Constitutional judgment 5-20-3

S U P R E M E C O U R T
EN BANC

JUDGMENT

in the name of the Republic of Estonia

Case number	5?20?3
Date of judgment	20 October 2020
Composition of court	Chairman: Villu Kõve; members: Velmar Brett, Peeter Jero Hannes Kiris, Ants Kull, Kai Kullerkupp, Julia Laffranque, Saal Heiki Loot, Kaupo Paal, Nele Parrest, Ivo Pilving, Jüri Põld, Paa Saare, Juhan Sarv and Tambet Tampuu
Case	**Application by the President of the Republic to declare uncon on amending the Funded Pensions Act and related Acts mandatory funded pension) adopted by the Riigikogu on 11 M**
Basis for proceedings	Application of 20 March 2020 by the President of the Republic

articipants in the proceedings	President of the Republic
	Riigikogu
	Chancellor of Justice
	Government of the Republic
	Minister of Justice
Hearing	4 August, hearing
Persons attending the hearing	Representative of the President of the Republic, attorney-at-law M
	Representatives of the Riigikogu: Chairman of the Finance Com and adviser to the Committee Kristo Varend
	Representative of the Government of the Republic: Minister Helme
	Minister of Justice Raivo Aeg
	Joint representatives of the Minister of Finance and Minister of law Paul Keres and Artur Sanglepp
	Chancellor of Justice Ülle Madise and officials of the Chancell Lopman, Kristi Lahesoo and Kärt Muller
	Auditor General Janar Holm
	President of the Bank of Estonia Madis Müller and employee Martti Randveer and Kadri-Liis Raun
	Chairman of the Board of the Financial Supervision Authority Kil
	Representatives of the Estonian Insurance Association: chairman Jesse and attorney-at-law Veiko Vaske
	Member of the Riigikogu Finance Committee Andres Sutt

OPERATIVE PART

To dismiss the application

FACTS AND COURSE OF PROCEEDINGS

1. On 14 November 2019, the Government of the Republic initiated the Draft (108 UA [1], XIV composition of the Riigikogu) “Act on amending the Funded Pensions Act and related Acts (reform of the mandatory funded pension)“ (hereinafter the FPA Amending Act or the contested Act) and on the same date the Riigikogu admitted it for proceedings.

2. On 24 January 2020, the Government of the Republic decided to link adoption of the FPA Amending Act with the matter of confidence.

3. On 29 January 2020, the Riigikogu adopted the FPA Amending Act.

4. On 7 February 2020, by decision No 551 the President of the Republic declined to promulgate the FPA Amending Act due to its conflict with the Constitution. The President made a proposal to the Riigikogu for a new debate on the Act and bringing it into line with the Constitution.

5. On 10 February 2020, the Riigikogu once again admitted the FPA Amending Act for proceedings and on 11 March 2020 the Riigikogu adopted the FPA Amending Act anew in its unamended form.

6. On 20 March 2020, the President of the Republic declined to promulgate the FPA Amending Act and applied to the Supreme Court seeking a declaration of unconstitutionality of the Act.

APPLICATION BY THE PRESIDENT OF THE REPUBLIC

7. The President finds that the FPA Amending Act contravenes §§ 10, 12, 14, § 28(2) and §§ 31 and 32 of the Constitution, as well as the preamble to the Constitution.

7.1. Section 28(2) of the Constitution, which entitles everyone to government assistance in the case of old age (old age assistance), gives rise to the state’s obligation to create a functioning pension system. Section 14 of the Constitution also lays down the duty to guarantee fundamental rights and freedoms.

7.1.1. In light of the principles of human dignity and the social state laid down by § 10 of the Constitution, § 28(2) of the Constitution obliges the state to ensure people the ability to cope in line with human dignity in retirement. This means the possibility of a standard of living considerably better than minimum subsistence, in order to prevent social risks from becoming a reality and individuals from falling into deprivation. The state has the duty to ensure minimum subsistence even without creating a pension system and this does not replace old age assistance. Pension insurance is also linked to a person’s contribution to the functioning of the state during their working life. The right to a pension is also protected under the fundamental right to property laid down by § 32 of the Constitution.

7.1.2. The preamble to the Constitution gives rise to an agreement between the generations that no unreasonable financial duties in fulfilling the core functions of the state are imposed on future generations. In a state with a diminishing population it is not possible to enter into a social contract implying that a future generation would pay for the old age pensions of the previous generation. Therefore, an intergenerational agreement requires that the previous generation should at least partially accumulate their own pension assets and thereby participate in reducing the risk of poverty during their pension age.

The Constitution also establishes some purely collective benefits as having superior legal force, such as the objective duty laid down in the preamble to the Constitution that the state should be a pledge for the social progress and general welfare of present and future generations.

7.1.3. In the current pension system, fulfilment of the duty laid down in § 28(2) of the Constitution is guaranteed first and foremost by the state pension and the mandatory funded pension. The latter enables targeted accumulation of assets of the people covered by the system, reducing their risk of poverty and increasing the sustainability of pension insurance. The aim of the Government has been to keep the average

pension on a level corresponding to 40% of the average wage, which would presumably ensure a sufficient standard of living in old age. In 2018, the ratio between the average wage and pension was 41.9%.

7.1.4. Section 1 clause 67 of the FPA Amending Act supplements the Funded Pensions Act (FPA) with § 43^1 which grants the right to people who are not yet entitled to a mandatory funded pension to demand redemption of all pension fund units and payment of the corresponding amount, as well as payment of the money in their pension investment account. Section 1 clause 120 of the FPA Amending Act supplements the FPA with § 72^4, which enables a policyholder to cancel a pension contract entered into before 1 January 2021 and receive the money to the extent of the surrender value of the contract. This enables people to waive the intended purpose of pension assets collected thus far or to be collected in the future, making the mandatory funded pension retroactively voluntary. A voluntary funded pension, however, does not ensure accumulation of pension assets with sufficient certainty. By abolishing the mandatory funded pension, the pension system will stop working according to its purpose and the number of pensioners finding themselves at risk of poverty will increase in the future. According to the explanatory memorandum to the contested Draft Act, upon the entry into force of the contested Act the ratio between the old age pension and wage would probably diminish more than in the event of continuation of the current pension system.

On that basis, the amendments introduced by the contested Act violate the fundamental rights laid down by § 28(2) and §§ 14 and 32 of the Constitution as well as the principles of human dignity, a social state and legitimate expectations guaranteed by § 10 of the Constitution, and the intergenerational agreement arising from the preamble to the Constitution.

7.1.5. The aim of giving people more freedom of choice in collecting an old age pension, to create additional opportunities in investing pension assets and thereby ensuring better coping ability in pension age does not justify violation of the principles of the Constitution. By increasing freedom in using pension assets, the state is not relieved of the constitutional duty to ensure sufficient coping in old age. Old age assistance is not replaced by an ambiguous opportunity to use other social guarantees which are intended for alleviating other types of social risks in old age. More than 740 000 people have joined the mandatory funded pension system and have developed a legitimate expectation that the current pension system in its key aspects would remain valid for them. A disproportionate tax burden will fall on future generations to fulfil the duty laid down by § 28(2) of the Constitution because, without it, future pensioners would fall into a greater risk of poverty.

7.2. Due to the establishment of § 43^1 of the FPA, the FPA Amending Act also contravenes the fundamental right to equality (§ 12 Constitution) and the principle of uniform taxation.

7.2.1. In comparison to those people who have not joined the funded pension system, the people that joined the system are treated differently since they are retroactively given an opportunity to withdraw pension assets collected on account of 4% of social tax and to freely use those assets. Persons who have joined the funded pension can decide on the intended purpose of the 4% of social tax and they are granted a retroactive social tax incentive. At the time of joining the system, people were not aware of such an opportunity.

7.2.2. Unequal treatment is unjustified since the declared aims of the pension reform (i.e. to increase freedom of choice, to give freedom in managing the assets and planning the necessary funds for coping) are not linked to social tax. These aims also cannot affect the rate at which the same type of income is taxed and for what purpose the collected social tax is used. One type of income should be taxed uniformly and joining or not joining the mandatory funded pension system does not change the income taxed with social tax. A retroactive change of the intended purpose of the assets collected through social tax to keep the pension system functioning also contravenes the principle of the rule of law (§ 10 Constitution).

7.3. In addition, establishment of § 43^1 of the FPA disproportionately interferes with the fundamental right to property of those people who do not leave the mandatory pension fund.

7.3.1. The state retroactively creates a risk that the value of the units of the mandatory pension fund and,

consequently, the subsequent pension of those remaining in the fund, would also depend significantly more than previously on the behaviour of the other unit-holders, in addition to developments in the financial markets and the economy. To change the units, it is also currently possible to redeem the pension fund units; however, the effect on the value of the units arising from this cannot be considered significant. If people are given the right to redeem units for the purpose of receiving a payment of money, the number of redemption transactions increases.

7.3.2. Costs related to exit from pension funds would be left to be borne by those unit-holders who do not leave the mandatory pension fund, which negatively affects the value of the units. This constitutes a significant additional financial obligation, which is disproportionate.

7.3.3. Significant changes to the mandatory funded pension system are introduced retroactively and rapidly. The legislator has not analysed the risks involved in the reform, considering them merely hypothetical. The legislator should analyse the effect of even hypothetical risks and their likelihood and establish effective measures to mitigate those risks.

7.3.4. Since the state worsens the prospects to the old age pension for those remaining in the mandatory funded pension system, the contested Act also contravenes the principles of legal certainty and legitimate expectations (§ 10 Constitution).

7.4. Section 72^4 of the FPA to be established with the contested Act, which grants the right to withdraw from a pension contract, disproportionately interferes with the freedom of enterprise of insurers (§ 31 Constitution) along with the principle of legal certainty.

7.4.1. Interference with freedom of enterprise cannot be justified by equal treatment of pension savers and persons having entered into a pension contract (policyholders). It is not correct to compare pension savers with persons who have already entered into a pension contract.

7.4.2. The effect of the change may be very profound. An insurer may be forced to abandon providing the service since contractual obligations can no longer be fulfilled in the changed situation, or continuation would result in serious loss or insolvency. The right to withdraw from lifetime pension contracts is surprising for the persons concerned since in essence the contract has been concluded for a specified term (including validity until the death of the policyholder). Both parties to the contract have a legitimate expectation that legislation will not interfere with contractual relations which have already become established.

7.5. Establishing § 72^4 of the FPA also disproportionately interferes with the fundamental right to property of policyholders who have entered into a pension contract – i.e. the right to continue receiving a pension on the basis of a lifetime pension contract – in combination with the principle of legitimate expectations. The interest of some policyholders in cancelling the pension contract and withdrawing the money does not outweigh the legitimate interest in the stability and sustainability of the system of those policyholders who do not wish to cancel their pension contract. The right to withdraw money does not balance interference with the fundamental rights of those persons.

7.6. With the introduction of § 72^4 of the FPA, persons having entered into a pension contract and those only receiving a state pension are retroactively and unjustifiably treated unequally, so that the contested Act contravenes the fundamental right to equality and the principle of uniform taxation. Persons having entered into a pension contract are given an opportunity to withdraw at once the 4% share of the social tax and to freely use it, thus changing the purpose of the social tax paid on their wages. No such opportunity existed when joining the mandatory funded pension. Retroactive change of the intended purpose of the social tax contravenes the principles of the rule of law.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

Riigikogu

8. The Finance Committee having submitted an opinion on behalf of the Riigikogu found that the FPA Amending Act was constitutional. A minority of the Finance Committee (five members) submitted a dissenting opinion and found that the contested Act was unconstitutional.

8.1. In the opinion of the Finance Committee, making the mandatory funded pension voluntary increases people's freedom and improves their awareness of the pension system. It will also expand investment opportunities and increase competition, as a result of which fund managers will have to make more effort to keep clients. Presumably, it will also result in improved productivity of pension funds which, in turn, will ensure a higher pension in the future.

8.1.1. It is not possible to claim with certainty that the contested Act would endanger people's coping and the state would in the future fail to fulfil its constitutional duties in meeting social fundamental rights. The duty of the state arising from § 28(2) of the Constitution to provide old age assistance to people is fulfilled, first and foremost, with the State Pension Insurance Act. Since no special requirements have been established for the mandatory funded pension system either by the Constitution or other acts, it is not necessary to assess whether the contested Act affects the conformity of the amount of the old age pension with adequate living standards.

8.1.2. The principles of human dignity and the social state give rise to the fundamental right to minimum subsistence and decent living. A more precise scope of assistance is determined by the state's economic situation. The legislator has a broad margin of appreciation in ensuring social rights, and it would only be unconstitutional if assistance fell below the minimum necessary threshold.

8.1.3. The contested Act does not contravene the fundamental right to organisation and procedure laid down by § 14 of the Constitution. If it should appear that the legal framework as a whole has shortcomings that fail to ensure the required level of social fundamental rights, this alone cannot lead to the conclusion that shortcomings arise only from the contested Act. The provisions of this Act do not, of themselves, bring about significant changes in the pension system in force to date. The effects arise from people's behaviour that these rules enable. In line with the contested Act, the state will consistently monitor the functioning of the Estonian pension system and, if necessary, will periodically improve the system.

8.2. Interference with the fundamental right to property arising from the contested Act is not serious and is compatible with the Constitution.

8.2.1. Stress tests of the liquidity of pension funds performed by the Financial Supervision Authority showed that payment of the money from the funds would not cause large-scale liquidity risks for the funds, so that in the event of a more moderate withdrawal scenario regular management of the fund would probably not be disturbed.

8.2.2. To protect the pecuniary interests of people wishing to continue collecting money under the second pension pillar, several measures were laid down in the contested Act. A possibility was established that from 2021 to 2024 a fund may temporarily dispense with compliance with statutory requirements for the asset structure of a fund. To facilitate investments and alleviate possible pressure for sale of a fund's assets arising from withdrawal from a pension fund, a five-month period was established for advance notice of withdrawal of money from a fund as well as for exit from the second pillar. Fund managers were also given the right to take a greater loan than previously on account of the fund (25% instead of the previous 10%). No increased rate for a fee for redemption of a unit was imposed by law since this would have no effect. People would be able to avoid the fee by first transferring the money to a pension investment account and then withdrawing it from there without a redemption fee.

8.3. The contested Act does not violate the fundamental right to equality.

8.3.1. Since the first and second pension pillars are different, different treatment of those having joined and those not having joined the second pillar is justified. A person not having joined the second pillar does not directly acquire any pecuniary rights but only the right to require that, upon reaching retirement age, the state would pay a guaranteed pension on the conditions and to the extent provided by law.

8.3.2. From social tax accounted on the wages of a person having joined the second pension, 16% is transferred to the assets of the state pension insurance system, so that their pension in the first pillar is smaller. For the 4% of social tax paid to the second pillar, a person acquires units in a mandatory pension fund which become their personal assets that can be changed and inherited. A pension saver having joined the second pillar obtains units in a fund for 4% of the social tax only on the condition that they themselves contribute to acquisition of the units with a 2% payment from their wages. Thus, the person bears a higher tax burden as well as an investment risk. Withdrawal of money from a pension fund entails a risk of receiving a smaller pension in the future, which does not arise in the case of the first pillar.

8.3.3. People who wish to continue receiving a pension under the contract are not deprived of this possibility by the amendments to § 72^4 of the FPA. The contested Act gives people who have already entered into a pension contract the right for a specified term to withdraw from the contract and choose how to withdraw their money collected in the second pension pillar. Instead of a lifetime pension, it is also allowed in the future to choose a pension for a specified term or to withdraw all money at once. A similar right is already enjoyed now by people receiving a funded pension for a specified term from the second pillar. They may also terminate their funded pensions and withdraw the remaining money all at once.

8.4. Section 1 clause 120 of the contested Act (§ 72^4 of the FPA) does not violate the freedom of enterprise of insurers who have entered into pension contracts. The right granted to policyholders to withdraw from an insurance contract has some undesirable impact on the economic activities of insurers. However, the law has stipulated several measures to alleviate that impact.

8.4.1. An insurer may refrain from making pension payments under pension contracts remaining in force from 1 February 2022. If an insurer refrains from making pension payments, the state will continue making payments to policyholders through the Social Insurance Board. The same possibility also applies if too many policyholders use the opportunity to change insurer (§ 52^2 FPA) and an insurer is unable to continue offering pension insurance for economic reasons. For insurers, the possibility of withdrawal from pension contracts already entered into balances the fact that, along with disappearance of the duty to enter into a pension contract, the number of new clients coming to insurers might be significantly smaller, so that insurers cannot reckon with insurance premiums.

8.4.2. The possibility of withdrawal from pension contracts is temporary and only applies within three months of entry into force of the Act but does not extend to new contracts. In view of entry into pension contracts becoming voluntary and the fact that the volume of pension contracts would presumably decrease, the obligation of an insurer to distribute profit to policyholders and beneficiaries has been abandoned (§ 118 clause 118 of the contested Act (§ 70(4) FPA). An insurer may charge a fee for withdrawal from an insurance contract. In conclusion, the possible unfavourable impact on the freedom of enterprise of insurers has been minimised and interference with freedom of enterprise can be considered constitutional.

8.5. The principle of legitimate expectations does not deprive the parliament of the right to amend existing legislation. The contested Act does not result in changes with an unfavourable retroactive effect. The mandatory funded pension was not established for a specific period nor was it promised that the rules would not change in the future. When adopting the Act, the Riigikogu also took into account that those concerned would be left sufficient time to adapt to the changes.

9. A minority of the Riigikogu Finance Committee found that the FPA Amending Act was unconstitutional

because of the following main arguments.

9.1. The rules under the contested Act interfere unconstitutionally with the right to old age assistance from the state under § 28(2) of the Constitution.

The required impact assessment was not carried out prior to adoption of the Act. Nor were any solid aims presented during the proceedings of the Draft Act to justify interference with fundamental rights and change of the basic logic of the pension system. Allowing withdrawal of the money from the second pension pillar only achieves short-term additional revenue to the state budget at the price of breaking the pension system, followed by a considerable increase in the number of pensioners finding themselves at risk of poverty. The funded pension cannot be seen as merely additional income provided alongside income guaranteed by the state. In a worsening demographic situation, the second and third pillars are an indispensable part of the pension system in order to ensure decent coping for Estonian pensioners, who are at the greatest relative risk of poverty in the European Union. In line with the principle of the social state, the state must ensure that pensioners do not fall into poverty risk in retirement, and the second pillar has a central role in this in the pension system. If in the future the pension of the majority of pensioners only relies on the first pillar, this places unreasonably large financial obligations on future generations and puts future pensioners at higher poverty risk than before.

9.2. The contested Act contravenes the fundamental right to equality since no reason exists for unequal treatment of people. The scope of the mandatory social protection of persons in a similar situation differs depending on their past choices. The principles of uniform taxation and the rule of law are also retroactively violated. People having joined the second pension pillar will have at their disposal an amount which has accumulated under the second pillar on account of the 4% of social tax and the supplementary payment made by the state. Nor has social tax been paid on the sum to be returned.

9.3. Enabling large-scale withdrawal of assets from funds throws financial management out of balance, imposes different liquidity, risk management, and length of investments but does not enable similar productivity that can be offered by a mandatory pension fund. The costs of withdrawal from a fund (such as the cost of a liquidity loan taken to redeem units, the cost of keeping a larger liquidity buffer, or increase of the fund fee due to diminished volumes) are left for the fund to bear. Departure of participants from the system is not predictable or compensable nor is it the result of competition.

