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**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 17 March 1999**

Review of the petitions of the Valga County Court and the Tartu Administrative Court to declare clauses 12 and 20(6) of “General rules for trading in markets and streets” invalid.

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 Kalm, Ants Kull and Jüri Põld, at its open session of 3 March 1999, with the Chancellor of Justice Eerik-Juhan Truuväli and the representative of the Government of the Republic sworn advocate Villu Kõve and the representative of the Minister of Justice Priidu Pärna appearing, and in the presence of the secretary to the Chamber Piret Lehemets reviewed the petitions of the Valga County Court of 31 December 1998 and the Tartu Administrative Court of 21 January 1999.

I. FACTS AND COURSE OF PROCEEDINGS

1. On 12 November 1998 an officer of the Valga Police Prefecture prepared an administrative offence report in regard to sole proprietor S. T., as S.T. was selling new manufactured goods in the market. Clause 20(6) of the “General rules for trading in markets and streets” (hereinafter “the general rules”), approved by Government of the Republic Regulation no. 37 of 11 February 1998 (as worded in the regulation of 11 August 1998) prohibited the sale of new manufactured goods in markets. The Police Prefecture submitted the report concerning the administrative offence to the Valga County Court requesting that S. T. be punished for the violation of the rules for trading in markets pursuant to § 133 of the Code of Administrative Offences (hereinafter “the CAO”).

The Valga County Court heard the administrative offence matter on 17 November 1998. The court decided not to apply clause 20(6) of the general rules due to its conflict with § 31 of the Constitution, and terminated the proceedings of the administrative offence matter due to the lack of the necessary elements of an administrative offence.

2. On 26 November 1998 the chief inspector of the Tartu and Põlva County office of the Consumer Protection Board prepared a report concerning an administrative offence by sole proprietor T. R., as T. R.

was selling new manufactured goods on the territory of the AS Tartu Turg and had no documents concerning consignment of goods, purchase and sale documents or documents certifying the origin and quality of the goods. According to the administrative offence report R. T. had violated clauses 12 and 20(6) of the general rules, thus committing an administrative offence established in § 133 of the CAO. The Tartu Administrative Court examined the administrative offence matter on 6 January 1999. The court declared clauses 12 and 20(6) of the general rules to be in conflict with §§ 31 and 32(2) of the Constitution and did not apply these provisions of the general rules.

3. Proceeding from § 15 of the Constitution and § 5(1) and (2) of the Constitutional Review Court Procedure Act the Chairman of the Valga County Court and the Chairman of the Tartu Administrative court filed petitions with the Supreme Court to declare invalid clause 20(6) of the general rules due to conflict with § 31 of the Constitution. Furthermore, the Chairman of the Tartu Administrative Court is requesting that in addition to the referred provision also clause 12 of the general rules be declared invalid due to conflict with § 32(2) of the Constitution.

4. On 3 February 1999 the Constitutional Review Chamber decided to join the proceedings of the petitions of the Valga County Court of 31 December 1998 and the Tartu Administrative Court of 21 January 1999.

5. By its regulation no. 76 of 3 March 1999 of the Government of the Republic declared clause 20(6) of the general rules invalid (RT I 1999, 25, 370).

II. FACTS AND COURSE OF PROCEEDINGS

A. Conformity of clause 20(6) of the general rules to § 31 of the Constitution

6. The Constitutional Review Chamber shall first review whether clause 20(6) of the “General rules for trading in markets and streets”, approved by the Government of the Republic Regulation no. 37 of 18 February 1998, which was in force at the time the report of the administrative offence was prepared, and which reads as follows:

“It is prohibited to offer or sell to the consumer in markets:

[...]

6) new manufactured goods;” (RT I 1998, 19, 298; 73, 1220),

is in conformity with the first and second sentences of § 31 of the Constitution which provide as follows:

“Estonian citizens have the right to engage in enterprise and to form commercial undertakings and unions. Conditions and procedure for the exercise of this right may be provided by law.”

Justifications of participants

7. According to the judgments of the Valga County Court and the Tartu Administrative Court, pursuant to § 31 of the Constitution every Estonian citizen has the right to engage in enterprise and to form commercial undertakings and unions, and conditions and procedure for the exercise of this right may be provided solely by law. The prohibition to offer or sell to consumers new manufactured goods, established by clause 20(6) of the general rules, approved by the Regulation of the Government of the Republic, has been issued exceeding competence and consequently is in conflict with § 31 of the Constitution. Furthermore, by prohibiting enterprise (sale of new manufactured goods in markets) the Government of the Republic has exceeded the discretion established by the purpose of the Consumer Protection Act and § 31 of the Constitution. The Government as an executive body has no competence to establish restrictions on enterprise by the general rules. The courts found that the intended purpose (the protection of consumers, proceeding from the Consumer Protection Act) and the measures taken (restriction on enterprise) were not in proportional correlation and thus the principle of proportionality valid in a state based on the rule of law has been violated. The Tartu Administrative Court adds that the established restriction is also inappropriate and is not necessary.

