

**JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT
of 28 April 2000**

Review of the petition of the Tartu Administrative Court to declare § 19(1)2) of the Alcohol Act invalid.

The Constitutional Review Chamber sitting in a panel presided over by the Chairman of the Chamber Uno Lõhmus and composed of members of the Chamber, justices Tõnu Anton, Ants Kull and Jüri Põld, at its open session of 13 April 2000, with the representative of the Riigikogu Liina Tõnisson, the representative of the Chancellor of Justice Aare Reenumägi, and the Minister of Justice Märt Rask appearing, and in the presence of the secretary to the Chamber Piret Lehemets reviewed the petition of Tartu Administrative Court of 2 March 2000.

I. FACTS AND COURSE OF PROCEEDINGS

1. During the period of 17 - 23 November 1999, under § 132(3) of the Code of Administrative Offences, the police officers of the Tartu Police Prefecture punished salespeople of sales-outlets, including A. Vindirevskihh - an employee of OÜ Kauplus Mõisavahe - for the violations of the Alcohol Act. On 18 November 1999 he was punished by a fine of four days' wages for the fact that on 16 November 1999 he had sold a bottle of A. Le Coq Porter and a pack of cigarettes to a minor born in 1984. The decision regarding the matter of administrative offence became effective on 29 November 1999.

2. The Police Prefecture informed the Tartu City Government of the fact of the administrative offence and, on 28 December 1999, on the basis of § 19(1)2) of the Alcohol Act, the latter issued an order revoking the activity licence of OÜ Kauplus Mõisavahe for retail trade in alcohol.

3. On 6 January 2000 OÜ Kauplus Mõisavahe filed an action with the Tartu Administrative Court, asking the court to declare the revocation of activity licence for retail trade in alcohol illegal. At the court session the representative of the person who filed the action specified the request and asked that § 19(1)2) of the Alcohol Act as an unconstitutional provision be not applied and that a constitutional review proceeding be initiated.

4. The Tartu Administrative Court, in its judgment concerning administrative matter no. 3-4/2000, dated 1 March 1999, did not apply § 19(1)2) of the Alcohol Act due to the conflict of the provision with § 11 of the Constitution, and under § 15 of the Constitution and § 5(1) and (2) of the Constitutional Review Court Procedure Act submitted a petition to the Supreme Court to declare invalid the words "or an employee of the holder of an activity licence" of § 19(1)2) of the Alcohol Act.

II. LEGAL MOTIVATION

5. The provision of the Alcohol Act that the Tartu Administrative Court did not apply, reads as follows:

"§19. Revocation of activity licences

(1) An activity licence shall be revoked by the issuer thereof on the basis of:

.....
2) a reasoned proposal, if the holder of the activity licence or an employee of the holder of the activity licence seriously violates the procedure for the handling of alcohol in the area of activity permitted by the activity licence and if the violation is established by a decision which is in force in the matter of a criminal offence or an administrative offence.

Justifications of participants

6. The Administrative Court is of the opinion that § 19(1)2) of the Alcohol Act gives the issuer of activity licences no choice as to the legal consequences, because it has no right to decide whether to revoke an activity licence or not. Pursuant to the provision of the Act an activity licence has to be revoked in any case. The Act regards the situations where violation is committed by the holder of an activity licence or by an employee of the holder of an activity licence as equal.

The court is of the opinion that sale of goods, including alcohol, amounts to engaging in enterprise, and revocation of an activity licence for retail trade in alcohol can be regarded as restriction of the right to engage in enterprise, established by § 31 of the Constitution. Also, revocation of an activity licence for handling alcohol is an administrative coercive measure. Application of any kind of coercive measures restricts individuals' rights and freedoms. § 11 of the Constitution establishes that rights and freedoms may

be restricted only in accordance with the Constitution. The restrictions must be necessary and shall not distort the nature of the rights and freedoms restricted. Also, when imposing restrictions one must take into consideration that restrictions must be proportional to the desired objective and should avoid excesses.

Considering these circumstances the administrative court is of the opinion that § 19(1)2) of the Alcohol Act is unconstitutional in so far as it establishes that a person's right to engage in enterprise and application of administrative coercion measures on him or her is contingent upon offences committed by his or her employees. The wording of § 19(1)2) of the Alcohol Act "or an employee of the holder of the activity licence" is in conflict with the principle of proportionality arising from § 11 of the Constitution. Revocation of an activity licence of a company because of an unlawful act of its employee, in order to guarantee the observance of the procedure for handling alcohol, is not necessary, nor is it a proportional measure, instead, it is an excessive measure.

7. The representative of the Riigikogu expressed the opinion that the contested provision of the Alcohol Act is not in conflict with the proportionality principle of § 11 of the Constitution.

8. The Chancellor of Justice is of the opinion that the petition is not to be satisfied as the words "... or an employee..." of § 19(1)2) of the Alcohol Act are irrelevant unless reference is made to serious violations enumerated in § 19(2). A legal person is responsible for offences of its employees even if the responsible persons and the owner of private limited company were unaware of the unlawful activities of the salespersons working in the shop.

9. Neither did the Minister of Justice find the petition of the Tartu Administrative Court to be justified, because although the persons' constitutional right to engage in enterprise is restricted by § 19(1)2) of the Alcohol Act, the restriction is partial (pertaining only to the sales of alcohol) and temporary, consequently the infringement is not very severe and the protection of minors' health as the objective of the infringement outweighs the partial restriction imposed on enterprise by the law. The employees of a company, when fulfilling their duties, act in the name of the company and consequently the company must be liable for offences committed by their workers upon fulfilling their duties.