9.4. The right to withdraw from an insurance contract violates the freedom of enterprise of insurers. Parties having entered into a contract have a legitimate expectation that legislation will not interfere with the contract. If insurers stop providing the service, this also damages the interest of pension savers and recipients to choose between different products and providers and receive a higher and lifetime pension. A lifetime pension as a public interest outweighs an individual’s interest in receiving their pension before retirement age or all at once without covering the longevity risk.

Government of the Republic and the Minister of Justice

10. The Government of the Republic and the Minister of Justice in their jointly submitted opinion find that the FPA Amending Act is not unconstitutional.

10.1. The pension reform does not interfere with the right to state assistance laid down by § 28(2) of the Constitution, or the principles of human dignity and the social state, or the preamble.

10.1.1. It is doubtful whether the mandatory funded pension system falls within the material scope of the right to state assistance under § 28(2) of the Constitution. Through the second pension pillar, the state does not provide material assistance to those in need but creates the conditions for mandatory pension collection. Even if the mandatory funded pension system falls within the scope of protection of § 28(2) of the Constitution, the pension reform does not interfere with that scope of protection. The legislator has a broad margin of appreciation in determining the type and extent of state assistance mentioned in § 28(2) of the Constitution and interference is possible only if assistance provided to a person falls below the statutory minimum subsistence. Currently and in the foreseeable future the state fulfils its duty of providing sufficient assistance even if the mandatory funded pension system were to be abolished completely.

10.1.2. Upon the entry into force of the contested Act, the Republic of Estonia also complies with the duties

arising from the European Social Charter and the European Code of Social Security. According to analysis by the Ministry of Social Affairs and the Ministry of Finance, pensions in the Republic of Estonia have exceeded and also currently exceed the rate of assistance required by the European Code of Social Security at least twofold. Even when taking into account extremely long-term forecasts by the Bank of Estonia and the National Audit Office, it is highly likely that the post-reform pension system would also continue to ensure a person minimum subsistence. Assistance to those at the risk arising from old age may also manifest itself in other measures apart from a pension. For example, payment of subsistence benefit is one such measure.

10.1.3. The pension reform does not interfere with the legitimate expectation of individuals as regards the amount of future pension or the functioning of the pension system. Individuals have not developed a legitimate expectation to preservation of the current pension system so that it would never be changed. The pension reform does not restrict but instead expands the legal position of an individual. Under the Constitution, what kind of regulatory arrangement is practicable and sustainable for collecting the assets needed to cope in the old age is for the legislator to decide. Decisions in shaping social policy and the state budget, if they occur in compliance with the Constitution, are not subject to review either by the courts or the President of the Republic.

10.1.4. The preamble to the Constitution does not give rise to the principle of an intergenerational agreement alleged by the President of the Republic. If in the future a need should arise to increase taxes, reduce other benefits or state expenditure in order to fulfil the functions of the state, the legislator is competent to carry out those changes. Following the pension reform, the necessary state budget environment in which state revenue is received as planned will still be guaranteed.

10.1.5. In the case of a change in demand, a natural consequence is additional effort by pension funds in satisfying that demand. Thus, it is probable that pension funds will begin to offer people better conditions to ensure that their services are used. The President's criticism concerning a possible increase in the tax burden is based on her assumption that she does not consider it possible that savings for retirement would be collected without state compulsion.

10.2. Although the FPA Amending Act treats people collecting their pension under the first and second pension pillar differently, different treatment is justified since the legal status of the groups is different under current law.

10.2.1. The tax burden of the members of the group under the second pension pillar is higher, while their pension received in the future under the first pillar is also respectively smaller. The second pillar group acquires pension fund units which are a person's own assets and can be disposed of to a limited extent. However, they also bear an investment risk entailing uncertainty with regard to future pension. The first pillar group bears no such risk. They obtain an insurance component based on which they are entitled to claim payment of a pension by the state upon reaching retirement age. When comparing the groups, different succession rights under the first and second pillar should also be taken into account.

10.2.2. No partial refund of social tax to the group under the first pension pillar can be stipulated since the taxes paid by their employer are used to finance payment of the pension to current pensioners, so that additional funds to the state budget would need to be collected. Thus, unequal treatment is also justified by the need to use state money economically. It would be extremely complicated to place the groups in an equal situation retroactively. It is not possible to give the first pillar group pecuniary rights similar to the second pillar group. It would not be possible to make uniform payments to the first and second pillar groups since, in the first case, the 4% share of the social tax has changed due to indexation while, in the second case, redemption of units would take place according to their net value which has been affected by a fund's productivity and costs. Administrative complexity can also be considered one legitimate reason among others for unequal treatment.

10.2.3. The contested Act does not retroactively change the intended purpose of the social tax. The purpose of the social tax paid on the wages of the members of the first and second pension pillar groups is different even under current law.

10.3. Section 431 does not violate the fundamental right to property of those remaining in the funds. Although a pension fund unit owned by a person falls within the material scope of protection of the

fundamental right to property, the risk of decrease in the value of units need not interfere with the fundamental right to property or the seriousness of the interference is small. Enabling redemption of units is a measure which is appropriate, necessary and proportional in the narrow sense for attaining the aims of the Act.

10.3.1. A negative effect might arise in the event of very extreme scenarios due to the need to increase the liquidity of funds and swift transfer of the assets, but with great probability no so-called run on the fund would occur. The liquidity level of mandatory pension funds is generally good. Requests for withdrawal are dispersed between 23 funds and the funds have five months to satisfy withdrawal requests. Pension funds are given the right to take a larger amount of loan and may temporarily exceed investment restrictions. The effect of the increase in the management fee on the accumulated assets is small. The average management fee is currently 0.61% and next year probably at or close to 0.59%. The increase in management fees (up to 1.14%) is noted in the explanatory memorandum to the FPA Amending Act. Fund volumes may recover over a longer period and management fees decrease.

10.3.2. Individuals have not developed a legitimate expectation because the legal positions are not favourable for individuals or they have not begun to realise them. It has not been proved that those remaining in the pension funds would in the future receive a smaller pension in comparison to the situation if no reform had been carried out.

10.4. Section 1 clause 120 of the FPA Amending Act (§ 724 of the FPA) does not violate the fundamental rights of insurers who have entered into pension contracts.

10.4.1. By giving policyholders a retroactive right to cancel pension contracts as continuing contracts already entered into, the state is interfering with the freedom of enterprise of insurers in combination with the legitimate expectation of insurers that pension contracts that have been entered into would remain in force. The state is also interfering with the freedom of property of insurers since insurers lose the opportunity to earn income based on cancelled contracts.

10.4.2. The first aim of the interference is to ensure equal treatment of all those having collected pension under the second pension pillar. In the situation where some persons get the opportunity to stop collecting pension thorugh the second pillar along with the right to request redemption of all the pension units, it cannot be considered justified that persons who have been compelled to enter into an insurance contract are treated unequally and are deprived of a similar right. The second aim of the interference is abolition of the mandatory nature of a pension contract so as to ensure greater freedom for persons in using the collected pension in line with the overall aims of the reform. The insurance pension system is unreasonably tilted in favour of insurers, essentially creating long-term guaranteed income for insurers but, on the other hand, locking in a policyholder who is the weaker party to a situation where they have no opportunity to use their collected pension precisely in a manner taking account of their specific situation. Both aims are legitimate as well as compelling.

10.4.3. The freedom of enterprise and the right to property of insurers does not outweigh the right and interest of policyholders in greater freedom of use of their property and freedom from a forced contract. Entering into a pension insurance contract is mostly mandatory under current law, so that it does not constitute entrepreneurship which has grown as a result of efforts by insurers themselves in response to market demand. Thus, interference with freedom of enterprise in combination with legitimate expectations is relatively insignificant since the legislator is not unfavourably affecting the rights belonging to the core of freedom of enterprise. For the same reasons, interference with legitimate expectations and the fundamental right to property is insignificant. The seriousness of interference is further reduced by the fact that even under the current arrangements policyholders have the right to withdraw from a pension contract for the purpose of changing insurer (§ 522 FPA). This is an implementing provision whose application is limited in time. Interference is also reduced by the possibility to terminate insurance activities and transfer to the state the obligation to make existing insurance payments, as well as abolition of the obligation of an insurer to distribute profits.

10.4.4. The right to withdraw from lifetime pension contracts does not interfere with fundamental policyholder rights; a person retains the possibility to receive an insurance pension. If necessary, the state will take over the obligations arising from insurance contracts.

Abolition of the technical profit distribution obligation for insurers is not unconstitutional. The effect of that change on the fundamental right to property of insurers is not significant. Over a ten-year period, 20 000 euros of profit a year has been distributed on average.

Chancellor of Justice

11. The Chancellor of Justice finds that the FPA Amending Act is unconstitutional.

11.1. Based on § 10 of the Constitution and interpreting § 28(2) of the Constitution in line with Article 12(3) of the Revised European Social Charter (hereinafter the European Social Charter) and Article 2(1) and Article 9 of the International Covenant on Economic, Social and Cultural Rights (hereinafter the UN Covenant on Economic, Social and Cultural Rights), the contested legislative amendment cannot be considered constitutional because upon entry into force of the FPA Amending Act the level of social protection in the case of old age would diminish.

11.1.1. Arising from the principle of human dignity and the social state, § 28(2) of the Constitution should be understood as saying that the state must provide assistance to the elderly in the event of loss of income and ensure them the services and assistive devices necessary for a decent living. When interpreting § 28(2) of the Constitution in combination with Articles 12 and 13 of the European Social Charter, the Constitution requires that in the event of traditional social risks people should first of all be ensured assistance by paying insurance benefits, regardless of whether a person is deprived or at risk of it.

11.1.2. The core of obtaining assistance from the state should be interpreted more broadly than simply protection ensured in the event of deprivation: assistance is sufficient if, in the case of loss of income, a person is provided financial assistance that maintains a reasonable proportion between the previous income and the substitute income guaranteed by the state. Assistance must enable dignified and unashamed participation in society, realisation of the rights and freedoms laid down in the Constitution, if necessary by using public services for the purpose. This would ensure interpretation of the Constitution in compliance with the opinion of the European Committee of Social Rights that the aim of benefits set out in Article 12 of the European Social Charter is to ensure partial protection of people’s previous income alongside protection against poverty.

11.1.3. By having ratified Article 12(3) of the European Social Charter and the UN Covenant on Economic, Social and Cultural Rights, Estonia has assumed an obligation to gradually raise the level of social protection. This means that benefits should be increased, the social security system may not be replaced with a welfare services system, and the level of social protection already achieved may not be easily dispensed with. The duty to raise the level of social protection can also be deduced from the principle of the social state. If § 28(2) of the Constitution were interpreted in the spirit of the above international instruments, the state has the duty to gradually raise the level of social protection in the case of old age since this ensures better implementability of other fundamental rights and freedoms mentioned in the Constitution. Lowering the level of social protection is allowed only in exceptional circumstances.

11.1.4. Although the level of pensions in Estonia in 2018 conformed to the level required by the European Social Charter and it cannot be claimed that immediately after the entry into force of the contested Act pensions would fall below the required threshold, it also cannot be claimed that without a mandatory funded pension they would remain exactly on the same level because, at the same time, the Riigikogu has not significantly amended the State Pension Insurance Act. At the time of adoption of the Act, Estonia had no economic crisis that could have justified amendments.

11.2. Section 43^{1} of the FPA contravenes the fundamental right to property and the fundamental right to procedure and organisation, as well as the principle of legitimate expectations.

11.2.1. A pension fund unit falls within the scope of protection of the fundamental right to property. The possibility for unit-holders to prematurely exit the fund containing jointly collected money unfavourably impacts the pecuniary rights of a unit-holder who continues collection. This leads to a more extensive risk than before concerning decrease in the value of units depending on the behaviour of other unit-holders. To make payments, the investment strategy of the funds should be changed, including withdrawing from long-term investments before an economically justified term. Costs related to withdrawals are rather left to be

borne by those unit-holders who remain in the fund. Since 431 of the FPA also covers those pension assets collected before entry into force of the rule, this interferes with the fundamental right to property of unit-holders in combination with legitimate expectations. People having acquired units in a pension fund have reasonable grounds to believe that the state will not retroactively create risks diminishing the value of the assets or endanger attaining the aim of the system.

11.2.2. The change does not increase the productivity of second pillar pension funds but rather decreases it and raises management fees. In order to influence pension fund providers to offer better conditions to clients, more effective alternatives exist which do not cause additional risks and costs for unit-holders. It is possible to stipulate the right of exit from the second pension pillar so that the money collected would remain in the fund until retirement age. To create increased competition, it would suffice to lay down a pension investment account. It is difficult to see that the aim of the retroactive amendment is to make the funded pension voluntary. The aim of granting freedom to decide over the money collected for a pension is not compelling and the amendments do not support the sustainability of the pension system. Significant restrictions on disposing of and using the money in the second pension pillar also remain after the reform. The fiscal aim of the amendment cannot be considered compelling.

11.2.3. The measures stipulated in the Act do not mitigate risks to unit-holders. Covering the costs of taking a loan is not regulated, nor have fees for redemption of units been set to the extent that would cover the costs of exit from the second pension pillar. A five-month term for advance notice does not alleviate the loss connected with withdrawal from long-term investments. Also, it is possible to withdraw an application one month prior to withdrawing the money.

11.3. Section 431 of the FPA contravenes § 12 of the Constitution. The point of departure for comparison are working-age people born before 1983 whose wages are taxable with social tax. Comparable groups are people having voluntarily joined or not joined the mandatory funded pension.

11.3.1. Although current law treats differently persons who have or have not joined the mandatory funded pension, in terms of taxation with social tax the groups are in a similar situation. Social tax at the same rate and for the same purpose – to ensure regular income in old age – has been paid from the wages of people belonging to both groups. Essentially similar pecuniary rights – to claim a pension – arise for people belonging to both groups.

11.3.2. People having joined the mandatory funded pension are entitled to withdraw from the pension scheme the money (including the part allocated from social tax by the state) collected prior to the entry into force of the Act before reaching retirement age and use it at their discretion. This retroactively lowers their social tax burden and on account of social tax they essentially obtain additional wages which are not taxable with social tax and unemployment insurance premiums. People of the same age who have not joined the mandatory funded pension do not have the opportunity before their retirement age to use the social tax related part collected before the entry into force of the Act.

11.3.3. The Riigikogu has failed to consider alternatives that would be compatible with the aims of the pension system and that would not lead to unequal treatment. The second pillar can be made voluntary as of the entry into force of the legislative amendments, and the right granted to withdraw the money collected only after the entry into force of the legislative amendment (e.g. within ten years). It would be possible to transfer the social tax collected into a second pillar pension fund, along with a respective increment of the assets, to the state budget and convert it into a person's first pillar pension rights, whereas the money withheld as a funded pension contribution (2%) and the respective yield would be paid out to the person. People's awareness of the pension system is not a value that would justify interference with fundamental rights. Better alternatives exist for achieving this (further training, awareness-raising, supplementing school curricula, etc.).

11.4. The procedure for withdrawal from insurance contracts (§ 724 of the FPA in combination with § 70(4)) interferes with the fundamental right to property, in combination with the right to legitimate expectations, of the people having joined the second pension pillar.

11.4.1. Through insurance contracts, people bearing similar risks have pooled their risks and resources, enabling insurers to offer the service. For an insurer, it may be commercially reasonable to terminate provision of the service altogether, and for policyholders the conditions of pension payments would change.

For compensation of the costs of an insurer, as of 1 January 2021, they do not have to distribute profit generated in 2020 and later. Thus, withdrawal costs are left for those remaining in the second pension pillar to bear, and a person is deprived of a measure increasing their purchasing power that they could reckon with when entering into the contract. If insurers abandon providing the service, people reaching retirement age after the funded pension reform might not be able to enter into a contract to receive a lifetime pension, or a pension contract is offered on less favourable terms than before. Neither policyholders nor insurers could anticipate the contested amendments and they had an expectation that their contractual relationship in its core part would remain in force on the conditions that it was entered into.

11.4.2. Reasoning for the amendments – the need to treat people having entered into a pension contract equally with people who can withdraw money from pension funds and to alleviate the system of payments – does not justify the instances of interference.

11.5. Section 724 of the FPA violates the freedom of enterprise, in combination with the legitimate expectations, of insurers having entered into pension contracts. It is reasonable to presume that the legislator will not significantly broaden the possibilities for withdrawal from long-term contracts, thus reducing the legal protection, and increasing the risks, of entrepreneurship. If, as a consequence of an unexpected legislative amendment, an undertaking is forced to abandon its activity due to a decrease in the volume of pension contracts, this amounts to serious interference with rights. For insurers, the possibility of transfer of contracts to the state does not redress the costs incurred by trusting the law in force and which are due to the activity planned for decades in advance.

OTHER OPINIONS ADMITTED TO THE CASE

Bank of Estonia

12. In the opinion of the Bank of Estonia, the FPA Amending Act reduces the sustainability of the pension system in a situation where the ratio of employees to old age pensioners decreases due to ageing of the population, and pension costs and the tax burden increase as a result. The longer people have collected assets to the second pension pillar, the stronger the effect of withdrawal of money on their future pension. Abolition of the mandatory funded pension does not increase people's wish to save and invest voluntarily for their retirement. For example, those not having joined the second pillar have not invested their additional 2% of income.

13. The change may also affect those unit-holders who do not stop saving for a funded pension. To make large-scale payments, fund managers should exit long-term investments, which may reduce the value of assets, primarily if investments have been made in Estonian real estate. Maintaining a liquidity buffer means lower productivity for the funds (e.g. a bank deposit which is liquid but offers close to zero interest) and, to compensate for this, investment in riskier assets increases risks for unit-holders. Productivity of funds ensures the value of pension assets and increase in pensions. Normally, growth in productivity has been ensured by investments in shares since stock markets have achieved better productivity than other financial markets.

14. It is not possible to assess how many people will exit the funds and what the aggregate amount of withdrawal claims would be, and similarly it is not known which funds will be exited. In the event of a quick sale, both those wishing to exit a fund as well as pension investors wishing to remain would suffer because the sale price would remain under market value. The possibility to take a loan is rather a short-term measure to cover a liquidity shortage. The costs of investment funds, including transaction costs connected to exiting a fund (account management fees, broker's commission and other fees, exchange rate differences) and the cost arising from liquidity maintained at a higher level than normal would be distributed among all unit-holders.

15. For 12 pension funds whose portfolio is composed to a large extent of liquid assets, it should be easy to make payments. From the remaining 11 pension funds, more than half should start planning the sale of less liquid assets well in advance. The situation is complicated for five funds from whose aggregate assets (1.5

billion euros) at least one-sixth (300 million euros) are of low liquidity. The period stipulated for making payments (six months) helps fund managers to plan cash flows and, to a small degree, spread them out, while compressing the period for making payments may unleash a quick sale. If a total of 70-80% of money is withdrawn from funds, this may cause short-term problems. As at 31 March 2020, the proportion of assets with very good or good liquidity in pension funds was 46% and the proportion of less liquid assets 11%.