8. The Government of the Republic finds the petition to be unjustified. The Government points out that the general rules do not establish a prohibition on certain categories of traders to pursue certain areas of activity and do not restrict all traders pursuing certain fields of activity. Instead, the general rules only determine the place of business, by restricting the sale of certain goods in markets and streets. As the sale of new manufactured goods is allowed in the shops, there is no restriction on enterprise. § 11(3) of the Consumer Protection Act gives the Government of the Republic the right and obligation to establish the general rules for trading in markets and streets. Thus, the Government of the Republic is empowered to decide how trading should be organised in these places. Establishment of a procedure constitutes a restriction on something, because a procedure in itself presupposes that one has to act pursuant to established rules and not pursuant to his or her discretion. The purpose of the adoption of the general rules for trade in the markets and streets was to fulfil the task arising from the Consumer Protection Act to guarantee the protection of consumers' rights. As a market is not a permanent place of business for the persons who offer goods, the consumers' rights concerning the guarantees on goods established by §§ 7 and 8 of the Consumer Protection Act are not guaranteed.

9. The Minister of Justice shares the opinions of the Valga County Court and the Tartu Administrative Court that clause 20(6) of the general rules is in conflict with § 31 of the Constitution. § 11(3) of the Consumer Protection Act includes a norm delegating authority which, in turn, contains a reference, which authorises the Government of the Republic to specify in more detail the prohibitions and restrictions provided for in Chapter II of the Act, and to create a procedural framework necessary for the observance thereof. But §§ 6 to 8 of the Act give rise to no grounds for the establishment of the extensive restriction provided for by clause 20(6) of the general rules. By establishing a sale restriction on such a wide category of goods the Government of the Republic exceeds the limits of the purpose of the Act – to protect the consumers' interests – and regulates trading in the markets and streets by issuing regulations independently of the law.

10. The Chancellor of Justice admits that from the formal legal sense, due to the imperative nature of the restriction, clause 20(6) of the general rules may be in conflict with § 31 of the Constitution. The conflict would be disputable or there would be no conflict at all if the wording of clause 20(6) was permissive, i.e. if the permissibility depended on the condition that the guarantees established by §§ 252, 253 and 254, etc. of the Civil Code were ensured.

The opinion of the Chamber

11. § 133 of the Code of Administrative Offences established administrative liability for the violations of rules for trading in the markets and streets. The disposition of the referred norm is substantially blank and has to be substantiated by other legislation of general application. § 2(2) of the CAO stipulates that the rules the violation of which creates administrative liability shall be established by law, by a regulation of the Government of the Republic or pursuant to procedure established by the Government of the Republic. It is pointed out in the same provision that the general rules approved by the Government of the Republic shall be the basis for the establishment of the rules referred to in § 133 of the Code. The government's obligation to establish the rules for trading in markets and streets proceeds from § 11(3) of the Consumer Protection Act. An issuer or adopter of legislation of general application is bound by the principle contained in § 11 of the Constitution, pursuant to which rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted. Pursuant to the interpretation of the Constitutional Review Chamber, according to the principle of legality, which is a generally recognised principle of law established by § 3 of the Constitution, fundamental rights and freedoms may be restricted solely by law (see also judgment of the Constitutional Review Chamber of 12 January 1994 – RT I 1994, 8, 129, p. 226).

12. Proceeding from the aforesaid it is necessary to clarify whether the restriction on the sale of new manufactured goods in the markets and streets restricts the constitutional right to engage in enterprise. The Chamber does not consent to the view of the Government of the Republic that for the purposes of § 31 of the Constitution only restrictions imposed on subjects can be considered as restrictions on enterprise. For the

purposes of § 31 of the Constitution, restrictions on enterprise are also restrictions on persons' activities which, as a rule, are aimed at gaining income from the manufacture and sale of goods, provision of services and realisation of property, etc.

13. It proceeds from the second sentence of § 31 of the Constitution that the conditions and procedure for engaging in enterprise may be provided by law. The Chamber is of the opinion that the referred sentence in conjunction with what has been provided in § 11 of the Constitution indicates, on the one hand, that the right to engage in enterprise expressed in § 31 of the Constitution is not an absolute right, and on the other hand offers a possibility to restrict the right to engage in enterprise. Upon imposing restrictions one has to see to it that the restrictions are necessary in a democratic society and that the means used are proportional to the desired aim. Restrictions must not prejudice the interests or rights, protected by law, to greater extent than justifiable by the legitimate objective of the norm.

14. Clause 1 of the general rules states that the rules have been established under § 11(3) of the Consumer Protection Act with the purpose of providing for requirements for trading in the markets and streets. The Government of the Republic explained that the general rules were issued in accordance with § 87(6) of the Constitution, for the implementation of the Consumer Protection Act, and that the restrictions were imposed in the interests of the protection of consumers' rights.

