and instead they invoke §§ 10 and 11 of the Constitution. The essence of § 10 is primarily that the constitutional list of fundamental rights and freedoms is not exhaustive, it may be complemented with rights proceeding from the spirit of the Constitution or which are in accordance therewith and correspond to the principles of human dignity and a state based on social justice and rule of law. § 11 imposes an obligation to weigh whether a restriction is necessary in a democratic society and does not distort the nature of the rights and freedoms restricted (the principle of proportionality). §§ 10, 11 and 13(2) are applicable if a fundamental right or freedom has been infringed upon.

The directive of the Competition Board infringes upon the right to engage in enterprise, stipulated in § 31 of the Constitution. In its judgment of 28 April 2000 the Supreme Court wrote as follows: "Any measure of public power which prevents, prejudices or eliminates any activity related to enterprise, infringes upon the right to engage in enterprise."[1] § 18(12)3) of the Competition Act hinders the freedom to enter into contracts for procuring work and services. That is why the circuit court should have examined the compatibility of the referred provision of the CoA with § 31 of the Constitution.

The aforesaid does not mean that the principle of legal clarity has no relevance in the process of constitutional review of norms. During this process a question as to the legal clarity of the norm must be raised. In German legal doctrine the definitiveness or legal clarity is a component of formal constitutionality.

The control scheme adopted by the European Court of Human Rights prescribes that the following three questions be answered upon deciding on the lawfulness of an infringement: 1) was the infringement in accordance with the law; 2) did the infringement have a legitimate aim, and 3) was the infringement necessary in a democratic society. Answer to the first question requires an analysis of whether a legal provision was clear and understandable.

In Estonian legal system the principle of legal clarity, indeed, proceeds from § 13(2) of the Constitution. The judgment under discussion leaves the issue of the meaning of legal clarity open. The Constitutional Review Chamber confines itself to stating that § 18(1)3) of the CoA is ambiguous.

One thing is clear: the requirement of legal clarity sets certain quality requirements to legislation. Pursuant to the instructions of the Council of Ministers of the European Union of 1993 the wording of legal acts has to be clear and simple and imprecise references to other texts have to be avoided. The rights and obligations of the persons to whom a legislative acts is addressed, must be defined clearly. Thus, these requirements are addressed first and foremost to the legislator and the observance of the requirements is reviewed by courts in cases of infringements of fundamental rights and obligations.

The principle of legal clarity is a blank concept and calls for value assessments from those who apply it. In its significant judgment in *Sunday Times v. United Kingdom* of 27 October 1978 the Human Rights Court has worded the following guideline:

“In the Court’s opinion, the following are two of the requirements that flow from the expression “prescribed by law”. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep peace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."[2]

Therefore, it is necessary to furnish the principle of legal clarity bearing in mind that a law must be sufficiently clear, which does not mean that every citizen should understand it without appropriate advice. It is also necessary to take account of who is the addressee of a law - an ordinary citizen or a powerful company who can afford qualified legal assistance.

III. On compatibility of § 18(1)3) of the CoA with the principle of legal clarity.

This provision establishes that an undertaking with a special or exclusive right or a natural monopoly shall purchase necessary things, other construction work and services pursuant to procedure provided for by the State Procurement Act. This is a direct reference to an Act, under which the provisions of the Public Procurement Act make up a mandatory part of the Competition Act. A norm referring to another Act must enable the addressee of the law to understand with sufficient clarity which norms are valid for him. Although the disputed provision does not enumerate specific sections of the PPA, it is possible, with appropriate advice, to come to a clear conclusion that an undertaking dominating the market, when purchasing works and services the value of which exceeds certain limit (§ 4 of the PPA), shall publish a notice of invitation to tender (§ 15), shall forward an invitation to tender (§ 16), open the tenders (§ 24), compare and evaluate the tenders (§ 26), declare one or several tenders suitable (§ 27) and declare one tender successful (§ 28) or reject all tenders (§ 30), etc. Even if a certain norm remains unclear it is possible to ask for an opinion.

Eesti Telefon contested the administrative act of the Competition Board not because it had difficulties in applying certain provisions of the PPA to competition for contracting of communications construction work. In the complaint *Eesti Telefon* expressed its disagreement on principles with the fact that the PPA is

extended to natural monopoly and undertakings with an exclusive right. It appears from the directive of the Director General of the Competition Board that in 1998 and 1999 the Competition Board has repeatedly tried to force *Eesti Telefon* to observe the provisions of § 18(1)3) of the CoA.

That is why I am of the opinion that § 18(1)3) of the CoA as a referring provision and the PPA as an Act referred to, in their conjunction, form a sufficiently clear basis for solving the issue under dispute without any need to declare the referring norm invalid.

---

[1] RT III 2000, 12 125 p 11
[2] EHRR (1979) Series A, Vol. 30, § 49