Financial Supervision Authority

16. The Financial Supervision Authority noted that, according to surveys, approximately 50% of unit-holders intend to exit the pension funds (moderate exit), but in terms of fund liquidity a more important factor is the volume of units to be redeemed and the corresponding volume of investments. Stopping payment of contributions by the state may stimulate exit.

17. The operating conditions of funds are presumably stable, giving unit-holders and fund managers certainty for action. Since service providers try to set a price on the possibility of changes, the amendment of legislation also results in costs to be borne by clients. Unit-holders when investing in a fund and fund managers when establishing the conditions of a fund and shaping investment policy could not reckon that a unit-holder might always withdraw units. The more open a fund the more liquid the assets it should invest in. Thus, no non-liquid investments having a higher expected return and higher risk can be made. In extreme situations (e.g. a financial crisis), those investments cannot be sold quickly enough and at a price reflected in the value of a fund's assets. In the long-term perspective, the legislative amendment will lead to a change in the investment policy of the funds so as to make it compatible with the redemption policy of the units.

The impact on productivity of funds is impossible to assess. Due to a decrease in volumes, management costs may increase and selection of funds become more limited. Besides liquidity risk, the reform would also bring about other risks as well as possibilities for conflict of interest.

18. Stress tests carried out at the end of 2019 showed that in the event of a moderate exit (50% of unit-holders), pension funds would be able to redeem units according to regular procedure. In the event of an extreme exit (75% of unit-holders), four funds of one fund manager (owning 27% of the total assets of all 25 funds) would be unable to realise the investments in a sufficient amount or keep the structure of the portfolio in conformity with requirements. In a very extreme case (90% of unit-holders), eight funds (owning 52% of the total assets of all funds) would run into difficulty.

If a fund is unable to make payments within a set deadline due to insufficient liquidity or if the composition of assets would become incompatible with the fund's conditions, the fund manager is obliged to suspend redemption of units until regular management of the fund is again possible. If restoration is not possible (due to the liquidity problem other unit-holders also want to leave) and it cannot be transferred to another manager, a fund finding itself in a liquidity crisis will be liquidated. The liquidator will transfer the fund's assets as soon as possible and distribute among unit-holders. During the reform (in 2021–2024), fund managers are allowed ? for reasons beyond their control ? to temporarily contravene the statutory requirements, the fund's conditions, and the prospectus.

19. The period of six months given for making payments enables a fund manager to manage risks in the general interest since it enables an assessment of the volume of redemption orders. This is not in the interests of a unit-holder requesting redemption of units since they would bear the risk of the price change of a unit during that period. To balance that risk, they may withdraw the application which, however, complicates the activities of a fund manager who has already taken steps needed to execute the redemption order. If redemption orders are submitted amounting to a large sum of money, in order to increase liquidity it would be necessary to carry out securities transactions whose costs are borne on account of the fund's assets, i.e. the costs would also be left to be borne by those unit-holders who remain the in the fund. To a certain extent, this could be prevented by setting a fee for redemption of units.

National Audit Office

20. The National Audit Office noted that the consequences for the sustainability of the pension system from making one mandatory component voluntary affect not only people connected with the second pension pillar but also the costs and earnings of the first pillar. Due to amendment of the FPA, there may be more people in the future who do not receive sufficient pension for subsistence, and the amendment may also affect the income of current pensioners.

21. For low-income earners it is reasonable to leave the second pension pillar only if a sufficient number of high-income earners leave as well since this would increase social tax receipts in the state budget. On the other hand, the possibility to withdraw money from the second pillar at a suitable time may actually motivate more well-off people to join the second pillar because that way they can pay less social tax to the state (16% instead of 20%). If contributions by high-income earners joining the second pillar were to exceed by 10% the contributions of low-income earners leaving the second pillar then in 2021 the first pillar would lose 36 million euros, and if by 20% then by 2023 the first pillar would lose 80.4 million euros.

22. People who have joined the second pension pillar will be enabled to withdraw the money collected (including the social tax related part) at a freely chosen time but people collecting a pension under the first pillar cannot withdraw the social tax part paid on their wages. Pension savers are in an unequal position since at the time of deciding whether to join the second pension pillar people could not proceed from that knowledge. The extent of unequal treatment could be avoided by enabling people to withdraw only the 2% paid as their direct contribution.

23. If a considerable number of people decide, for whatever reason, to withdraw money in the future and the funds are forced to sell a considerable part of the assets, this may lead to smaller productivity or higher fees. Management fees depend partly on the volume of assets of fund managers. Due to losing the mandatory nature and enabling withdrawal of money, the value of assets already acquired by the people who continue collecting may decrease, so that the principles of their legitimate expectations and equal protection of property are not respected.

Estonian Insurance Association

24. In the opinion of the Estonian Insurance Association, § 1 clause 120 of the FPA Amending Act (§ 72^4 FPA) violates the freedom of enterprise, in combination with the principles of legal certainty and protection of trust, of insurers who have entered into pension contracts.

24.1. The aim of interference arising from this provision to treat people who have entered into a pension contract equally with those to whom the contested Act grants the right to exit the second pension pillar is not appropriate to justify restricting insurers' freedom of enterprise. It is not correct to compare pension savers with persons who have already entered into a pension contract. Pension savers, as well as those ending collection of a pension and going into retirement and those receiving a funded pension have, at any given moment, a claim involving a specific amount against a fund manager. The actual claim of a policyholder having entered into a pension contract which may arise during the validity of the contract may, however, be significantly larger or smaller in comparison to the original insurance premium. Thus, the two groups of persons are in a completely different situation. Second, the right to withdraw from a pension contract has been granted to persons who have joined the second pillar voluntarily and knowing that after joining the second pillar, as a rule, it is mandatory to enter into a pension contract which may only be withdrawn from for the purpose of changing insurer. Since policyholders who have voluntarily joined the second pillar and persons in the collection phase are not treated unequally, then the right granted to policyholders to withdraw from a pension contract is also not appropriate to eliminate such inequality.

24.2. Also illusory is the aim to abolish the mandatory nature of pension contracts, i.e. to ensure greater freedom in using the collected pension. It is not possible to speak of abolishing the mandatory nature of pension contracts because no contract has been entered into with a person mandatorily joining the funded pension system since the retirement age of those who have joined mandatorily is still decades away.

It is unjustified to claim that the pension system is tilted in favour of insurers. The rigid regulatory

arrangement of the pension insurance system proceeds from the aim of offering a policyholder as large a monthly pension as possible until the end of their life regardless of lifespan. A lifetime insurance contract provides guaranteed income not only for an insurer but also for a pension recipient in respect of whom the insurer assumes the obligation to pay them a guaranteed pension until the end of life regardless of how long they live. An insurer's earnings only consist of a one-off insurance premium on account of which the insurer must guarantee payments to the policyholder until the end of life, including bearing longevity risk and investment risk. In the case of persons having entered into an insurance contract, it is also impossible to speak of expanding free use of their property. When entering into a pension contract, a policyholder pays a one-off insurance premium after which their ownership of the sum collected ends. For their insurance premium, a pension saver acquires not a claim in the same amount but a lifetime claim of an unspecified amount to a regular pension regardless of how long they live. This is an essentially different instrument which an insurer can actually offer only on the assumption that a specific policyholder cannot withdraw from the contract when their life expectancy decreases.

24.3. If equal treatment of policyholders and pension savers were nevertheless to be deemed an admissible aim for interference with freedom of enterprise, and granting the right to withdraw from pension contracts for this purpose were to be deemed suitable, this is not a necessary solution because the legislator has not considered any other measure which would interfere less with freedom of enterprise and would enable policyholders greater freedom in disposing of their pension assets.

24.4. In any case, interest in withdrawal of the money collected by a policyholder who has joined the second pension pillar voluntarily does not outweigh serious interference with the freedom of enterprise of insurers along with interest in the stability of the system by those policyholders who do not wish to withdraw from their pension contract. The right to withdraw from pension contracts together with the possibility to optimise one's behaviour depending on state of health and assessment of life expectancy very significantly affects the economic situation of insurers. This may bring about a significant decrease in their ability to meet payments or, with the aim of preventing this, their exit from the pension insurance market. This amounts to serious interference with freedom of enterprise. This is not offset by the possibility stipulated by the Act to stop distribution of profit to policyholders or the possibility of transferring to the state the duty of pension payments. Costs related to the reform have been left for undertakings to bear while such costs could not be predicted.

24.5. Policyholders might also not be interested in having the state continue their pension payments instead of an insurance company because the state does not distribute its profit to them. In the present case, freedom of enterprise of policyholders is interfered with in combination with interference with the principle of legitimate expectations. Policyholders have assumed that the restriction on withdrawal from contracts would remain in force and, on that basis, have planned their entrepreneurial activity and exercised their freedom of enterprise in entering into pension contracts. The possibility to withdraw from contracts is not justifiable by any compelling public interest.

24.6. Section 1 clause 120 of the FPA Amending Act interferes with the core of freedom of enterprise, which is the right to a legal environment enabling the functioning of a free market and to the absence of unjustified obstacles imposed by the state. It is unjustified to claim that interference with freedom of enterprise is insignificant since entering into a pension contract is mostly mandatory and, therefore, an insurer's business has not grown from their own efforts as a response to market demand. That way, one could exclude from the scope of protection of freedom of enterprise basically all regulated services whose use is indispensable for someone, including, for instance, telecommunications, banking, or waste management. The activities of insurers take place within the frame of that system but this does not provide a guaranteed profit or a possibility to disregard the general market economy principles. The entire current portfolio of pension contracts consists of pension recipients who have voluntarily joined the system.

Estonian Association of Pensioners' Societies

25. The Estonian Association of Pensioners' Societies found that the contested Act was constitutional.

According to the opinion, the reform will eliminate current interference with freedom of contract, unfair standard terms (i.e. it will ensure consumer rights) and will end illegal state aid to credit institutions. The legislator must be left an opportunity to change the pension system so as to make it compatible with the

changed socio-economic situation. The pension reform must be completed.

HEARING OF THE CASE IN THE SUPREME COURT

26. After having examined the case, the five-member panel of the Supreme Court Constitutional Review Chamber, in view of the large-scale social significance and long-term effects of the reform instituted by the contested Act, by order of 9 June 2020 (5?20?3/18) referred the case for adjudication to the Supreme Court *en banc*.

27. At the hearing of the Supreme Court *en banc*, the participants in the proceedings and other institutions and bodies that had submitted their opinions maintained their main positions, further elaborating them and replying to questions by the composition of the court.

CONTESTED ACT

28. The President has contested the "Act on amending the Funded Pensions Act and related Acts (reform of the mandatory funded pension)" adopted by the Riigikogu on 11 March 2020. The application questions the constitutionality of § 1 clauses 67 and 120 of the Act which supplement the FAP, respectively, with §§ 43^1 and 72^4 in the following wording:

"§ 43^1. Payment to a person who is not yet entitled to mandatory funded pension

(1)?A person who is not yet entitled to a mandatory funded pension pursuant to § 40(1) of this Act shall have the right to demand redemption of all units and payment of the corresponding amount and the money in all pension investment accounts under the conditions provided for in this section. A person may exercise the right provided for in this subsection up to twice.

(2) Pension fund units shall be redeemed and the corresponding amount and the money in the pension investment accounts shall be paid out in January, May or September. Payment shall be made not later than:

1)?on 20 January if the corresponding application has been submitted and the information specified in the application has been received by the registrar not later than on 31 July;

2)?on 20 May if the corresponding application has been submitted and the information specified in the application has been received by the registrar not later than on 30 November;

3)?on 20 September if the corresponding application has been submitted and the information specified in the application has been received by the registrar not later than on 31 March.

(3)?If a person has acquired financial assets through the pension investment account, then all financial assets must have been transferred, including that the contracts entered into when acquiring the financial asset must have expired and the money received in the course of the transfer must have been received in the pension investment account.

(4)?An application for withdrawal of money shall be submitted and the payment shall be made pursuant to the procedure provided for in §§ 52^4–52^6 of this Act.

(5)?By withdrawing the money a person shall terminate making contributions. Making contributions shall terminate as at the end of the month preceding the payment.

(6)?A person who is not yet entitled to a mandatory funded pension pursuant to subsection 40(1) of this Act has the right to demand redemption of all of his or her pension fund units and payment of the corresponding amount and the money in pension investment accounts if after previous withdrawal of money at least ten years have passed since the obligation to make a contribution has arisen.

§ 72^4. Pension contract entered into before 1 January 2021

(1)?A policyholder shall have the right to cancel a pension contract entered into before 1 January 2021 and receive a payment to the extent of the surrender value of the contract. The provisions of § 52^2 subsections (1)–(4) of this Act do not apply to cancellation of a pension contract pursuant to the provisions of this section.

(2)? The insurer shall notify the policyholder not later than by 15 January 2021 in a form that can be reproduced in writing of the change in the terms of his or her pension contract, including the policyholder's right to cancel the pension contract and receive payment to the extent of the surrender value of the contract and of the term for submission of the application to withdraw from the pension contract. The information provided for in this subsection shall also be available to policyholders of pension contracts on the insurer's website from 15 January to 31 March 2021.

(3)?The policyholder shall submit an application for cancellation of the pension contract to the insurer in writing or by any means capable of producing a written record not later than by 31 March 2021.

(4)?A pension contract that is cancelled by a policyholder shall expire on 31 August 2021. The insurer shall pay the surrender value agreed in the pension contract to the policyholder not later than 30 September 2021.

(5)?The insurer shall have the right to refrain from making pension payments on the basis of pension contracts remaining in force as of 1 February 2022. In that case, the Social Insurance Board shall make pension payments to policyholders and beneficiaries as of 1 February 2022 in the amount agreed upon in the pension contracts.

(6)?The Government of the Republic shall establish by a regulation the more detailed terms and conditions and procedure for making the pension payments specified in subsection (5) of this section.

(7)?An insurer shall notify the Ministry of Finance not later than on 31 May 2021 of refraining from making pension payments and shall notify the number of persons to whom the Social Insurance Board continues to make pension payments on the basis of subsection (5) of this section and an estimate of the annual amount of their pension payments and surrender values ?of their pension contracts as at 30 November 2021.

(8)?An insurer shall notify the Financial Supervision Authority of the decision to refrain from making pension payments by 31 May 2021 at the latest.

(9)?Not later than on 15 June 2021, the insurer shall notify the policyholders specified in subsection (7) of this section at least by means capable of producing a written record that from 1 February 2022 the Social Insurance Board shall continue to make pension payments instead of the insurer, as well as of the right of the policyholder not to agree to and to cancel the pension contract and of the term for submission of an application for cancellation of the contract. The information provided for in this subsection shall also be available to policyholders of pension contracts on the insurer's website from 15 June to 30 June 2021.

(10)?In the case provided for in subsection (9) of this section, the policyholder shall submit to the insurer an application for cancellation of the pension contract in writing or by any means capable of producing a written record not later than on 30 June 2021.

(11)?A pension contract cancelled pursuant to the provisions of subsection (10) of this section shall expire on 31 August 2021 and the insurer shall pay the surrender value agreed in the pension contract to the policyholders not later than on 30 September 2021.

(12)?The insurer shall submit the specified information stated in subsection (7) of this section to the Ministry of Finance not later than on 31 August 2021.

(13) The insurer shall transfer to the state budget, during January 2022, pursuant to the procedure provided for in the regulation specified in subsection (6) of this section, the surrender values agreed upon in the pension contracts based on which the Social Insurance Board begins to make pension payments.

(14)?Pension contracts shall terminate upon making pension payments to policyholders in January 2022 and transferring the amount provided for in subsection (13) of this section to the state budget.

(15)?The surrender values of the pension contracts specified in subsections (4) and (11) of this section shall be calculated as at 31 July 2021 and the surrender values ?of the pension contracts specified in subsection (13) as at 30 November 2021, in both cases taking into account all the pension payments which are made by the insurer pursuant to the provisions of this section before termination of pension contracts.

OPINION OF THE SUPREME COURT*EN BANC*

29. The Court *en banc* will first generally deal with the President's application and its admissibility and the range of participants in proceedings and other persons and institutions involved in providing an opinion (I), as well as the formal constitutionality of the contested Act (II). Then the Court *en banc* will analyse the compatibility of § 431 of the FPA with § 28(2) of the Constitution (III), the preamble to the Constitution (IV), § 32 of the Constitution (fundamental right to property) (V), and § 12 of the Constitution (fundamental right to equality) (VI). Next, the Court *en banc* will assess the compatibility of § 724 of the FPA with § 31 of the Constitution (freedom of enterprise) (VII), § 32 of the Constitution (VIII), and § 12 of the Constitution (IX). To conclude, the Court *en banc* will summarise the opinions and resolve the application (X).

I

The application and its admissibility and the range of participants in proceedings and other persons and institutions involved in providing an opinion

(A)

30. The President of the Republic seeks a declaration of unconstitutionality of the FPA Amending Act on account of its conflict with §§ 10, 12 and 14, § 28(2) and §§ 31 and 32 of the Constitution, as well as the preamble.

31. Specifically, the President questions the constitutionality of § 1 clause 67 and clause 120 of the FPA Amending Act.

Section 1 clause 67 of the contested Act supplements the FPA with § 43^1 "Payment to a person who is not yet entitled to mandatory funded pension". Section 1 clause 120 of the contested Act supplements the FPA with §§ 72^4–72^8, of which the application calls into question the constitutionality of § 72^4 "Pension contract entered into before 1 January 2021".

32. The first sentence of § 43^1(1) of the PFA abolishes the restriction on disposal of mandatory pension fund units which, in the case of redemption of units, excludes making payments to a unit-holder before reaching the retirement age (§ 64(10) of the Investment Funds Act in combination with the provisions of the FPA which exhaustively lay down payments from a mandatory pension fund). This also repeals an element which under current law makes the funded pension mandatory. Under § 43^1(5) of the FPA, withdrawal of the money also terminates mandatory funded pension contributions by that person.

The right of disposal of units laid down in the first sentence of § 43^1(1) of the FPA extends to all mandatory pension fund units – i.e. units acquired before the entry into force of the contested Act as well as units acquired after the entry into force of the Act. This right also extends both to those who have joined the second pension pillar voluntarily and those who did so mandatorily.

33. The first sentence of § 72^4(1) of the FPA grants a person who has joined the mandatory funded pension and entered into a pension contract under § 41 of the FPA before 1 January 2021 the right to withdraw from the contract and receive a payment to the extent of the surrender value of the contract. In that case, the restrictions laid down by § 52^2(1)–(4) of the FPA, which do not allow cancellation of a pension contract before three years have passed from entering into the contract and do not enable a policyholder to withdraw the surrender value of the contract, do not apply to withdrawal from the pension contract (second sentence of § 72^4(1) FPA).

Since the first sentence of § 72^4(1) of the FPA entitles a person to terminate a pension contract entered into before 1 January 2021, this concerns people who joined the pension pillar voluntarily. People born after 1 January 1983, for whom joining is mandatory, have not yet reached retirement age. Entering into a pension contract may have been the only possibility for a person to receive payments from the second pillar in retirement (they had the obligation to enter into a pension contract), but a pension contract may also have been entered into by a person who could also have requested a lump-sum payment (§ 43 FPA) or agreed on a funded pension (§ 42 FPA).