The Chamber agrees to the opinions expressed in the petitions of the Valga County Court and the Tartu Administrative Court that the Government exceeded its competence by prohibiting the sale of new manufactured goods in the markets. Pursuant to § 11 and the second sentence of § 31 of the Constitution the law may stipulate the conditions of and procedure for the right to engage in enterprise, consequently to restrict the right. The Chamber is of the opinion that the law does not have to describe all such restrictions in detail. The law must, though, determine the framework within which the executive power shall specify pertinent provisions of law. Only then is a regulation in conformity with § 87(6) of the Constitution.

§§ 6 to 8 of the Consumer Protection Act describe the prohibitions and restrictions on offering goods and services, to guarantee the protection of consumers' rights. Although the Act empowered the Government of the Republic to impose general rules for trading in the markets and streets, the government is restricted by conditions stipulated by law. The provisions of Chapter II of the Consumer Protection Act determine the requirements for goods and services, enumerate the obligations and prohibitions on those who sell goods and offer services, and restrictions on the sale of goods and provision of services. The delegation norm in § 11(3) of the Consumer Protection Act authorises the Government of the Republic only to specify the prohibitions and restrictions established by §§ 6 to 8 of the Act. The referred provisions do not provide grounds for the imposition of the restriction provided by clause 20(6) of the general rules.

15. For the aforesaid reason clause 20(6) of the general rules is in conflict with the first and second sentences of § 31, and with § 87(6) of the Constitution. In the light of this conclusion the Constitutional Review Chamber considers it unnecessary to examine whether the measures taken were proportional with the aim of protection of consumers' rights.

As the Constitutional Review Chamber can not declare invalid a legal provision which has already been declared invalid, the Chamber confines itself to establishing the unconstitutionality of clause 20(6) of the general rules.

B. Conformity of clause 12 of the general rules to § 32(2) of the Constitution

16. According to the petition of the Tartu Administrative Court clause 12 of the general rules is unconstitutional. It appears from the judgment of the court of 6 January 1999 that the court did not apply clause 12(1), which provided for administrative liability at the material time of preparation of the administrative offence report as follows:

“A seller has the obligation to keep in the place of selling:

1) Documents concerning consignment of goods, documents of purchase and sale and documents certifying the origin and quality of the goods – until the end of the sale of pertinent goods.”

The court argued that this provision was in conflict with the first and second sentences of the § 32(2) of the Constitution, providing that: “Everyone has the right to freely possess, use, and dispose of his or her property. Restrictions shall be provided by law.”

Justifications of the participants

17. The Tartu Administrative Court is of the opinion that the obligation to keep in the place of selling the documents concerning consignment of goods, documents of purchase and sale and documents certifying the origin and quality of the goods, imposed by clause 12(1) of the general rules, contains a restriction on the right to dispose of one’s property. Without the referred documents the owner of the goods can not sell the goods (property) belonging to him or her. The restriction has been imposed by administrative legislation and is not in conformity with the purpose of the Consumer Protection Act.

The opinion of the Chamber

18. The Constitutional Review Chamber consents to the views of the Government of the Republic and the Chancellor of Justice that the obligation to keep in the place of selling the documents concerning consignment of goods and documents of sale of goods or services, and to present these to competent persons conducting inspection is established by § 7(13) of the Consumer Protection Act. The general rules repeat what has been established by the Act. The Chamber considers it necessary to add that the requirement to keep in the place of selling the documents concerning consignment of goods and documents of sale of goods or services does not restrict the constitutional right to freely dispose of one’s property.

19. Disposal of property as a component of the right of ownership means the right to determine the legal status of one’s property. For a seller this means first of all the right to transfer the goods. The lack of the documents enumerated in clause 12(1) of the general rules does not prevent the sale of goods. At the same time these documents help to check the origin and qualities of goods.

20. On the basis of the aforesaid clause 12(1) of the general rules is not in conflict with the first and second sentences of § 32(2) of the Constitution.

Proceeding from § 15(1) of the Constitution and from § 19 of the Constitutional Review Court Procedure Act, **the Constitutional Review Chamber of the Supreme Court has decided:**

1. To establish that clause 20(6) (as worded in the regulation of 11 August 1998) of the “General rules for trading in markets and streets”, approved by the Government of the Republic Regulation no. 37 of 11 February 1998, was in conflict with the first and second sentences of § 31 of the Constitution.

2. To dismiss the petition of the Tartu Administrative Court to declare invalid clause 12 (as worded in the regulation of 11 August 1998) of the “General rules for trading in markets and streets”, approved by the Government of the Republic Regulation no. 37 of 11 February 1998.

The judgment is effective from the date of pronouncement, is final and is not subject to further appeal.

U. Lõhmus
Chairman of the Constitutional Review Chamber

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