Opinion of the Constitutional Review Chamber

10. Pursuant to the first sentence of § 31 of the Constitution Estonian citizens have the right to engage in enterprise. Enterprise is an activity the aim of which is generally to gain revenue from the production and sale of goods, providing services, sale of property, etc. The object of protection of enterprise encompasses all fields of activity and professions where persons offer goods or services in their own name. Thus, trading is enterprise for the purposes of the first sentence of § 31 of the Constitution. Private limited company Kauplus Mõisavahe is thus an entitled subject of the right to engage in enterprise. The right to engage in enterprise is extended to the company under § 9(2) of the Constitution, pursuant to which fundamental rights shall extend to legal persons in so far as this is in accordance with the general aims of legal persons and with the nature of such rights, freedoms and duties. The protection of the right to engage in enterprise is extended to private limited company Kauplus Mõisavahe.

11. Any measure of public authority which prevents, prejudices or eliminates any activity related to enterprise, infringes upon the right to engage in enterprise. § 19(1)2) of the Alcohol Act provides for the possibility to deprive a person of the right to trade in alcohol. Such legal regulation restricts the right to engage in enterprise.

12. The right to engage in enterprise, provided by § 31 of the Constitution, is not an absolute right. The second sentence of the article allows the legislator to provide the conditions and procedure for the exercise of this right. As the restrictions on the exercise of the right to engage in enterprise are provided by law, the infringement arising from § 19(1)2) of the Alcohol Act is - in the formal sense - in conformity with the Constitution.

13. § 11 of the Constitution gives rise to the requirement that restrictions on rights and freedoms must be necessary in a democratic society and must not distort the nature of the rights and freedoms restricted. Restrictions must not prejudice legally protected interests or rights more than is justifiable by the legitimate aim of the provision. The means must be proportional to the desired aim (*Mutatis mutandis* see judgment of the Constitutional Review Chamber of 17 March 1999 - RT III, 1999, 9, 89). The legislators, as well as those who apply law, must take the proportionality principle into consideration.

14. The Chamber does not agree with the opinion of the Tartu Administrative Court that § 19(1)2) of the Alcohol Act is excessive in so far as it states that revocation of activity licence depends on the breaches of law of the employees of the holder of the activity licence. A salesperson does not act independently; when performing his or her duties he or she is but a representative of his or her employer and is concluding and fulfilling sales agreements with the buyers in the name of the employer. Person holding an activity licence is liable for observing the procedure for handling alcohol even if he or she handles alcohol through

assistants. The Chamber does not see a conflict between the Alcohol Act and the Constitution in the fact that application of administrative coercion measures to a company is contingent upon breaches of law committed by his or her employees.

15. The Chamber agrees with the statement of the administrative court that § 19(1)2) of the Alcohol Act does not give the issuers of activity licences any choice as to the legal consequences if a serious breach of the procedure for handling alcohol by the holder of an activity licence or by an employee thereof has been ascertained. As this argument was submitted by the Tartu Administrative Court both in its judgment and in the petition to the Supreme Court, the Chamber can not overlook the argument. That is why it is necessary to assess § 19(1)2) of the Alcohol Act in its entirety and in conjunction with subsection (2) thereof.

16. The right to engage in enterprise is a fundamental right with a reservation that restrictions on it must be established by ordinary law, as the second sentence of § 31 of the Constitution allows the legislator to provide for the conditions and procedure for the exercise of this right. The restrictions have a legitimate aim of protecting society against untrustworthy salespersons. A member of society must feel certain that children are not sold alcohol. A company is not trustworthy if it does so. Thus, the means used to achieve the aim - revocation of activity licences - are appropriate and necessary, and the Tartu Administrative Court has expressed no doubt as to that.

17. The Chamber is of the opinion that § 19(1)2) of the Alcohol Act is disproportional in so far as it does not allow the issuer of activity licences to choose legal consequences. The law provides imperatively that an activity licence shall be revoked if the procedure for the handling of alcohol is seriously breached. The issuer of activity licences, who has to apply the law, has no possibility to weigh whether the restriction of rights and freedoms is necessary in a democratic society in the concrete cases before it. Thus, the activity of those who apply law are excluded from the sphere of § 11 of the Constitution. The law does not allow to take into consideration the circumstances of breaching the procedure for the handling of alcohol, for example the age of the buyer, the quantity and strength of alcohol sold. The legislator must give the executive a possibility to take into consideration various circumstances, so that the exercise of state power through infringement upon persons' sphere of freedoms could be justified and in conformity with the circumstances of the breaches of law.

18. For the above reasons § 19(1)2) of the Alcohol Act is in conflict with §§ 11 and 31 of the Constitution in their conjunction.

19. Until necessary amendments to the Act are made, the above conclusion does not prevent revocation of activity licences in cases of serious breaches of law, because pursuant to § 19(3)3) of the Alcohol Act an activity licence may be revoked in cases of serious breaches of the procedure for the handling of alcohol, if it is necessary considering all circumstances of the breach. If the issuer of licences has already revoked an activity licence under § 19(1)2) of the Alcohol Act and the decision has been contested in an administrative court, the court has to consider in substance whether revocation of the activity licence was necessary and justified considering the concrete circumstances.

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

To declare § 19(1)2) of the Alcohol Act, passed on 10 February 1999, invalid.

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

U. Lõhmus

Chairman of the Constitutional Review Chamber