Section 72^4 of the FPA additionally regulates the conditions and procedure for exercise of the right of withdrawal from a pension contract. The right to withdraw from a contract is limited in time, in that the relevant application can only be submitted from 1 January to 31 March 2021 (subsection (3)). The contract is deemed to have expired on 31 August 2021 and payment will have to be made on 30 September at the latest (subsection (4)). Section 72^4 of the FPA also regulates how an insurer can refrain from making payments under a pension contract and how the duty to make payments transfers to the Social Insurance Board (subsections (5)–(15)).

34. The President's main arguments for declaring the unconstitutionality of the contested Act were briefly as follows:

- upon the entry into force of § 43^1 of the FPA, compliance with § 28(2) of the Constitution, which obliges the state to create a functioning pension system corresponding to everyone's right to old age assistance from the state, is not ensured;
- the amendments do not observe the intergenerational agreement arising from the preamble to the Constitution that no unreasonable duties in fulfilling the core functions of the state are imposed on future generations;
- § 43^1 of the FPA interferes disproportionately with the fundamental right to property (§ 32 Constitution) in combination with the principle of legitimate expectations (§ 10 Constitution) of those people who do not leave the mandatory pension fund;
- due to 43^1 of the FPA, the contested Act also contravenes the fundamental right to equality (§ 12 Constitution) and the principle of uniform taxation and, additionally, the intended purpose of social tax is changed retroactively, contravening the principle of the rule of law (§ 10 Constitution);
- § 72^4 of the FPA interferes disproportionately with insurers' freedom of enterprise (§ 31 Constitution) along with the principle of the rule of law (§ 10 Constitution);
- § 72^4 of the FPA interferes disproportionately with the fundamental right to property of policyholders who have entered into a pension contract – i.e. the right to continue receiving a pension

on the basis of a lifetime pension contract – in combination with the principle of legitimate expectations;

- § 72[4] of the FPA, retroactively and unjustifiably, treats persons having entered into a pension contract and those only receiving a state pension unequally, so that the contested Act contravenes the fundamental right to equality and the principle of uniform taxation; the intended purpose of social tax is also changed retroactively and in contradiction of the principle of the rule of law.

35. According to the assessment of the Court *en banc*, the President's application is admissible (about the criteria, see Supreme Court Constitutional Review Chamber judgment of 19 December 2019 in case No 5?19?38/15, paras 61–63) and the Court *en banc* is able to adjudicate it on the merits.

(B)

36. With regard to the range of institutions and persons involved in resolving the matter, the Court *en banc* deems it necessary to note the following.

36.1. Section 10(1) of the Constitutional Review Court Procedure Act (CRCPA) sets out the participants in constitutional review proceedings. In the present case of abstract constitutional review, these are the Riigikogu as the body which passed the contested Act (para. 1), the Chancellor of Justice (para. 5), the minister responsible for the area (para. 6), and the minister representing the Government of the Republic (para. 7). The participant in the constitutional review proceedings initiated by the President is also the President herself (§ 4(2) and § 5 CRCPA). Participants in proceedings enjoy the rights of participants in proceedings laid down by law, including the right to submit requests (see § 49 CRCPA).

The Board of the Riigikogu has notified the Supreme Court that in the present case the Riigikogu is represented by its Finance Committee, represented in the proceedings by its chair. As the minister responsible for the area, the Minister of Justice stands in the court proceedings. The Minister of Finance has been notified to the Supreme Court as the minister representing the Government of the Republic. The Minister of Finance and the Minister of Justice have submitted joint positions in the proceedings.

36.2. In the present case, in addition to the opinions of the participants in the proceedings, the Supreme Court admitted to the case opinions by the Bank of Estonia, the Financial Supervision Authority, the National Audit Office, the Estonian Insurance Association, and the Estonian Association of Pensioners' Societies, as well as the dissenting members of the Riigikogu Finance Committee.

II

Formal constitutionality of the contested Act

37. A legal act is constitutional if it is compatible with the Constitution in both form and substance.

38. Neither the President or any of the participants in the proceedings have questioned the formal constitutionality of the FPA Amending Act. Nor does the information at the disposal of the Court *en banc* provide any grounds for misgivings about the formal constitutionality of the contested Act.

The Act has been adopted by the Riigikogu in compliance with the procedure prescribed for this. According to the assessment of the Court *en banc*, at least insofar as concerns the contested provisions, the Act has also sufficient legal clarity.

39. As regards the proceedings of the contested Act, it should nevertheless be noted that the Government which initiated the Draft Act linked its adoption to the matter of confidence prior to its second adoption (§ 98 Constitution). As an issue of formal constitutionality of an Act, proceedings of a Draft Act linked to the matter of confidence are subject to judicial review in constitutional review proceedings, and this is so regardless of the claims raised in the application submitted.

39.1. Arising from § 98(2) of the Constitution and Division 1 of Chapter 16 of the Riigikogu Rules of Procedure and Internal Rules Act, proceedings of a draft legislation linked to the matter of confidence take place with significant distinctions in comparison to the general procedure for dealing with draft legislation laid down in Chapter 11 of the Riigikogu Rules of Procedure and Internal Rules Act. In the event of linking draft legislation to the matter of confidence, the duties of the previous lead committee end and transfer to the Government of the Republic. The Government will review and decide on taking into account amendments submitted to the Draft and will prepare the text for the second reading of the Draft, as well as the explanatory memorandum and the list of amendments. The Draft is included on the Riigikogu agenda at the time set by the Government, no voting takes place on amendments proposed to the Draft, and the Draft can be adopted at the second reading (§ 137 subs. (2), (3), (6) and (7) of the Riigikogu Rules of Procedure and Internal Rules Act).

39.2. The aim of linking a piece of draft legislation to the matter of confidence is to enable the Government to implement its policy (§ 87(1) Constitution). According to the stenographic reports of the Constitutional Assembly, this measure was developed first and foremost with a view to resolving a deadlock in the relations between the Government and the Riigikogu and enabling the Government to influence the majority of the parliament to support its policy (Põhiseadus ja Põhiseaduse Assamblee. Koguteos. [The Constitution and the Constitutional Assembly. The Digest.] Tallinn, 1997, pages 799 and 847).

39.3. Proceedings for draft legislation linked to the matter of confidence are much quicker than ordinary proceedings in the Riigikogu and primarily reduce the opportunities of the opposition for a parliamentary debate related to the draft legislation. Over-frequently linking draft legislation to the matter of confidence or using this measure to achieve aims not arising from the Constitution may lead to excessive intervention by the Government in the activities of the legislator and restrict the competence of the Riigikogu laid down by § 65(1) of the Constitution to pass laws or resolutions. This may also violate the principle of separation and balance of powers arising from § 4 of the Constitution and the principle of democracy arising from § 10 of the Constitution. Therefore, these proceedings can only be used in exceptional cases. Linking draft legislation to the matter of confidence may not be used to suppress parliamentary debate and, consequently, also democracy.

39.4. During the present composition of the Riigikogu, the Government has linked draft legislation with the matter of confidence on one occasion, i.e. when adopting the contested Act. The materials on preparation of the draft of the contested Act, including the explanatory memorandum to the second reading of the Draft Act submitted by the Government, do not explain the aim of linking the Draft Act to the matter of confidence. At the Riigikogu session of 29 January 2020, the Minister of Finance justified linking the Draft Act to the matter of confidence with the claim that the Riigikogu opposition had employed obstructionist tactics in respect of the Draft Act by submitting a huge amount of non-substantive amendments to the Draft Act. The Minister of Finance affirmed the same at the hearing of the Supreme Court.

Prior to the second reading, 957 amendments were submitted to the draft of the contested Act (see the list of amendments to the Draft Act linked to the matter of confidence), of which the majority were proposals by the Riigikogu opposition parties. The Court *en banc* concedes that the number and substance of the amendments indicate use of obstructionist tactics. For example, 352 amendments were submitted consisting of proposing different dates for entry into force of the Act.

39.5. The Court *en banc* finds that linking draft legislation to the matter of confidence in order to avoid or overcome obstruction is not, of itself, unconstitutional. Obstruction may excessively hamper the work of the parliament so that adoption of draft legislation submitted by the Government may be dragged out, nor does it contribute to substantive parliamentary debate. Linking draft legislation to the matter of confidence complies with the aim arising from the Constitution if it is used to resolve a deadlock in relations between the parliament and the Government and, in the opinion of the Government, adoption of the draft legislation is indispensable for implementing its policy.

In view of the foregoing, linking the draft of the contested Act to the matter of confidence was constitutional.

III

Compatibility of § 43[1] of the FPA with § 28(2) of the Constitution

(A)

40. The President is of the opinion that § 28(2) of the Constitution gives rise to the state's duty to create a functioning pension system, and in combination of the same provision with the principles of human dignity and the social state arising from § 10 of the Constitution, also to the duty to ensure a decent income to people in retirement, which means a standard of living considerably better than minimum subsistence.

41. The Court *en banc* agrees with the President that the first sentence of § 28(2) of the Constitution also gives rise, among other subjective rights, to a separate right to receive state assistance in old age (old age assistance).

Section 28(2) of the Constitution explicitly distinguishes the right to old age assistance from assistance against other social risks and state assistance in the case of deprivation ensured by the same provision. The right to assistance in the case of deprivation gives a person the right to claim from the state, and imposes on the state the duty to provide assistance which would ensure minimum necessary means and services for subsistence. Deprivation within the meaning of the Constitution should be understood as a situation where a person lacks the minimum necessary means of subsistence (see Supreme Court Constitutional Review Chamber judgment of 21 January 2004 in case No 3?4?1?7?03 [2], para. 16; judgment of 5 May 2020 in case No 5?20?1/15 [3], para. 18).

However, the state's duties as to old age assistance go further than the duty to ensure minimum means of subsistence. In the opinion of the Court *en banc*, the aim of state old age assistance, in addition to reducing the risk of poverty, is to create a system which would ensure that people's standard of living does not decrease to a level which is unjustified in comparison with their standard of living during working life. The aim of protecting the elderly as a socially vulnerable group of persons with an enhanced need for assistance, on a level which is higher than merely assistance provided in the event of deprivation is also deducible from the principle of the social state.

42. However, it cannot be concluded from the above that the Constitution obliges the state to ensure unconditionally that assistance provided to someone in old age is greater than assistance provided in the event of deprivation. Similarly to other social risks mentioned in § 28(2) of the Constitution, in the case of old age the state does not bear the sole responsibility but a person themselves and their family are responsible for the person's coping (cf. Supreme Court Constitutional Review Chamber judgment of 5 May 2020 in case No 5?20?1/15 [3], para. 22).

Old age together with the need for assistance arising from this is a clearly predictable social risk for which a working-age person capable of work can mostly prepare. A person's own responsibility for having a higher level of assistance ensured for their old age in comparison with assistance provided merely to prevent deprivation lies primarily in the person's contribution (or a contribution of another person, such as an employer, on their behalf), made to the extent, on the conditions and according to the procedure prescribed by the state, to the social protection systems created by the state. A contribution may mean a monetary contribution in the form of taxes, insurance premiums, or the like, as well as working during a specific period or fulfilling another similar condition prescribed by the legislator. In this regard, the larger a person's own contribution to the state-created system guaranteeing old age protection the higher the assistance ensured to them in old age should be. On the other hand, in creating a pension system, solidarity arising from the principle of the social state is also important. The second sentence of § 28(2) of the Constitution

stipulates that the categories and extent of assistance provided in the case of old age, and the conditions and procedure for its allocation, are also provided by law. If the legislator has determined a person's own contribution or a contribution made on their behalf to the social protection systems as a precondition for receiving old age assistance, a person gains entitlement to such assistance only if they have fulfilled those conditions.

43. The right to old age assistance from the state is violated if the system created by the state for providing assistance fails to ensure provision of assistance to persons in old age to the minimum extent required by the Constitution. The Constitution does not lay down the manner of provision of old age assistance or a specific rate, but leaves those for the legislator to determine. Yet, similarly to other social fundamental rights, the court may review the sufficiency of old age assistance by interpreting the norms of the Constitution, by assessing, inter alia, the state's ability to provide assistance and the general standard of living, international obligations assumed by the state and those arising from European Union law, and other circumstances. Violation of the fundamental right in question is also possible if a law arbitrarily worsens the extent and conditions guaranteed under the second sentence of § 28(2) of the Constitution.

Considering that, similarly to other social fundamental rights, the constitutionally required extent of state old age assistance is not precisely measurable and that the legislator is afforded a broad margin of appreciation in this area, the court is justified to intervene only if the discrepancy between what has been established by the legislator and what is required by the Constitution is manifest and no sufficient assistance is ensured to a person (see Supreme Court Constitutional Review Chamber judgment of 21 January 2004 in case No 3?4?1?7?03 [2], para. 16; judgment of 5 May 2020 in case No 5?20?1/15 [3], para. 23). The degree of constitutionally required minimum assistance may change in time.

44. The state can provide sufficient assistance to a person in the case of social risks mentioned in § 28(2) of the Constitution only if it creates and maintains a necessary system for provision of assistance (see e.g. Supreme Court Constitutional Review Chamber judgment of 11 May 2017 in case No 3?4?1?17?16 [4], para. 51).

In this regard, similarly to other social fundamental rights, the legislator again enjoys a broad margin of appreciation in shaping a system for old age assistance. Section 28(2) of the Constitution gives rise to the duty of the state to create a social insurance system for mitigating risks related to old age. This duty also arises for Estonia from Article 12 paras 1 and 2 of the European Social Charter which obliges the state to establish and maintain a system of social security and maintain it at a satisfactory level at least equal to that necessary for ratification of the European Code of Social Security. Under Article 25 of the European Code of Social Security, a state for which Part V of the Code is in force shall secure to the persons protected the provision of old age benefit in accordance with this part of the Code. From the European Social Charter as well as the European Code of Social Security and the practice of the European Committee of Social Rights supervising compliance with the European Social Charter, specific thresholds of minimum old age assistance can be deduced which the state is obliged to ensure to a person through the pension insurance system.

Ensuring old age assistance in the form of social security generally means collection of assets into funds with a person's own contribution, from which, in the event of occurrence of the insured event (arrival of retirement age), periodic financial disbursements are made to a person regardless of their actual need for assistance (see also Supreme Court Constitutional Review Chamber judgment of 21 January 2004 in case No 3?4?1?7?03 [2], para. 20).

45. The right of the legislator arising from the second sentence of § 28(2) of the Constitution to determine the conditions and procedure for provision of state assistance also includes the right to decide on whether the state fulfils the task of provision of assistance itself in the form of direct state administration or arranges fulfilment through another person. In creating schemes of assistance, the legislator can use forms falling under public as well as private law.

Guaranteeing state assistance in old age, including provision of assistance in the form of pension insurance, is not a kind of function of the state which, in line with the provisions and spirit of the Constitution, could only be fulfilled by a government agency (core function) (see Supreme Court *en banc* judgment of 16 May 2008 in case No 3?1?1?86?07 [5], para. 21). A precondition and simultaneously also a limit for delegation is compliance with other constitutional requirements, such as the principle of the statutory reservation (§ 3(1) Constitution) and the principles of the rule of law and the social state (§ 10), including creation of effective control mechanisms over the lawfulness of fulfilling the delegated function. Provision of assistance through a form or entity established under private law does not relieve the state of the final responsibility to ensure constitutionally compliant old age assistance.

46. If the state has created a system of assistance for fulfilling its duties under § 28(2) of the Constitution in which old age assistance to people is provided through other persons or in a form falling under private law, that assistance too should be deemed state old age assistance within the meaning of § 28(2) of the Constitution, and, inter alia, that assistance should be taken into account when assessing the constitutionally required minimum level of assistance. This does not mean that the Constitution would require a system of assistance specifically in a form falling under private law or, of itself, would prohibit a subsequent change of the system of assistance, including replacing a private system of assistance with a public one.

(B)

47. The mandatory funded pension was created by the FPA and, under that law, a periodic allowance is ensured with the aim of offering a person supplementary income in retirement in addition to state pension insurance. To obtain a periodic mandatory funded pension, mandatory pension fund units are acquired under the FPA and the Social Tax Act, and this is paid from a pension fund or by the insurer (§ 1 and § 2(2) FPA).

48. Also according to the explanatory memorandum to the Draft FPA, the funded pension (including the mandatory funded pension) was created primarily with the aim of ensuring that the current level of pension is ensured to a person in old age or, in the case of a positive development, even a higher pension than before, in a situation where due to unfavourable demographic development the ability of the state to pay old age pensions from state pension insurance resources should decrease (see the explanatory memorandum to the Draft FPA (73 SE, IX composition of the Riigikogu), page 41).

In other words, the main aim of the mandatory funded pension is to ensure sustainability of state assistance to a person in old age by diversifying the pension insurance system and dispersing economic and social risks. The mandatory funded pension also enables, better than in the case of a merely state old age pension, taking into account a person's own responsibility for ensuring their pension assets and bringing the amount of a person's future pension better into conformity with the person's contribution (see para. 42 of the judgment).

49. The legislator has planned the mandatory funded pension as part of a complete and interconnected pension insurance system founded on the so-called three pension pillars, of which the first pension pillar consists of the state old age pension, the second pillar of the mandatory funded pension, and the third pillar of the supplementary funded pension. Since in this system the mandatory funded pension has been planned, as can be seen from the above, with the aim of dispersing risks concerning the amount of state assistance guaranteed by the state old age pension, this also serves the aim arising from § 28(2) of the Constitution and, together with the state old age pension, amounts to state old age assistance to a person within the meaning of that provision.

50. Similarly to state pension insurance, the resources needed to pay the mandatory funded pension are collected to the extent of 2/3 on account of social tax paid by a person themselves or on their behalf, and to the remaining extent on account of public mandatory insurance premiums – i.e. mandatory funded pension contributions. Although these resources are placed in units of pension funds (investment funds) managed by

private legal entities, and funded pension payments are made to a person either from a pension fund or on the basis of a funded pension insurance contract entered into with a private insurer, the mandatory funded pension can be treated as part of the pension insurance system created by the state. As noted above (see para. 45 of the judgment), the Constitution does not prohibit the state from delegating performance of its functions in ensuring social protection to a certain extent to private entities or from providing state assistance by using a form under private law.

Treating mandatory funded pension insurance as part of the system of fulfilling state duties arising from § 28(2) of the Constitution is also not precluded by the fact that it lacks or only weakly manifests several of the features characteristic of state pension insurance according to the State Pension Insurance Act, such as being founded on the principle of solidarity and payment of pensions from state budget pension insurance resources (§ 2 State Pension Insurance Act), as well as absence of a specific statutorily guaranteed level of pension.

51. In the event of disappearance or a significant reduction of the mandatory funded pension, state assistance ensured to a person in old age might fall below the constitutionally required level. However, the state must ensure the minimum necessary old age assistance to everyone regardless of whether they have joined the mandatory funded pension system or not.

However, merely abolition of the mandatory funded pension or a significant change to the system does not mean that state assistance would automatically fall below the constitutionally required level if the state ensures minimum old age assistance through the state old age pension or otherwise. Section 28(2) of the Constitution does not require provision of old age assistance specifically through the mandatory funded pension system. The state may also perform its tasks directly, without delegating its functions to anyone. The state may also fundamentally change a system it has once created, if it otherwise ensures performance of its constitutional functions. However, the extent of assistance provided by law in accordance with the second sentence of § 28(2) of the Constitution may not be reduced or its conditions worsened arbitrarily.

52. Establishing the unconstitutionality of a legislative act is also possible due to violation of fundamental rights only about to take place in the future if a violation is sufficiently probable (e.g. Supreme Court Constitutional Review Chamber order of 3 March 2015 in case No 3?4?1?60?14 [6], paras 17 and 18). At the same time, the more distant the future where an alleged violation is to take place and the larger the diversity of circumstances that need to be taken into account in assessing the probability of violation, the more difficult it is to assess the probability of an alleged violation. It should also be taken into account that above (see para. 43 of the judgment) the Court *en banc* considered it possible in the case of interference with the fundamental right laid down by § 28(2) of the Constitution only to assess whether the minimum level of state assistance guaranteed under that provision would manifestly fall below the constitutionally required level in the future.

In order to consider the anticipated effect on a fundamental right to be manifest, the probability of the effect arising must be high. The effects of legislative amendments called into question in the present case are considerably disputable. It should also be kept in mind that people themselves can significantly direct the effects of the reform on them. Also according to the more negative development scenarios as a consequence of the reform, first of all the pension of those people who withdraw money from the second pension pillar as a lump-sum payment before reaching retirement age may decrease. Premature withdrawal of the money can be in the future taken into account when assessing the constitutionality of the extent of state old age assistance.

53. What the state's possibilities will be to provide people assistance in the case of old age after entry into force of the contested Act depends, primarily, on how many people having joined the mandatory funded pension or those joining in the future decide to use the opportunities given them by the contested Act. An equally important factor affecting the state's capability to ensure social protection arises from a change in the economic and demographic situation and from the state's future social policy choices in maintaining the sustainability of the pension system (e.g. possible decisions concerning the tax burden or retirement age). At

least some of those circumstances cannot be reliably anticipated even in the short-term perspective. It is also necessary to take into account that the constitutionally required level of minimum old age assistance is not unchanged in time but varies depending on changes in the state's economic situation and other circumstances.

54. That the pension reform would result in the most negative forecasts becoming a reality and thus a violation of the fundamental right to old age assistance, cannot be considered so probable, based on the data at the disposal of the Supreme Court, that it would justify declaring the law unconstitutional in abstract constitutional review in the conditions of a broad margin of appreciation enjoyed by the parliament.

54.1. In the opinion of the Court *en banc*, to reach the conclusion in the present case that a clearly unconstitutional situation would emerge in the future, it does not merely suffice that several impact assessments drawn up on the contested Act (see e.g. the explanatory memorandum to the FPA Amending Act, page 98; Impact analysis of the changes to the pension system. Bank of Estonia. 2020, page 12, online: https://www.eestipank.ee/publikatsioon/teemapaberid/2020/pensionisusteemi-muudatuste-mojuanaluus [7]) consider the most probable development scenario to be one where the average old age pension in comparison to the average net wage will decrease in the future as an impact arising from the FPA Amending Act.

Establishing that an unconstitutional situation will occur would presume that in the future the state will probably lack the possibility to prevent a potential violation of the fundamental right or to eliminate it by other social policy measures. However, no such conclusion can be reached.

54.2. The Court *en banc* concedes that the contested Act may reduce the level of assistance intended for old age. There is also no dispute that persons leaving the second pension pillar will receive a lower pension in the future. Also, the volume of assets collected in the pension system on account of social tax and mandatory funded pension contributions will decrease upon withdrawal of money from the second pillar.

However, the Court *en banc* does not have at its disposal any data that would enable the certain belief that, as a result of the reform, the state pension of persons exiting the second pension pillar and being covered only by the state pension insurance in the future would fall below the level required by § 28(2) of the Constitution. Nor does the contested Act change the proportion of the part of social tax earmarked for pension insurance, which the state contributes to a person's old age pension. If in the future a threat should appear to the sustainability of the pension system or to the guarantee of the constitutionally required minimum old age assistance, either due to making the mandatory funded pension voluntary or for other reasons, then arising from § 28(2) of the Constitution and the principle of the social state the legislator is obliged to take measures to eliminate such a situation. Currently, there is no reason to believe that the legislator would not fulfil that duty or that it does not have at its disposal means to prevent or eliminate an unconstitutional situation that may arise in the future. There is also no basis to claim that the only means that would ensure sustainable functioning of the pension system in the future is preservation of the mandatory funded pension system in its present form.

54.3. The Court *en banc* emphasises that the state can ensure sustainability of the pension system and fulfil the duty of provision of sufficient old age assistance to people only if also in the future the sustainability of the pension system and the facts affecting it will be consistently assessed. The contested Act inserts § 72^{8} in the FPA which imposes a duty on the Ministry of Finance to draw up an analysis by 2023 on the effects of making the mandatory funded pension laid down by the FPA voluntary and, if necessary, submit proposals for amending legislation. Also, the FPA Amending Act inserts § 61^{5}(2) in the State Pension Insurance Act, according to which the Government shall prepare an analysis by the year 2023 and every five years thereafter concerning the financial and social sustainability of the pension insurance system and, if necessary, submit a proposal to the Riigikogu on amending the pension system.

(C)

55. The Chancellor of Justice in her opinion has found that § 10 and § 28(2) of the Constitution, when interpreted in combination with Article 12(3) of the European Social Charter and Article 2(1) and Article 9 of the UN Covenant on Economic, Social and Cultural Rights, give rise to the obligation of the state to gradually raise the level of social protection in the case of old age. She finds that since upon entry into force of the FPA Amending Act, in the case of some persons, the possibility to receive a mandatory funded pension in the future would disappear, it cannot be claimed that state old age pensions would remain on the current level without amending the State Pension Insurance Act.

Therefore, in the opinion of the Chancellor of Justice, amendments introduced by the contested Act contravene § 10 and § 28(2) of the Constitution even if they do not result in an immediate decrease of old age assistance ensured to a person to a level below the constitutionally required minimum.

56. The Supreme Court does not agree with the Chancellor of Justice. Provisions of international law instruments do not give rise to an obligation of a State Party to guarantee that the level of social security would in any case rise in time and that this level would not be lowered in any situation.

56.1. Under Article 2(1) of the UN Covenant on Economic, Social and Cultural Rights, each State Party to the Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. Under Article 9 of the Covenant, the States Parties to the Covenant recognize the right of everyone to social security, including social insurance.

According to point 9 of General comment No 3 of the UN Committee on Economic, Social and Cultural Rights (online: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f [8]), measures restricting the level of social protection (*retrogressive measures*) are not precluded but would require the most careful consideration and would need to be fully justified by the need to protect other rights provided for in the Covenant.

56.2. Under Article 12(3) of the European Social Charter, the Parties undertake to endeavour to progressively raise the system of social security to a higher level with a view to ensuring effective exercise of the right to social security.

From the opinions of the European Committee of Social Rights supervising compliance with the European Social Charter it follows that lowering the level of social security (*restrictive evolution in the social security system*) is not automatically in violation of Article 12(3), and whether the requirements under the Charter have been violated should be ascertained on a case-by-case basis, assessing the nature of and reasons for the changes, the extent of the changes, the necessity of the reform, the guarantee of social assistance for those concerned by the measures, and the results obtained by such changes (see the Digest of the case-law of the European Committee of Social Rights, December 2018, page 140; online: https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80 [9]).

57. Even in isolation from the state's international obligations, there is no reason to interpret social fundamental rights and the principle of the social state so that they would enable the state only to increase the level of social protection, including social security, inter alia the extent of old age assistance, or would allow decreasing it only for exceptionally compelling reasons. Such a restriction would be contrary to the second sentence of § 28(2) of the Constitution.

At the same time, the legislator does not enjoy complete freedom to decide to what extent and to whom the social rights laid down by § 28 of the Constitution are to be ensured (see Supreme Court Constitutional

Review Chamber judgment of 21 January 2004 in case No 3?4?1?7?03, para. 16).

58. In the present case, in the opinion of the Court*en banc*, the legislator has not arbitrarily lowered the level of old age assistance.

The aim of the FPA Amending Act is to establish the second pension pillar as a voluntary collection scheme enabling a person themselves to decide on placement of the money collected, to reduce the costs involved in its management, and thereby eliminate shortcomings in the second pension pillar (see also paras 76.2, 100 and 113 of the judgment). In view of the legislator's broad margin of appreciation and limited judicial review in assessing protection of social fundamental rights, the Court *en banc* considers these aims as justifying the reform, even though its precise effects are difficult to forecast.

IV

Compatibility of § 43[1] of the FPA with the preamble to the Constitution

59. In the opinion of the President, the preamble to the Constitution gives rise to the principle of an intergenerational agreement obliging the legislator not to impose on future generations unreasonably large financial duties in fulfilling the core functions of the state. The President concludes this from the obligation of the state mentioned in the preamble to strengthen and develop the state which is founded on liberty, justice and the rule of law and is a pledge for the social progress and general welfare of present and future generations.

60. The Court *en banc* finds that the preamble to the Constitution, similarly to other parts of the Constitution, is legally binding and may give rise to direct duties of public authority. One of the functions of the preamble to the Constitution is to determine the main goals of the state. According to the preamble, ensuring social progress and the general welfare of present and future generations is one of the main goals of the state.

61. The provisions of the preamble must be taken into account primarily in interpreting the substance of other provisions and principles in the Constitution. The Supreme Court has previously noted that, with a view to achieving the goals arising from the preamble to the Constitution, the state must create an environment where revenue to the state budget is received as planned, enabling the state to perform its core functions and ensure protection of fundamental rights and freedoms (Supreme Court *en banc* judgment of 12 July 2012 in case No 3?4?1?6?12 [10], paras 167 and 168).

In the context of social security, the above means that the state ensures sustainable functioning of the pension system at least on the constitutionally minimum level of social protection, by planning reasonably in advance the costs necessary for its functioning and the sources to cover costs. Expedient and economical use of state money also covers the aspect that long-term functioning of the pension system in its totality should be ensured by taking into account the actual possibilities of society. Pensions constitute the state's long-term incremental obligation which must be predictable and for which sources of coverage must exist (see Supreme Court *en banc* judgment of 6 January 2015 in case No 3?4?1?18?14 [11], para. 59; Supreme Court Constitutional Review Chamber judgment of 29 May 2015 in case No 3?4?1?1?15 [12], para. 55).

62. At the same time, in view of the level of generalisation of the preamble, it is not possible to conclude that the legislator has a duty, arising from the preamble or the principle of the social state, to prefer one manner of building the social security system to another or to also use another system alongside one if the costs of one system are too high. Nor does the preamble prescribe how the social and economic interests of different generations should be weighed or responsibility shared in bearing the state's future anticipated financial duties. In line with the second sentence of § 28(2) of the Constitution, choices in building the social security system must be made by the legislator.

63. The Court *en banc* did not consider it possible above to reach the conclusion that the changes introduced

by the FPA Amending Act would clearly result in old age pensions falling below the constitutionally required level. Thus, there is also no reason to believe that the contested Act would impact the life of future generations so negatively that it could endanger the preservation of the state and performance of core functions. The Court *en banc* found above that ensuring state assistance in old age is itself not the state's core function (see para. 45 of the judgment).

V

Compatibility of § 43^1 of the FPA with § 32 of the Constitution

(A)

64. The President finds that § 43^1 of the FPA violates the fundamental right to property along with the principle of legitimate expectations of those unit-holders of the mandatory pension fund not wishing to leave the fund. The reason is that, retroactively, a disproportionate risk is created that the value of the units of the mandatory pension fund and, consequently, the future pension of those remaining in the fund, would also depend significantly more than previously on the behaviour of the other unit-holders, in addition to developments in the financial markets and the economy (the risk that the value of the units will decrease considerably). Also, the costs related to exit from pension funds would be left to be borne by other unit-holders (an additional and disproportionate pecuniary obligation in comparison to the previous situation) which also negatively impacts the value of units.

65. Thus, in the instant case the issue in dispute is whether the FPA Amending Act (primarily § 431 FPA but also possible related provisions) unconstitutionally interferes with the fundamental right to property of those mandatory pension fund unit-holders who acquired units in the fund before the entry into force of the contested Act.

(B)

66. The fundamental right to property guaranteed by § 32(1), (2) and (3) of the Constitution protects a person's property from interference by the state but also obliges the state to protect property. The scope of protection of the fundamental right to property includes things as well as rights and claims valued in money (see Supreme Court *en banc* judgment of 17 June 2004 in case No 3?2?1?143?03 [13], para. 18). Interference with the fundamental right to property means exerting any unfavourable influence on a legal position falling within the scope of protection of this right (see Supreme Court *en banc* judgment of 31 March 2011 in case No 3?3?1?69?09 [14], para. 57).

67. A mandatory pension fund is an investment fund created for collecting a mandatory funded pension. Both a mandatory pension fund and a voluntary pension fund created for collecting a supplementary funded pension (third pension pillar) are each contractual investment funds. The aim of an investment fund is to invest the capital involved in it for the benefit of investors and in their common interest, the main objective of pension funds being to provide a unit-holder with a funded pension (§ 2(1), § 5(1) Investment Funds Act).

68. A contractual investment fund is not a legal entity but a pool of assets owned jointly by unit-holders, with a unit representing a unit-holder's share in the assets of the fund (§ 4(1) (first sentence), § 13(3), § 14(1) Investment Funds Act). The number of units held by a person depends on the amount of money received by the fund on behalf of that person and the issue price of a unit (the net value of a unit at the time of issue).

A unit of a mandatory pension fund as an investment fund is a right with a pecuniary value and thus falls within the scope of protection of the fundamental right to property.

69. In comparison with other contractual investment funds, specific rules have been imposed on pension funds. First and foremost, the rights of a pension fund unit-holder in disposing of units are more restricted (a holder cannot transfer or encumber them, § 64(3) Investment Funds Act), and the requirements imposed on the activities of fund managers and other market participants are also regulated more precisely, and certain differences in taxation related to pension funds have also been laid down.

The law restricts disposal of mandatory pension fund units during the collection phase more than in a voluntary pension fund, and the requirements on investing a mandatory fund's assets and on collateral are also regulated more specifically. On the other hand, a mandatory pension fund unit is more protected against claims lodged against a unit-holder (neither a bailiff in enforcement proceedings nor a trustee in bankruptcy can request redemption of pension fund units; see § 64(13) Investment Funds Act). More precise requirements have also been laid down for investing the assets of a mandatory pension fund.

Under current law, before reaching retirement age a mandatory pension fund unit-holder can change a unit only for a unit of another mandatory pension fund (§ 23 FPA, § 64(10) Investment Funds Act). Under current law, a unit-holder cannot request payment of the value of units during the collection phase. Prior to reaching retirement age, payment of units can only be requested by an heir of a unit-holder. This is meant to guarantee collecting for old age. The restriction on disposal is also justified by the fact that payments into a mandatory pension fund are made on account of money coming from the state. This also includes the social tax related part paid for a person for the purpose of pension insurance (4% of sums taxable with social tax; see § 10(3), $(3^{1)}$, (4) and (4^{1}) Social Tax Act, § 12(4) FPA).

70. The above restriction on disposal is abolished under the FPA Amending Act since the first alternative in the first sentence of § 43^{1}(1) of the FPA entitles a mandatory pension fund unit-holder to request payment of an amount corresponding to the value of their units. And, in this regard, a unit-holder may request payment of units acquired both before and after the entry into force of the contested Act.

The second alternative in the first sentence of § 43^{1}(1) of the FPA entitles a person to request payment of the money in an investment account created by the contested Act (§ 1 clause 30 of the contested Act which supplements the FPA with § 17^{1}). It is also possible to pay into an investment account the money received from redemption of mandatory pension fund units (i.e. if one manner of collection is changed for another, where in doing so not all units have to be changed), and it is also possible to transfer to the account the assets received in the future from the second pension pillar (§ 1 clauses 32 and 39 of the contested Act which lay down in amended form § 18(2) clauses 1 and 2 and § 23(1) of the FPA). It is also possible to transfer to a pension investment account (and withdraw from it) money received from redemption of mandatory pension fund units acquired prior to the entry into force of the contested Act.

70.1. The right laid down in the first sentence of § 431(1) of the FPA (to claim payment of money) can only be used so that payment of units in all pension funds, as well as all the money in pension investment accounts, i.e. the entirety of pension assets, is claimed.

Withdrawal of money can be requested up to twice (second sentence of § 431(1) FPA) and by exercising this right a person terminates making contributions into the second pension pillar (§ 431(5) FPA). Making contributions can be resumed only after ten years have passed (§ 272(1) FPA inserted by § 1 clause 41 of the contested Act), subsequent to which payment of all the money collected can be claimed again after ten years of collection (§ 431(6) FPA). After this, a person can no longer join the mandatory funded pension (§ 272(2) FPA).

These rules apply to people who joined the mandatory funded pension prior to entry into force of the contested Act or mandatorily join it after this. Slightly different rules apply to people who voluntarily join the mandatory funded pension after the entry into force of the contested Act (§ 725(8) FPA established by §

1 clause 120 of the contested Act).

71. Although the contested Act (§ 43^1 FPA) increases a unit-holder's right of disposal and freedom of choice, this, in turn, may negatively affect the right to property of those unit-holders who wish to remain in a second-pillar fund in its previous form. First and foremost, this is so because of a possible decrease in the value of units and additional costs.
Therefore, the Court *en banc* finds that § 43^1 of the FPA unfavourably affects mandatory pension fund units acquired prior to the entry into force of the contested Act, thus interfering with unit-holders' fundamental right to property.

71.1. The right to withdraw money from the second pillar places a more onerous duty on a fund manager to make payments from the pension fund and reduces contributions into the pension fund, so that fund managers will have to change investment policy in a way that may hamper productivity of the funds.

The liquidity and productivity of assets in which a fund manager can invest a fund's assets depends on the rules for redemption of units (by whom, when and on what conditions units can be redeemed). The more opportunities a holder has during the collection phase for redemption of units, the more a fund manager must be prepared to make payments from the fund within a deadline laid down by law. This leads to the need to sell less liquid assets and increase investments in more liquid assets, which, as a rule, have lower productivity. The smaller a unit-holder's opportunities for redemption of units, the more a fund is able to make long-term investments with potentially higher productivity. Fund managers should also be prepared that due to a financial crisis or another event with large-scale effects a large number of people may simultaneously claim payment of fund units but transfer of assets in such a situation is probably less profitable.

71.2. Under current law, during the collection phase a manager of a mandatory pension fund must take into account that payments from a fund have to be made in the event of change of units and their succession. By entitling a unit-holder to claim payment of units during the collection phase, in comparison with current law the contested Act imposes on a fund manager an additional duty to make payments during the collection phase. The law does not restrict exercise of the right granted under § 43^1 of the FPA to a specific period (cf. § 72^4 of the FPA where the right can be exercised within three months), only laying down how many times and after what collection period a person may exercise the right. Although how many people will exercise that right and what the amount of units held by them will be is not known with certainty, the Financial Supervision Authority in its opinion submitted to the Supreme Court considered it probable that the number of unit-holders withdrawing their units and claiming payment of money will be significantly higher than the number of those who have so far used the possibility to change units.

71.3. Securities transactions made to quickly increase liquidity also entail additional costs which will ultimately be left to be borne by all unit-holders (account management fees and broker's commission, other fees, exchange rate difference). Withdrawal of money also causes costs which are borne on account of the fund's assets. Although the extent of interference depends on the behaviour of unit-holders after the entry into force of the Act, it can nevertheless be predicted with sufficient probability that a negative effect will occur from withdrawal of money.

71.4. The activities of a fund manager are also affected by the possibility to switch collecting into a mandatory pension fund for a pension investment account (§ 23(1) FPA established in amended form by § 1 clause 39 of the contested Act) since this, too, means a duty to make payments from the fund which is not stipulated by current law.

71.5. Activities of a pension fund are also affected by the fact that withdrawal of money from the second pension pillar terminates making funded pension contributions (§ 43^1(5) FPA). Therefore, a person will no longer be an obligated person within the meaning of § 6 of the FPA and the Tax and Customs Board will stop transfer of assets on the person's behalf to the registrar of the pension register who, in turn, will terminate payments into the pension fund.

72. Upon the entry into force of the FPA Amending Act, a unit-holder has essentially three options – not to withdraw money from the second pension account, to redeem units and transfer the money into a pension investment account, or to claim payment of the units.

By remaining in the fund, the value of a unit may decrease (due to transactions made to pay out the units of other persons) and it is not known what the investment environment will be in the long-term perspective. For transfer into a pension investment account, fund units have to be redeemed but this, too, involves the risk that during the same period a large number of people could apply for redemption, so that the net value of units may suffer. The law does not stipulate that applications submitted under § 23 of the FPA (change of pension funds and pension investment accounts) should be preferred to applications submitted under § 43^1 of the FPA. In addition, a pension investment account lacks the efficiency arising from joint investment and, moreover, success in investing depends on a person's own skills. The third option – to claim payment of units – also involves a risk that the value of a unit may have decreased. Additionally, in that case, more income tax must be paid than in the case of payments in retirement age (§ 4(2) Income Tax Act). However, in that case a person will not receive a funded pension payment in retirement age. That person's pension under the first pillar will also be smaller because, while contributions to the second pension pillar were being made, the social tax related part accounted for that person and received into state pension insurance assets in the state budget was 16% instead of 20%.

73. Section 10 of the Constitution gives rise to the principle of legitimate expectations, which must give people certainty with regard to durability of rules established. The Supreme Court has found that everyone has the right to act with a reasonable expectation that applicable law will remain in force. Everyone must be able to exercise their statutory rights and freedoms at least within the period laid down by law. An amendment to a law may not be untrustworthy in respect of subjects of law (see Supreme Court Constitutional Review Chamber judgment of 30 September 1994 in case No III?4/1?5/94 [15]). The Constitution does not protect against every disappointment caused by changing rules favourable for a person into unfavourable ones. A person's expectation deserves protection when they had a reasonable ground to trust that the regulatory provisions would remain in force and they had begun to realise their rights (see Supreme Court Constitutional Review Chamber judgment of 30 June 2017 in case No 3?4?1?5?17 [16], para. 66).

Rules applicable to mandatory pension fund units acquired prior to the entry into force of the FPA Amending Act become less favourable, along with an increase of freedom of disposal, in the manner described above. People having joined the second pension pillar had a reasonable ground to trust that the rules would remain in force and, when acquiring the units, they had begun to realise their rights. Therefore, they had developed a legitimate expectation that the legislator would not retroactively render rules concerning their property less favourable.

(C)

74. Section 11 of the Constitution allows circumscribing fundamental rights only in accordance with the Constitution, setting the precondition that circumscription must be necessary in a democratic society and may not distort the nature of the rights and freedoms circumscribed. That is, interference with a fundamental right must have a (legitimate) aim complying with the Constitution and the interference must be proportionate to attaining it (appropriate, necessary and proportional in the narrow sense). Interference with a fundamental right is a measure appropriate for attaining the aim if it helps to attain the aim. However, interference is necessary only if the aim cannot be attained by using a measure which is less restrictive of fundamental rights (see Supreme Court *en banc* judgment of 21 June 2019 in case No 5?18?5/17 [17], para. 65).

75. The fundamental right to property is a fundamental right subject to a simple statutory reservation which

may generally be circumscribed for any aim that is not unconstitutional (see Supreme Court Constitutional Review Chamber judgment of 17 April 2012 in case No 3?4?1?25?11 [18], para. 37).

76. With regard to the aims of the FPA Amending Act, the explanatory memorandum to the Draft Act notes the following: "The aim of the Draft Act is to make mandatory funded pension voluntary. The voluntary nature of the second pension pillar increases people's freedom and improves their awareness of the pension system. In addition, it will expand investment opportunities and increase competition, as a result of which fund managers will have to make more effort to keep clients. Presumably, it will result in improved productivity of pension funds which, in turn, will ensure a higher pension in the future." (Explanatory memorandum to the Draft FPA Amending Act, page 1) These aims for carrying out the reform were also affirmed by the the Riigikogu Finance Committee in the Supreme Court proceedings.

76.1. Even though the second pension pillar will after the reform still be called a "mandatory funded pension" under the FPA and one way to collect it will be acquiring "mandatory pension fund" units within the meaning of the Investment Funds Act, the clear aim of the reform was to establish the second pension pillar as voluntary in the future. Inter alia, this is indicated by the substance of amendments introduced by the contested Act since the measures currently ensuring the mandatory nature of the second pillar – a person's obligation to pay a funded pension contribution and a ban on claiming payment of pension fund units during the collection phase – will be abolished.

76.2. Thus, the aim of the reform of the mandatory funded pension, including the aim of § 43^1 of the FPA is to establish the second pension pillar as a voluntary collection scheme in order to enable people themselves to decide on placement of the money collected and reduce the costs of administering it in pension funds, as well as thereby eliminating the current shortcomings of the second pension pillar. People obtain the right to decide themselves whether they collect into the second pillar, when they claim payment of the money collected to the second pillar, and how or whether at all they use the money for achieving the aim of the funded pension (to ensure additional income during retirement). The supplementary funded pension (third pension pillar) is intended to ensure additional income during retirement but the conditions of withdrawing money differ somewhat from those of the second pillar.

77. Since shaping the pension system is within the legislator's decision-making competence (see para. 44 of the judgment), establishing the second pension pillar as voluntary is a (legitimate) aim which is compatible with the Constitution.

78. Section 43^1 of the FPA is appropriate and necessary for attaining the aim in question. To this effect, one element ensuring the mandatory nature of the current second pension pillar – the restriction on disposal of pension assets by a unit-holder during the collection phase – is abolished and the assets under the current second pension pillar will be treated similarly to the assets to be collected under the reformed second pillar.

Although in reforming the system several solutions can be imagined for treatment of previously collected assets, it is difficult to see another measure that would grant a person equivalent freedom to decide on their pension assets.

79. Increasing the productivity of funds and the wish thereby to ensure higher pensions has also been mentioned as an aim for making the second pension pillar voluntary.

79.1. A fund's productivity affects the amount of the payment to be made in retirement age because the value of a unit at the moment of redemption depends on it (the value of a fund's assets is divided by the number of units), and thus also the amount of the payment. In the initial years of making payments, the size of payments may have been affected on the one hand by the fact that due to advanced age people had been able to collect pension assets only for a short time and they had acquired few units (in particular if a person's income during that period had not been high). On the other hand, making the first payments from the funds fell to the period of the financial crisis in 2007–2009. That crisis tested the system as a whole and, during

that time, the volume of assets in pension funds was smaller for a certain period than the volume of contributions made (there was neither nominal nor real productivity). Inter alia, the value of pension fund assets with a conservative investment policy intended for people reaching retirement age decreased (although, generally, negative cumulative productivity could be avoided) (page 4 of the explanatory memorandum to the Draft "Act on amending the Funded Pensions Act and related Acts" (870 SE [19], XI composition of the Riigikogu); see also annex 1 to the explanatory memorandum "Statistics on productivity and investments regarding the mandatory funded pension").

Low productivity of the funds has also been linked to restrictions on investments and high fees and costs of fund managers.

79.2. The explanatory memorandum to the Draft FPA Amending Act does not explain how making the second pension pillar voluntary (in the form stipulated in the contested Act) would increase the productivity of the funds. It may be concluded from the explanatory memorandum to the Draft Act (quote in para. 76 of the judgment) that increase in productivity is expected to result from increased competition which should arise from the opportunity to transfer assets to a pension investment account, as well as to claim payment of the money from the second pillar. Thus, the underlying assumption is that a fund's productivity depends on the activities of a fund manager (administrators) and that in the event of good productivity a person is motivated to continue investing in the fund instead of transferring the money to a pension investment account or claim payment of that money.

79.3. In the opinion of the Court *en banc*, the contested Act, including § 43^1 of the FPA, will not help to increase the productivity of mandatory pension funds.

When assessing interference with the fundamental right to property above, it was described how the amendment reduces contributions to the funds and creates preconditions for an increased amount of payments from them. Consequently, pension funds will have to reorganise their investment policy and bring a fund's assets into conformity with the new conditions, which entails costs. It is highly likely that the fund volumes will decrease, so that no economy of scale facilitating investment will be achieved, the rate of management fees will rise and the service will become more expensive for a unit-holder (see para. 71 of the judgment). Although the amendment may impel fund managers to make increased efforts, those efforts are probably aimed primarily at reducing the unfavourable impact on the activities of the funds as a result of the reform and not on raising the current level of productivity. Since the earnings of fund managers will probably decrease (explanatory memorandum to the Draft FPA Amending Act, page 102), this may instead motivate them to abandon providing the service, which would lead to reduced competition in the market.

(D)

80. To decide on the narrow proportionality of a measure requires considering, on the one hand, the extent and intensity of interference with a fundamental right and, on the other hand, the importance of the aim of the restriction. The more intense the interference with a fundamental right, the more compelling the reasons justifying interference have to be (see Supreme Court *en banc* judgment of 11 June 2019 in case No 5?18?8/19 [20], para. 66).

81. The fundamental right to property is an important value which, in the instant case, is afforded more weight by the legitimate expectations of unit-holders.

The seriousness of interference with the fundamental right to property resulting from § 43^1 of the FPA depends primarily on how strongly destabilising the initial impact of the reform is on pension funds upon the entry into force of the FPA Amending Act and in the time following it. What the volumes and productivity of the funds will be in the longer-term perspective when the activities of the pension funds might reach a new balance, would depend, in turn, on the short-term impact of the reform.

82. Several circumstances play a role in the case of the initial impact of the reform. The most important of these is how many people will exercise the right granted under § 43^1 of the FPA to claim payment of the units and how many units they hold (the proportion of fund assets). If payment of the units is claimed by people who have been collecting longer or whose contributions have been larger (higher taxable income), payments from the fund will be higher. If payment of the units is claimed by many people but the number of units held by them is not large (people who have collected for a shorter time or having lower taxable income), payments from the funds will accordingly be smaller.

Assessing how many people and to what extent will claim payment of money from a fund's assets and what consequences this will have on unit-holders is a forecast based on generalised data, which the constitutional review proceedings can, however, take into account (cf. Supreme Court *en banc* judgment of 15 December 2015 in case No 3?2?1?71?14 [21], para. 117).

In the opinion of the Court *en banc*, based on the the forecasts submitted, the underlying assumption in resolving the case can be that upon entry into force of the Act a significant number of unit-holders will claim payment of money whose withdrawals may make up a considerable part of the funds' assets.

82.1. A survey that was a basis for the 2019 study "Elanike finantskirjaoskus ehk rahatarkus" [Financial literacy, or the financial smartness, of the population] by the Ministry of Finance (online: https://www.rahandusministeerium.ee/sites/default/files/eesti_elanike_finantskirjaoskuse_aruanne_loplik_november_ [22]) showed that among the people who have joined the second pension pillar 49% of respondents would like to continue collecting the same way, 10% would like to collect independently in the future and 19% would stop collecting (17% had not decided what they would do). However, the survey was conducted in June 2019 when the details of the reform were still unknown.

82.2. In the opinion submitted to the Supreme Court by the Financial Supervision Authority, it was found that it also cannot be excluded that 70–80% of unit-holders would exit some funds even though this is rather unlikely.

82.3. The explanatory memorandum to the Draft FPA Amending Act concedes that a person's decision to withdraw the money may be affected by the poor situation in financial markets and in the economy (page 86). Thus, in a worsening situation the number of people wishing to exit the second pension pillar may also increase.

83. The second important criterion in assessing the impact of the FPA Amending Act on the value of units and, hence, on the rights of unit-holders, is how withdrawal of a significant proportion of money from the funds affects financial situation and productivity of the funds. This, in turn, also depends on how well fund managers are able to predict the number of people potentially exiting specific funds and appropriately reorganise their activities – if necessary, by changing the fund's conditions and composition of assets in order to increase the amount of liquid assets for making potential payments.

In the opinion of the Court *en banc*, it is probable that, at least in the short term, withdrawal of a significant amount of pension assets may have a negative impact on the financial situation and productivity of the funds.

83.1. If in the course of the reform it is necessary to sell a fund's assets, a negative impact on the rights of unit-holders depends on the conditions on which assets can be sold. The quicker the assets have to be sold or the less liquid they are (e.g. some types of real estate), the more unfavourable the conditions of sale may be. This results in a decrease in the fund's assets, i.e. the value of units of all its unit-holders, and they will also bear the costs related to reorganising the composition of assets. The sale price of assets is also affected by the situation in the financial markets and in the economy, depending on the types of instrument in which a fund has invested its assets.

83.2. It should also be taken into account that the increase in the volume of the funds has already slowed

down because from 1 July 2020 to 31 August 2021 the state has suspended contributions to the second pension pillar made on account of state pension insurance money (4%) (except in the case of people born 1942–1950) and in October 2020 people also become entitled to suspend making funded pension contributions (2%) from 1 December 2020 to 31 August 2021. A motivation to continue making funded pension contributions might be that, in that case, the state will transfer 4% of social tax to the second pillar from 1 January 2023 (adding to it the average productivity of second pillar pension funds if it is positive) (Act on amending the Acts related to the 2020 Supplementary State Budget Act (measures related to the spread of the coronavirus causing the COVID-19 disease), which established § 13(17)–(22) of the Social Tax Act, § 67^3 of the Funded Pensions Act, and § 59^1 of the State Pension Insurance Act).

84. However, the FPA Amending Act also stipulates several measures mitigating the possible negative consequences related to implementing the Act.

84.1. A fund manager's opportunities to make the necessary preparations (transactions with fund assets) for payments are increased by the five-month period remaining between submission of an application for redemption of units and actual redemption of units, the payment will have to be made within 20 days of redemption of units (§ 43^1(2) FPA; § 52^5(3) FPA established by § 1 clause 111 of the contested Act), and in 2021 and 2022 the time given for this is about 30 days (§ 70(3) FPA).

At the same time, uncertainty is increased by the right of unit-holders to withdraw their application. More specifically, since the price of units may change within that period, at the time of submitting the application a unit-holder does not know in advance what the value of the unit at the moment of redemption will be. If the value of the unit is low (or for other reasons), a unit-holder may withdraw the application approximately one month before redemption of the units (second sentence of § 52^4(5^3) of the FPA established by § 1 clause 106 of the contested Act). By that time, a fund manager has probably already made the transactions needed to pay out the units and if the fund manager was forced to sell the fund's assets on unfavourable terms then the fund's assets will already have decreased as a result.

84.2. Making payments on account of a fund's liquid assets may not lead to the situation where the composition of the fund's assets is no longer in conformity with the law or the fund's basic documents (the fund's condition's and prospectus). To mitigate the latter possibility, the contested Act allows a fund manager temporarily (in the years 2021–2024) to contravene the requirements (§ 2 clause 12 of the contested Act which establishes § 525(3) and (4) of the Investment Funds Act).

84.3. To mitigate possible problems related to liquidity, the contested Act also entitles a fund to take more loan than previously (§ 2 clause 8 of the contested Act which establishes § 124(3) of the Investment Funds Act).

85. If redemption of units and payment of the money would significantly harm the interests of unit-holders or regular management of the fund, a manager of a mandatory pension fund must suspend redemption of units (§§ 57 and 66 Investment Funds Act). In the opinion submitted to the Supreme Court, the Financial Supervision Authority considered a fund's ability to overcome the liquidity crisis in such a case as unlikely. A fund finding itself in difficulty is merged with another pension fund, its management is transferred to another fund manager, or the fund is liquidated (§ 169 et seq., § 187 Investment Funds Act). No payments to unit-holders are made upon liquidation of the fund but the assets are distributed between them so that units in a fund selected by the person are acquired for this (§ 187(2) Investment Funds Act).

86. The estimated stress tests carried out by the Financial Supervision Authority at the end of 2019 showed that in the event of a moderate exit scenario (50% of unit-holders redeem their units) the majority of mandatory pension funds should have no problem with payments since they have enough liquid assets for making payments (the level of liquidity is either very good or good). In the event of extreme or very extreme scenarios (75% or 90% of unit-holders), 4–8 pension funds may run into difficulty with payments.

On that basis, the Court *en banc* has no reason to believe that, as a result of the reform, mandatory pension funds would run into a liquidity crisis and would be unable to make payments.

87. The Court *en banc* does not have at its disposal any certain data to indicate that in the event of withdrawal of a significant proportion of pension assets from the second pillar funds the values of fund units would also significantly decrease. Even if a decrease occurs in the short term, it is currently impossible to assess with sufficient probability what the longer-term impact of the law will be and whether and how quickly fund volumes and productivity could recover.

In view of the foregoing and the fact that the legislator has stipulated several mitigating measures to enable payment of assets (see para. 84 of the judgment), as well as the fact that the probability of a liquidity crisis of the funds is low, the Court *en banc* is of the opinion that interference with the fundamental right to property of a pension fund unit-holder arising from § 43^1 of the FPA is not serious, so that the legislator's aim to increase the freedom of unit-owners justifies the interference.

88. In this regard, the Court *en banc* emphasises that it provides its assessment by relying on forecasts. The Court *en banc* also notes the state's duty to monitor application of the Act and, if necessary, to take corrective measures (see para 54.3 of the judgment).

VI

Compatibility of § 43^1 of the FPA with § 12 of the Constitution

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(A)

89. The President finds that § 431 of the FPA contravenes the fundamental right to equality guaranteed under § 12 of the Constitution.

90. In the opinion of the President, the contradiction arises from the fact that, in comparison to those who have not joined the funded pension system, those that joined the system are treated differently since they are retroactively given an opportunity to withdraw pension assets collected on account of 4% of social tax and to freely use those assets. Persons who have joined the funded pension can decide on the intended purpose of the 4% of social tax and they are granted a retroactive social tax incentive. At the time of joining the system, people were not aware of such an opportunity.

In the opinion of the President, unequal treatment is unjustified because the declared aims of the pension reform are not related to social tax and cannot influence the rate at which the same type of income is taxed and for what purpose social tax collected is used. One type of income should be taxed uniformly and joining or not joining the mandatory funded pension system does not change income taxed with social tax.

91. In the opinion of the President, the principle of uniform taxation is violated and, furthermore, a retroactive change of the intended purpose of resources collected through social tax to keep the pension system functioning is contrary to the principle of the rule of law (§ 10 Constitution).

92. According to the assessment of the Court*en banc*, the President has questioned unequal treatment of those people covered by pension insurance who have acquired pension assets on account of social tax prior to the entry into force of the FPA. Although different rules would also apply to pension assets collected after the entry into force of the contested Act, in that case the rules have not been changed retroactively.

(B)

93. Section 12(1) of the Constitution lays down the fundamental right to equality which is violated if people in a similar situation are treated unequally. To ascertain unequal treatment, the point of departure of unequal treatment must be determined (*genus proximum*) and, on that basis, the groups of comparable persons set out (see Supreme Court *en banc* judgment of 30 June 2016 in case No 3?3?1?86?15 [23], para. 47; Constitutional Review Chamber judgment of 16 September 2003 in case No 3?4?1?6?03 [24], para. 18).

94. The fundamental right to equality is subject to a simple statutory reservation, interference with which is contrary to the Constitution if no reasonable and relevant ground exists for unequal treatment. In order to assess the constitutionality of interference, the aim of the unequal treatment and the severity of the unequal situation caused has to be weighed (see Supreme Court Constitutional Review Chamber judgment of 29 January 2014 in case No 3?4?1?52?13 [25], para. 47; Supreme Court *en banc* judgment of 30 June 2016 in case No 3?3?1?86?15 [23], para. 53).

95. Since in the instant case § 43^1 of the FPA is in dispute insofar as it concerns pension assets acquired prior to the entry into force of the FPA, in the opinion of the Court *en banc* it is appropriate to use as the point of departure for comparison a working-age person who has acquired personalised pension assets on account of social tax prior to the entry into force of the contested Act.

96. In line with the point of departure for comparison, the Court *en banc* believes the following groups should be compared:

(a) working-age persons who have acquired only state old age pension insurance components on account of social tax prior to the entry into force of the contested Act (comparison group I);

(b) working-age persons who have acquired both state old age pension insurance components and second pillar pension fund units on account of social tax prior to the entry into force of the contested Act (comparison group II);

97. Although significant differences exist between second pillar pension fund units and state old age pension insurance components, enough similarities also exist between the comparison groups. Their different treatment therefore interferes with the fundamental right to equality, and the constitutionality of this interference can and must be assessed.

97.1. The Supreme Court found above that a mandatory pension fund unit is a right of pecuniary value falling within the scope of protection of the fundamental right to property (see paras 67 and 68 of the judgment).

97.2. State old age pension consists of a base amount, a part calculated on the basis of years of pensionable service, and an insurance part (§ 11(1) State Pension Insurance Act). The amount of the insurance part, in turn, equals the sum of the insurance components of an insured person multiplied by the value of a year of pensionable service (§ 11(1) clause 3 State Pension Insurance Act). The value of a year of pensionable service is the monetary value of one year of pensionable service and an insurance component of 1.000 (§ 11(2) State Pension Insurance Act). In order to calculate the insurance component, the amounts of the state pension insurance part of individually registered social tax calculated for the insured person are totalled and divided by the average amount of the state pension insurance part of the individually registered social tax in the given calendar year (§ 12(1) State Pension Insurance Act).

Thus, an insurance component is the annual ratio of social tax accounted or paid for a particular person and the average social tax in Estonia.

97.3. Although pension fund units constitute disposable pecuniary rights while insurance components of state pension insurance are only accounting units in granting a state pension, their essential common element is that they can both be considered a benefit obtained in return for paying social tax and both are

personalised pension assets. Although the money paid for a person as social tax repeatedly changes owners before a person having joined the second pension pillar acquires ownership of a pension fund unit, a mandatory pension fund unit is acquired to the extent of 2/3 on account of social tax resources. Had a person not joined the second pillar, that money would have been paid to state pension insurance resources.

An insurance component is also used to insure the risks of a specific person. Due to the existence of a specific benefit in return, both in the case of the first and the second pension pillar the respective 4% part of social tax can be viewed as a mandatory insurance premium. An insurance component is also distinguishable already in the collection phase and has an identifiable amount (although the specific amount of a payment made on the basis of it depends on the annual value of a year of pensionable service in retirement age – the value of a year of pensionable service may increase). Both in the case of group I and group II, the 4% part of social tax covers a similar income basis, i.e. the previous work-related activity of insured persons.

97.4. The payment phase of both state old age pension and the second pillar pension begins with retirement age (§ 7 State Pension Insurance Act, § 40(1) FPA).

98. Comparison group I has not joined the second pension pillar (thus, these must be people born before 1983). Comparison group II has joined the second pillar (voluntarily or mandatorily), so that they acquire personalised pension assets under both pillars.

99. For persons in both groups, currently a restriction applies on disposal of their personalised pension assets in the collection phase (before retirement). Unequal treatment upon entry into force of the FPA lies in the fact that § 43^1 partially abolishes (in respect of units in the second pension pillar funds) the restriction on disposal of assets by people belonging to comparison group II while no similar right is granted to group I.

(C)

100. As the Court *en banc* found above (see para. 76.2 of the judgment), the aim of the reform of the mandatory funded pension, including the aim of § 43^1 of the FPA, can be considered the legislator's wish to establish the second pension pillar as a voluntary collection scheme in order to enable people themselves to decide on placement of the money collected and reduce the costs of administering it in pension funds, as well as thereby eliminating the current shortcomings of the second pension pillar.

In the opinion of the Court *en banc*, the aim of unequal treatment of the two comparison groups is primarily the wish to avoid the complexity of administering payments to comparison group I which would be entailed in making payments from the state budget. This is also the explanation given for unequal treatment by the Government of the Republic and the Minister of Justice.

101. By weighing the aim of unequal treatment and the severity of the unequal situation caused, the Court *en banc* finds that a reasonable and relevant ground exists for unequal treatment, and interference with the fundamental right to equality is thus constitutional.

102. First, the Court *en banc* notes that the rights of comparison group I are not reduced by the FPA Amending Act. Under current law it is also not possible to withdraw money from the state pension insurance on account of the insurance component while from the second pension pillar this is possible in limited cases even now, primarily in the event of succession of a unit (§ 28(2) FPA). Moreover, the social tax related part payable for those who exit the second pillar will in the future be directed by the state to state pension insurance which will better enable financing payment of a pension to persons covered only by state pension insurance and may also offer an opportunity to raise state pensions.

In the opinion of the Court *en banc*, unequal treatment is also justified by the fact that, alongside the social tax contribution paid by the state, persons themselves had to contribute an additional 2% of their wages,

while persons belonging to group I could freely use that money. Thus, the tax burden of comparison group II has been greater. By enabling withdrawal of money from the second pension pillar, a person is also enabled a refund based on the value of assets acquired for that 2%.

103. Persons who have joined the funded pension, unlike those who are only covered by the state pension system, also bear an investment risk. While persons in comparison group I enjoy a statutorily guaranteed pension insurance component (and increase of a pension through indexation until death), for group II receipt of a pension also depends on how profitably a pension fund was managed and on what conditions a pension is offered on account of the assets collected. Additionally, the value of assets collected on account of contributions made for them may be reduced by fund management fees and other costs related to a fund. The contested Act entitles a person to decide themselves whether they wish to bear the investment risk of a fund in the future or will decide themselves how to place the money and will continue under state pension insurance. In this regard, the choice to move into group I means that the person's future pension from state pension insurance will be smaller than the pension of those who were originally in group I.

104. In view of the different situation of the comparison groups described above, it is also possible to agree with the reference by the Government of the Republic and the Minister of Justice that placing the groups retroactively in an equal situation would be extremely complicated.

It is not possible to give comparison group I pecuniary rights similar to group II. This would presume, inter alia, that unplanned expenses would have to be incurred during a budgetary year since state pension insurance resources are used to finance pensions paid to current pensioners. It would not be possible to make uniform payments to the first and second pillar groups since, in the first case, the 4% share of social tax has changed due to indexation while, in the second case, redemption of units would take place according to their net value which has been affected by a fund's productivity and costs.

105. The Court *en banc* does not agree with the President that the FPA Amending Act violates the principle of uniform taxation and that retroactive change of the intended purpose of resources collected through social tax to keep the pension system functioning is contrary to the principle of the rule of law (§ 10 Constitution).

105.1. Social tax is a state tax which has to be paid when a person receives a monetary benefit mentioned as an object of taxation by law (remuneration, compensation, benefits) (§ 2 Social Tax Act). Tax is a public financial duty which interferes with the fundamental rights of persons. Although the legislator enjoys a broad margin of appreciation in imposing public financial duties on persons (cf. Supreme Court *en banc* judgment of 15 December 2015 in case No 3?2?1?71?14 [26], para. 122), when establishing a tax (including in regulating tax incentives) the requirements arising from the Constitution have to be taken into account, including the duty to treat people equally (§ 12 Constitution).

105.2. Within the formal meaning of tax law, the contested Act does not stipulate a tax refund. No retroactive changes will occur in calculation of social tax paid for persons having joined the second pension pillar.

The Court *en banc* concedes that, in economic terms, premature payment of money from the second pillar may, nevertheless, have an effect similar to a tax refund. However, that similarity is not of decisive importance. The principle of uniform taxation also ultimately boils down to the principle of equal taxation, and it would not be contrary to this to lay down justified differences in tax refunds. Since in the opinion of the Court *en banc* the differences in the mandatory funded pension in comparison to state pension insurance are sufficient to justify, in light of the aims of the contested Act, the different treatment of comparison groups I and II, then also no constitutional principles of taxation have been violated by differentiating between them.

105.3. The contested Act does not stipulate a change of the intended purpose of social tax contrary to the principle of the rule of law (§ 10 Constitution). Since the purpose of social tax is to obtain revenue for

pension insurance and state health insurance, the social tax paid for a person (as a rule, 33% of a taxable amount) is partly transferred to pension insurance (20%) and partly to health insurance resources (13%) (§ 1, § 7(1), § 10(2) Social Tax Act). If a person has joined the second pension pillar, the state transfers part of the tax collected for pension insurance (4%) to the second pillar and the person acquires mandatory pension fund units for this.

105.4. Partial transfer of social tax to the second pension pillar is justified by the fact that, similarly to state pension insurance, the aim of the mandatory funded pension is to offer a person income in retirement age (§ 1 FPA). Although § 43^1 of the FPA enables claiming payment of the assets collected to the second pillar even before reaching retirement age, upon payment of the assets the person is also not prevented from saving it for retirement in a suitable manner. In the event of premature withdrawal, the pension of a person who had joined the second pillar will be smaller in the future. However, the opportunity to choose the time for conversion of pension assets into money does not mean that the aim of the second pillar would disappear completely. A pension fund under the reformed second pillar will be similar to a voluntary pension fund intended for collecting a supplementary funded pension (third pension pillar) whose aim is also to help secure a person's retirement.

VII

Compatibility of § 72^4 of the FPA with § 31 of the Constitution

(A)

106. The President finds that the right granted by § 72^4(1) (first sentence) of the FPA to policyholders to withdraw from insurance contracts already entered into and claim payment in money of the surrender value of the contracts disproportionately interferes with the freedom of enterprise of insurers (§ 31 Constitution) in combination with the principle of legal certainty.

107. The contested first sentence of § 72^4(1) of the FPA entitles a person who has joined the second pension pillar and has reached retirement age and has entered into a lifetime or fixed-term pension insurance contract under the Funded Pensions Act to withdraw from that contract. According to the same provision, the right applies to insurance contracts entered into before 1 January 2021. The right can be exercised until 31 March 2021 (§ 72^4(3) FPA). The contract expires on 31 August 2021 and the insurer must pay the policyholder the surrender value agreed under the pension contract by 30 September 2021 at the latest (§ 72^4(4) FPA).

Since the right applies to pension contracts entered into before 1 January 2021, this concerns only people who joined the second pension pillar voluntarily. The reason is that people who were joined to the mandatory funded pension system by law, i.e. people born after 1983, have not reached retirement age and have not been able to enter into pension contracts.

(B)

108. Under § 31 of the Constitution, Estonian citizens are entitled to engage in entrepreneurship and to form commercial associations and federations. The law may provide conditions and procedures for the exercise of that right. Freedom of enterprise includes activities taking place for the purpose of earning profit (see Supreme Court *en banc* judgment of 1 July 2015 in case No 3?4?1?20?15 [27], para. 43).

Freedom of enterprise, on the one hand, protects against interference by public authority in that activity taking place for the purpose of earning profit and, on the other hand, requires public authority to create an environment suitable for entrepreneurship. Freedom of enterprise also protects an undertaking's freedom of contract including trust that contracts entered into in the frame of entrepreneurship will remain in force (the

principle of *pacta sunt servanda*). Freedom of enterprise does not mean the state's duty to create demand in the market for goods and services offered by an undertaking.

109. Pension insurance as a framework for the area of entrepreneurship was created by the state by the Funded Pensions Act in 2004, and operating within it is regulated in detail by law. An insurer dealing with pension insurance enters into pension contracts for the purpose of earning profit (§ 41 FPA).

When entering into a pension contract the mandatory pension fund units held by a person are redeemed and the pension centre will make a lump-sum payment to the selected insurer (§ 49(10) FPA). Either all units, or units to the extent determined by the policyholder, are redeemed (first sentence of § 41(3) FPA). An insurer collects insurance premiums from people who have joined the mandatory funded pension and have reached retirement age and have either been obligated by law to enter into a pension contract, or have voluntarily entered into one, for the purpose of receiving mandatory funded pension payments. A pension contract covers the risk of absence of income in the event of longevity and, as a rule, payments on that basis are made until the end of a person's life. Entrepreneurial activity by an insurer takes place in the form of investing the insurance premiums paid under the contracts, collecting fees related to contracts, and making pension payments to policyholders.

110. The conditions of a pension contract are regulated extensively in the Funded Pensions Act (primarily in Subdivision 2 of Division 8). Inter alia, the current law also establishes the right to withdraw from a contract but only for the purpose of changing insurer and taking into account the limitations (§ 52^2 FPA).

The first sentence of § 72^4(1) of the FPA also introduces a new ground for withdrawal from a pension contract in comparison to the current law and the contracts entered into on that basis.

111. Changing the conditions of pension contracts negatively affects the entrepreneurial activity of insurers. The current procedure for withdrawal from a pension contract is meant to ensure that people do not withdraw from contracts, for example due to deterioration in their health, and that changes in insurance portfolios due to changing insurer would be of random effect in view of life expectancy.

However, the procedure established by the contested provision, which enables withdrawing a contract's surrender value in money, creates the risk that contracts will be cancelled by policyholders who, based on their health data, find that their life expectancy is shorter and consider it more profitable to withdraw the money instead of periodic pension payments. This, in turn, would result in an increase in life expectancy based on the insurance portfolio and an increase of potential costs for the insurer. In addition, as a result of possible withdrawals from pension contracts and payment of a contract's surrender value, the insurer will lose the opportunity to earn profit from investing insurance premiums paid on the basis of an insurance contract and from managing insurance contracts.

In conclusion, in the opinion of the Court *en banc*, the contested provision interferes with insurers' freedom of enterprise.

112. Interference with statutory conditions of pension contracts already entered into and being executed by insurers also means that, in combination with interference with freedom of enterprise, the legitimate expectation of insurers that the current scheme will remain in force is harmed.

(C)

113. The explanatory memorandum to the contested Act notes that the general aim of the Act is to make the mandatory funded pension voluntary, increase people's freedom and, in the context of withdrawal from pension contracts, also expand the rights of policyholders in connection with their pension assets (explanatory memorandum to the FPA Amending Act, pages 1 and 61). The Court *en banc* found above (see

para. 76.2 of the judgment) that the aim of the mandatory funded pension reform is to establish the second pension pillar as a voluntary collection scheme in order to enable people themselves to decide on placement of the money collected and to reduce the costs of administering it in pension funds, as well as thereby eliminating the current shortcomings of the second pension pillar.

Section 72^4 of the FPA entitles policyholders to withdraw from a pension contract and withdraw the contract's surrender value in money. In light of the foregoing, the aim of interference with the freedom of enterprise of insurers can be considered as increasing the freedom of policyholders in deciding on the use and disposal of their pension assets, by eliminating restrictions on the use and disposal of assets collected to the second pension pillar – constituting property within the meaning of § 32 of the Constitution – and transferred to an insurer for insurance premiums, similarly to abolition of ownership restrictions in § 43^1 of the FPA on assets acquired by persons in the collection phase of the second pension pillar prior to the entry into force of the contested Act. Such an aim is legitimate.

114. The Court*en banc* considers interference with the freedom of enterprise of insurers, in combination with interference with legitimate expectations, to be a proportionate solution for attaining the aims set out in the previous paragraph.

The measure chosen by the legislator for giving policyholders the right to withdraw from contracts is appropriate for attaining the legitimate aim. Granting this right is also necessary and proportional in the narrow sense for attaining the aim.

115. The legislator has created pension insurance under legislation as a form of entrepreneurship for provision of state old age assistance within the meaning of § 28(2) of the Constitution. In line with the second sentence of § 28(2) of the Constitution, the categories and extent of that assistance, as well as the conditions and procedure for its allocation, are provided by law.

Therefore, the legislator also has a possibility, by modifying the aims it has set, to reshape the provision of pension insurance as a form of entrepreneurship. Although insurers, by relying on the principle of legitimate expectations, have been able to expect that the regulatory scheme for pension contracts along with restrictions on withdrawal from contracts would essentially remain in force, i.e. it would not be changed in respect of contracts already entered into, amending those statutory conditions for a compelling reason is not precluded. A decision on what kind of reforms to undertake and which groups in society should be preferred by those reforms is within the legislator's competence (see Supreme Court Constitutional Review Chamber judgment of 19 December 2017 in case No 5?17?13 [28]/10, para. 39 et seq.).

116. Section 72^4 of the FPA does not harm freedom of enterprise too excessively. In the proceedings of this case, it has not been specifically indicated that the contested provision would significantly affect the economic activities of an insurer.

The contested provision provides the right of withdrawal from a pension contract but does not impose an obligation to exercise that right nor does it directly terminate those contracts. The actual impact of the possibility to withdraw from a contract on economic activities of insurers depends on the behaviour of policyholders. The state does not directly interfere with the validity of contracts entered into by insurers in the frame of entrepreneurship (cf. Supreme Court Constitutional Review Chamber judgment of 10 May 2002 in case No 3?4?1?3?02 [29], in which, on account of a violation of freedom of enterprise, a provision of law which deemed certain commercial lease contracts to be terminated prematurely was declared unconstitutional and repealed). How many people having entered into pension contracts would decide to withdraw from them has not been proved by reliable forecasts in the instant proceedings.

117. The opportunity to withdraw from a pension contract for the purpose of payment of the surrender value is a one-off and temporary measure which has been established for transition from mandatory pension contracts to voluntary ones. It is valid for a short period: based on the contested provision, pension contracts

entered into prior to 1 January 2021 can be withdrawn from only to 31 March 2021 (§ 72^4(3) FPA). In the event of withdrawal, a pension contract expires on 31 August 2021 and payment will have to be made by 30 September 2021 at the latest (§ 72^4(4) FPA). After the transition period, the surrender value of a contract can no longer be withdrawn in money but the possibility to withdraw from a contract for the purpose of changing insurer under § 52^2 of the FPA will still remain.

118. The law stipulates several solutions which mitigate the risks involved in a possible withdrawal from pension contracts. These include a fee for withdrawal from a contract, an insurer's possibility to stop distributing part of profit to policyholders, and ultimately also transfer of execution of pension contracts to the state.

The Court *en banc* finds that the rights granted in the interests of insurers considerably reduce the economic impact on entrepreneurial activity of insurers which would result from realisation of the risks caused by the possibility to withdraw from contracts. Considering the seriousness of interference with the freedom of enterprise and the measures intended to mitigate this, in the opinion of the Court *en banc* the legislator has duly taken account of the legitimate expectations of insurers when expanding the possibilities to withdraw from pension contracts.

118.1. The possibility to charge a fee for withdrawal from a pension contract was given when laying down the right of withdrawal by amendments to the Funded Pensions Act which entered into force on 14 November 2008 (see § 51(1) clause 7, § 52^2(7) FPA). As a rule, a pension contract is an insurance contract without a specified term which insures the risk of longevity and is valid until the death of the policyholder. Since in practice pension contracts cannot normally be withdrawn from, the fee was intended to compensate for the risk entailed in withdrawal that cash flow would not cover the costs related to managing contracts if some charges are not received as a result of withdrawal from contracts. For the same reasons, a fee for withdrawal from a contract is also applicable in the event of withdrawal from a pension contract on the basis of the contested provision. However, that fee may not be claimed at a rate which essentially precludes withdrawal from a pension contract (see Supreme Court Civil Chamber judgment of 19 December 2018 in case No 2?17?284 [30]/42, para. 45).

118.2. Section 70(4) of the FPA entitles an insurer to stop distributing profit to policyholders. That right is intended to cover the risk that after contracts have been cancelled by people who consider their life expectancy to be shorter, the average life expectancy of people having pension contracts with a specific insurer will have risen and the expected costs in making payments on the basis of pension contracts will have increased.

118.3. Section § 72^4(5) of the FPA entitles an insurer as of 1 February 2022 to refrain from making pension payments on the basis of pension contracts entered into before 1 January 2021 and transfer to the state the making of payments on the basis of those contracts.

That right in the interests of an insurer has been laid down as a reaction to the risk that an insurer will remain bound by the duty to execute pension contracts unprofitable for it once contracts have been cancelled by people who consider their life expectancy to be shorter and the average life expectancy of people having pension contracts with a specific insurer will have risen considerably. This is a measure of last resort in order to ensure, on the one hand, a possibility for protection of insurers to lawfully withdraw from an unprofitable line of business to continue offering other insurance products. On the other hand, this ensures the possibility for policyholders to continue receiving pension payments on the basis of contracts.

119. In conclusion, broadening the right to withdraw from pension contracts for the aims mentioned in para. 113 of the judgment outweighs the right of insurers to earn profit by investing insurance premiums paid from the assets collected by policyholders to the second pension pillar and by managing those pension contracts. Section § 72^4 of the FPA does not disproportionately harm the freedom of enterprise of insurers arising from § 31 of the Constitution in combination with the principle of legal certainty, and is, to that

extent, compatible with the Constitution.

VIII

Compatibility of § 72^4 of the FPA with § 32 of the Constitution

(A)

120. The President finds that § 72^4 of the FPA which entitles a policyholder to withdraw from a pension contract entered into and to claim payment of the surrender value of the contract interferes unconstitutionally with the fundamental right to property (§ 32 Constitution), in combination with the principle of legitimate expectations, of those policyholders who wish to continue receiving payments on the basis of a pension contract.

121. A pension contract is one way of making payments in retirement to a person who has joined the second pension pillar (§ 40(2) FPA). A pension contract is an insurance contract for an unspecified or specified term on the basis of which an insurer undertakes to make periodic pension payments to a policyholder until the policyholder's death, while a policyholder undertakes to pay an insurance premium (§ 41(1) (first sentence) FPA).

A pension contract has a guaranteed rate of interest which may not be negative (the investment risk is borne by the insurer) (§ 45(3^1) FPA). It is possible to agree on special conditions (§ 46 FPA), and since 2018 it is also possible under law to enter into a pension agreement involving an investment risk (§ 46^1 FPA). Under current law, the insurer is obliged to distribute profit in each financial year to policyholders of pension contracts and beneficiaries, increasing all future pension payments (§ 45(8) FPA). The aim of this measure is to compensate for the effect of inflation on pension assets in the payment phase.

Thus, a pension contract gives rise to a policyholder's pecuniary right which falls under the protection of the fundamental right to property guaranteed by § 32 of the Constitution.

(B)

122. Under current law, a policyholder may withdraw from a contract only to change insurer (§ 52^2 FPA). In the event of withdrawal, the surrender value of the contract is not paid out to the policyholder but is transferred to another insurer with whom the policyholder has entered into a contract (§ 52^2(3) FPA).

The first sentence of § 72^4(1) of the FPA gives policyholders an additional right to withdraw from pension contracts entered into before 1 January 2021 and claim a one-off payment of the surrender value of the contract (see, in more detail, para. 107 of the judgment).

123. The right arising from § 72^4(1) of the FPA to terminate a pension contract and claim payment of the surrender value of the contract creates an additional risk for an insurer in comparison with the current scheme. However, this may also have an unfavourable impact on the pecuniary rights of those policyholders who do not wish to terminate their pension contract since they would like to receive payments on the basis of the pension contract to the end of their life.

124. When entering into a pension contract, an insurer makes calculations as to what payment it can offer to a specific person until their death. On the one hand, this depends on an insurer's existing contracts (insurance portfolio) but also on the forecast of how many contracts will be concluded in the future, what the contributions paid on that basis are, and what productivity the insurer will be able to obtain from investing

the contributions.

125. The right to withdraw from a pension contract means that the insurer will have to make a payment that may have a negative impact on the insurance portfolio. This is also admitted in the explanatory memorandum to Draft of the contested Act: "Although the average life expectancy of the portfolio of remaining pension contracts may increase as a result of withdrawal from contracts, insurers cannot change the price (i.e. to reduce the amount of a pension) of the contracts remaining in force. First and foremost, withdrawal may lead to an increase in the average life expectancy of a portfolio if the ratio of men and women in the portfolio changes – more women than men will remain. [...] And it is known that women live on average longer than men" (explanatory memorandum to the Draft FPA Amending Act, pages 62 and 63).

Thus, due to more extensive withdrawal from contracts, an increase may occur in the average life expectancy which the insurer will have to cover. This is a risk that the insurer did not take into account when compiling the portfolio and making investments. Therefore, the insurer's economic situation may deteriorate and a liquidity risk, or at least the unprofitability of the pension payments service, may arise, which may motivate the insurer to abandon providing the service. Due to abolishing the duty to enter into a pension contract, the impact on liquidity is also not compensated by new pension contracts that are entered into. In the longer-term perspective, the consequence may be that the pension contract service would no longer be offered in the market or would be offered on less favourable terms for policyholders than before.

126. Similarly to payments under § 431(1) of the FPA, it is complicated to assess how many policyholders will use the right laid down by § 724(1) of the FPA. An interest in withdrawing from a contract may be shown first and foremost by people whose health has deteriorated and who assess their life expectancy to be shorter than average and who, therefore, hope to obtain more profit from a contract's surrender value than they believe they would obtain from pension payments during their lifetime.

127. A policyholder's pecuniary rights are also affected by the fact that the FPA Amending Act will abolish an insurer's duty to distribute profit (§ 70(4) FPA) as of 1 January 2021 with the aim of restraining an increase in costs incurred by an insurer. This will also apply to those pension contracts entered into before 1 January 2021.

However, when entering into a pension contract a policyholder could not foresee that insurers might be relieved of that duty in the future, as has also been conceded in the explanatory memorandum to the Draft of the contested Act (explanatory memorandum to the FPA Amending Act, page 63). Although it is for an insurer to decide whether to distribute profit in the future, refraining from distribution of profit (and increasing pension payments by that extent) may be an insurer's only opportunity to ensure the ability to make payments (on the basis of § 72^4 of the FPA or contractual pension payments).

128. The right given to a policyholder by § 72^4 of the FPA is substantively also linked to the right given to an insurer as of 1 February 2022 to refrain from making pension payments on the basis of pension contracts entered into before 1 January 2021 (first sentence of § 72^4(5) FPA). If a contract were to be withdrawn from by an insurer, this would violate the rights of those policyholders who do not wish to withdraw from a pension contract and appreciate receiving a pension from the second pillar until the end of their life. Therefore, in that case as of 1 February 2022 the duty to make pension payments would be taken over by the state (Social Insurance Board) to whom the insurer would transfer the surrender values of contracts (§ 72^4(5) (second sentence), § 72^4(7), (8), (13)–(15) FPA). A policyholder can decide whether to withdraw from an insurance contract and claim payment of the surrender value (§ 72^4(10) FPA) or to receive payments from the state in the future (theoretically it is also possible to withdraw from a contract and enter into a new contract with an insurer who continues offering pension contracts). While the duty to distribute profit was abolished, no measures have been stipulated to compensate the effect of inflation on insurance premiums paid by the Social Insurance Board.

129. The Court *en banc* concludes from the above that § 72^4 of the FPA interferes with the fundamental right to property of those policyholders who wish to continue receiving payments on the basis of pension contracts. Persons having entered into pension contracts also had a legitimate expectation that the legislator

would not retroactively make the statutory conditions for contracts already in force less favourable.

(C)

130. The Court *en banc* found above (see para. 76.2 of the judgment) that the aim of reform of the mandatory funded pension is to establish the second pension pillar as a voluntary collection scheme in order to enable people themselves to decide on placement of the money collected and reduce the costs of administering it in pension funds, as well as thereby eliminating the current shortcomings of the second pension pillar.

131. In addition to the right to claim payment of the money during the collection phase (§ 43^1FPA), people are also given the right to decide in the payment phase whether to enter into a pension contract, agree on a funded pension, or to take out the money (as a lump-sum payment). This means abolishing the duty to enter into a pension contract or a funded pension (§ 42(3) and § 43(1) of the current FPA; by the contested Act § 42 of the FPA will be repealed and § 43 will be established in a new wording), as well as abolishing the requirement that a second pillar pension has to be paid to a person until the end of their life (the duty to enter into a lifetime pension contract is abolished, subsection (3) of the new wording of § 45 FPA). However, an insurer will have no duty in the future to enter into a pension contract, regardless of the amount collected.

132. In the explanatory memorandum to the Draft of the contested Act, it is noted: "Considering that the Draft Act will confer additional rights on all people who have joined the second pension pillar (the right to withdraw the money, the right to choose how to use their money in retirement), different treatment of policyholders of pension contracts would not be justified." (explanatory memorandum to the Draft FPA Amending Act, page 61).

It follows from the foregoing that § 72^4 of the FPA is intended to give a person who has entered into a pension contract before the entry into force of the contested Act the rights which are as similar as possible in deciding on the use of their pension assets during the payment phase as they would have had if they had retired from the second pillar after the entry into force of the contested Act. Thus, the aim is to treat people who have retired from the second pillar prior to the entry into force of the contested Act equally with those who retire from the second pillar after the entry into force of the contested Act.

133. In the opinion of the Court *en banc*, § 72^4 of the FPA is a measure that is appropriate as well as necessary for achieving the aim.

In essence, a person who has withdrawn from a pension contract under § 72^4 of the FPA will have the right upon the entry into force of the contested Act to claim a payment from the insurer which is similar to a lump-sum payment under § 43 of the FPA to a person who is entitled to a mandatory funded pension. While after the reform a person, when retiring from the second pillar, is entitled to claim under § 43(1) of the FPA payment of the amount accumulated in a pension fund or a pension investment account, payment to a person having entered into a pension contract before the reform would be made by an insurer to the extent of the surrender value of the contract.

First and foremost, the measure can be considered appropriate for achieving the aim in the case of those people who entered into a pension contract because, under the law in force at the moment of their retirement, they were not entitled to claim a lump-sum payment from a pension fund (there was a duty to enter into a pension contract or they did not wish to use the funded pension as an alternative). At the same time, the contested provision does not distinguish on what basis pension contracts which may be withdrawn from were entered into. It is not known whether and to what extent people will be entitled under the contested provision also to withdraw from pension contracts intended for use of pension assets whose lump-sum payment a person could have claimed.

134. The Court *en banc* is of the opinion that the unfavourable effect on the fundamental right to property of a policyholder arising from the contested provision is not major, although in the instant case its weight is further increased by legitimate expectations.

134.1. An insurer cannot make contracts less favourable. As an exception, a person may only lose the right to share the profit distributed by an insurer. However, this is balanced by the policyholder's right to terminate a contract. In 2009–2018, insurers have distributed approximately 200 000 euros of profit, i.e. on average 20 000 euros a year (explanatory memorandum to the Draft of the FPA Amending Act, page 63).

134.2. Considering the small volume of contracts entered into and the short deadline for withdrawal from contracts, it is improbable that an insurer would run into liquidity problems because of this.

134.3. Even in the case of an insurer abandoning provision of the service, the insurer or the state would subsequently make pension payments in the agreed amount.

134.4. Although the Constitution does not give rise to the requirement to treat persons in the collection phase and payment phase of the second pension pillar equally, the legislator's aim to ensure people equal opportunities in disposing of pension assets during the payment phase is sufficiently compelling.

IX

Compatibility of § 72^4 of the FPA with § 12 of the Constitution

(A)

135. The President finds that § 72^4 of the FPA, which entitles a policyholder to terminate a pension contract that has been entered into and to claim payment of the surrender value of the contract, treats unequally those who have joined and those who have not joined the second pension pillar since it enables those who have joined the second pillar to freely use the social tax related part.

136. According to the assessment of the Court *en banc*, in order to resolve the dispute, it is appropriate to choose as the point of departure for comparison a person who has reached retirement age and owns personalised pension assets (pecuniary rights) acquired on account of social tax prior to the entry into force of the FPA Amending Act.

Such a point of departure for comparison has been chosen because the aim of the provision in dispute was to enable withdrawal from pension contracts entered into prior to the entry into force of the contested Act, and the dispute is over equal treatment of people during the payment phase, i.e. after reaching retirement age. Under the first pension pillar, a person acquires pension rights on account of social tax, of which the insurance component of state pension insurance can be considered as constituting personalised pension assets (see para. 97 of the judgment). Under the second pillar, a person first acquires pension fund units which are also acquired to the extent of 2/3 on account of social tax and which can also be considered to constitute personalised pension assets. If a person has entered into a pension contract in retirement age, then pension fund units have been converted into a different type of pension assets, i.e. into payments made on the basis of the pension contract.

137. The following comparison groups are formed on the basis of the point of departure described in the previous paragraph:

> (a) persons who have reached retirement age and have acquired, on account of social tax, personalised pension assets only in the first pension pillar prior to the entry into force of the contested Act (comparison group I);

(b) persons who have reached retirement age and have acquired, on account of social tax, personalised pension assets both in the first and second pillars, and have entered into a pension contract, prior to the entry into force of the contested Act (comparison group II);

(B)

138. The law treats comparison groups differently. Persons belonging to group I are paid a pension from the resources of state pension insurance in monthly payments until their death. Payments are indexed in order to take into account the impact on pension payments arising from an increase in wages (increase in social tax) and inflation (through the consumer price index), but on the other hand, first pillar pension rights are not inheritable. Persons belonging to group II acquire an entitlement under the contested provision to claim payment of the second pillar pension assets as a lump-sum payment and to use the money for freely chosen purposes.

139. The Court *en banc* found above (see para. 113 of the judgment) that the aim of interference under § 72^4 of the FPA with the freedom of enterprise of insurers can be considered as increasing the freedom of policyholders in deciding on the use and disposal of their pension assets, by eliminating restrictions on the use and disposal of assets collected to the second pension pillar – constituting property within the meaning of § 32 of the Constitution – and transferred to an insurer for insurance premiums. This is done similarly to abolition of ownership restrictions in § 43^1 of the FPA on assets acquired by persons in the collection phase of the second pension pillar prior to the entry into force of the contested Act.

In the opinion of the Court *en banc*, in doing so the aim of unequal treatment of the two comparison groups is primarily the wish to avoid the complexity of administering payments to comparison group I and to save the state's money. For instance, the Government of the Republic and the Minister of Justice point out that treatment of group I equally with group II would be complicated administratively and would result in making payments from the state budget.

140. By weighing the aim of unequal treatment and the severity of the unequal situation caused, the Court *en banc* finds that a reasonable and relevant ground exists for unequal treatment, and interference with the fundamental right to equality is thus constitutional.

140.1. The right to claim a lump-sum payment of the surrender value of a pension contract is given with the aim that during the phase of mandatory funded pension payments people who have retired from the second pillar before or after the entry into force of the contested Act be treated equally. The reason is that in the event of retiring from the second pillar after the reform a person has more rights to dispose of their pension assets – the right to decide themselves whether to choose a lump-sum payment (§ 43 FPA), a funded pension, or to enter into a lifetime or fixed-term pension contract.

140.2. The aim of measures used during the payment phase (in the event of realisation of old age as the insured risk) is to ensure income for as long a time as possible. Even under current law the system of payments in the case of pension assets under the first and second pillar is different depending on the volume of assets accumulated under the second pillar. Payments under the first pillar are most similar to pension contracts for an unspecified term since in both cases payments are ensured until a person's death. Nor are pecuniary rights inheritable in either case. The opportunity to enter into a pension contract is not abolished in the future but it is left for a person to choose.

140.3. In order to grant a similar right of disposal of pension assets with regard to the first pillar pension assets, payments should be made from state pension insurance resources. It would also be administratively complicated to ascertain to what extent it would be fair to make payments because pension assets under the second pillar have been acquired to the extent of 1/3 on account of a funded pension contribution paid by the person. Therefore, granting more freedom to dispose of assets along with the need to save state budget resources can be considered a reasonable and appropriate ground for unequal treatment.

X

Summary of opinions and resolving the application

141. The President asserts that the contested Act is unconstitutional and deciding on this falls within judicial review of constitutionality. The Supreme Court is the court of constitutional review (second sentence of § 149(3) of the Constitution). The duty imposed on the Supreme Court under the Constitution to protect the Constitution and fundamental rights must be fulfilled by taking account of the division of powers laid down by the Constitution, regardless of sharp political disagreements.

142. In conclusion, the Court*en banc* ascertained that the contested Act results in instances of interference with fundamental rights. However, no violation of the Constitution could be concluded with sufficient certainty in the frame of abstract constitutional review and based on existing forecasts, and the aims of the reform outweigh the ascertained instances of interference resulting from it.

On that basis, the Court *en banc* dismisses the application by the President.

143. The Court *en banc* concedes that in a specific case implementation of the Act may nevertheless lead to an unconstitutional situation if the risks entailed in the legislative amendment become a reality in respect of someone to a larger extent than anticipated. To eliminate this, it is possible, if necessary, to initiate specific constitutional review in respect of the Act on the basis of the judgment and to reach a different result in the frame of that review. The opinion of the Supreme Court in the instant case also does not rule out assessment of the constitutionality of the same rules in new abstract review proceedings (e.g. on the basis of an application by the Chancellor of Justice) in the event of a change in legal or factual circumstances.

Villu Kõve, Velmar Brett, Peeter Jerofejev, Henn Jõks, Hannes Kiris, Ants Kull, Kai Kullerkupp, Julia Laffranque, Saale Laos, Viive Ligi, Heiki Loot, Kaupo Paal, Nele Parrest, Ivo Pilving, Jüri Põld, Paavo Randma, Kalev Saare, Juhan Sarv, Tambet Tampuu

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