CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

J U D G E M E N T
on Behalf of the Republic of Latvia
in Riga, on 22 December 2017,
in Case No. 2017-08-01

The Constitutional Court of the Republic of Latvia, comprised of: the chairperson of the court hearing Ineta Ziemele, Justices Sanita Osipova, Aldis Laviņš, Gunārs Kusiņš, Daiga Rezevska, Jānis Neimanis, and Artūrs Kučs,

having regard to an application by the Administrative Regional Court,

on the basis of Article 85 of the *Satversme* of the Republic of Latvia and Para 1 of Section 16, Para 9 of Section 17 (1) as well as Section 19^1 and Section 28^1 of the Constitutional Court Law,

at the court hearing of 23 November 2017, examined in written procedure the case

"**On Compliance of Section 253 (3) of the Administrative Procedure Law with the First Sentence of Article 92 of the *Satversme* of the Republic of Latvia".**

The Facts

1. On 25 October 2001, the *Saeima* adopted the Administrative Procedure Law, which entered into force on 1 February 2004. Section 253 (3) of the Administrative Procedure Law (hereinafter – the contested norm) provides: "In cases provided for by law a court may amend an administrative act and

determine the specific content thereof." The contested norm has not been amended and is in force in its initial wording.

2. **The applicant – the Administrative Regional Court** (hereinafter – the Applicant) **–** requests reviewing the compatibility of the contested norm with the first sentence of Article 92 of the *Satversme* of the Republic of Latvia (hereinafter – the *Satversme*).

The Applicant is adjudicating administrative cases No. A43010415 and No. A43009415, which have been initiated on the basis of applications by several merchants. In both cases, the Competition Council had established in the activities taken by merchants violation of the prohibition of agreement, defined in Section 11 (1) of the Competition Law, and had imposed monetary fines. The merchants had requested revoking or amending, by decreasing the monetary fine defined therein, the decisions by the Competition Council. Hence, the contested norm is applicable in these cases.

The Supreme Court, in interpreting the contested norm, has recognised that a court may amend an administrative act and determine the specific content therefore instead of an institution only if this competence has been envisaged *expressis verbis* in legal norms. In the particular instance, neither the Competition Law nor any other provisions of the competition law envisage *expressis verbis* the court's right to amend the decisions of the Competition Council.

In establishing the content of fundamental rights, included in the first sentence of Article 92 of the *Satversme*, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) should be taken into account. The European Court of Human Rights (hereinafter – ECtHR) had noted that legal proceedings with regard to a decision by a national competition authority to impose monetary fines fell within the scope of the first part of Article 6 of the Convention. The Supreme Court, in turn, had recognised that the monetary fine set by the Competition Council and the procedure for imposing it was of criminal law nature

Hence, in adjudicating cases, where a penalty of criminal law nature had been imposed in administrative procedure by an institution, a person should be

ensured the right to have the penalty imposed on it reviewed in court, which complies with the criteria of a fair trial, defined in the first part of Article 6 of the Convention, and which has "full jurisdiction, i.e., the right to review the validity and proportionality of the penalty as well as, if necessary, to amend its amount. It is alleged that the contested norm significantly restricts this competence of a court and, thus, a person's rights envisaged in the first sentence of Article 92 of the *Satversme* are restricted.

Allegedly, Section 289^{12} (2) of the Latvian Administrative Violations Code (hereinafter – the Code) envisages a broader competence for the court in reviewing the penalty imposed by an institution than the contested norm. The court not only may revoke an institution's decision but also change the penalty imposed by the institution. Both in the administrative procedure in courts and in the cases of administrative violations, such penalties, which have the features of criminal law, imposed by institutions, are reviewed. The Applicant holds that different legal regulation like this lacks legitimate grounds.

The Applicant does not uphold the statement that the contested norm complies with the right to a fair trial since in the case of an institution's error, pursuant to Section 253 (6) of the Administrative Procedure Law, the court may order the institution to impose the penalty anew. The aforementioned legal norm is said to be applicable in cases, where the court does not have at its disposal all information needed to adjudicate the case or if the institution still has to make considerations regarding usefulness. However, the court, upon establishing that the imposed penalty is not proportionate to the offence, usually has to make the same considerations as the institution. I.e., the court, in the course of review, itself makes the conclusion as to which penalty is the right one. In such an instance, the principle of effectiveness requires the court itself to impose the correct penalty.

3. The institution, which issued the contested act, – **the *Saeima***, holds that the contested norm complies with the first sentence of Article 92 of the *Satversme*.

It is maintained that, usually, a court does not amend an administrative act and does not change its content in the administrative procedure. The court

can verify how the institution exercises its discretion but cannot make considerations regarding usefulness instead of the institution. I.e., in deciding on the legality of an administrative act, the court verifies whether the institution has abided by procedural requirements and has not made errors in exercising its discretion – failure to exercise it, exceeding of it or exercising it incorrectly.

Upon establishing that the application requesting revoking an administrative act or declaring it invalid is substantiated, the court revokes it in full or in part thereof or declares it to be invalid. However, if an institution has made an error in issuing an administrative act but the person, nevertheless, should be sanctioned for the violation committed, the court may order the institution to issue a new act, and the instructions given to the institution by the court are binding. If the institution fails to abide by these orders a person may submit a complaint regarding inappropriate or inadequate execution of the judgement in the procedure established in Section 376 of the Administrative Procedure Law

However, the legislator has provided that, in certain cases, a court may be granted the competence to amend an administrative act. Such exceptional cases are regulated in the special legal norms but not in the contested norm. The contested norm is said to not apply to the said exemptions and does not deal with them.

The *Saeima* upholds the Applicant's opinion that the decisions of the Competition Council, which impose a penalty on a person, are of criminal law nature. Therefore, the safeguards of the first sentence of Article 92 of the *Satversme* and the first sentence of Article 6 of the Convention are applicable to the judicial review of these decisions. However, the *Saeima* is of the opinion that the contested norm does not prohibit the court from reviewing an institution's decisions in the scope required by norms of the *Satversme* and the Convention.

Pursuant to ECtHR's findings, in cases of administrative violations, disciplinary cases in prisons, as well as cases regarding violations of tax law, competition law and the like, it is admissible that initially a penalty of criminal law nature is applied by an institution, which does not comply with the safeguards set in Article 6 of the Convention. However, in such a case, a person

should have the right to appeal against the institution's decision in a court, which complies with the safeguards of Article 6 of the Convention and has "full jurisdiction".

In ECtHR's findings, the concept "full jurisdiction" is to be understood as a court's competence to review and revoke an institution's decision in all of its aspects: both with respect to the facts and legal reasoning. The requirement that the court should have the right to amend the institution's decision does not follow from Article 6 of the Convention. I.e., it is sufficient that a court fully reviews the legality, validity and proportionality of the institution's decision and, if necessary, revokes it.

The case law of administrative courts in cases of violations of the competition law is said to prove that the applicants' arguments are reviewed in a detailed way and on their merits. If necessary, the courts exercise their right to revoke the decision by the Competition Council in full or partially and provide concrete instructions for issuing a new administrative act. Hence, an administrative court should be regarded as a court with "full jurisdiction" in the meaning of the Convention.

Globally, there are four basic ways in which a court can exercise its jurisdiction, in reviewing decisions by an institution that supervises competition. In the first one, a court's authorisation is significantly restricted; i.e., the court only identifies significant errors in applying regulatory enactments and revokes obviously unreasonable decisions. In the second one, the court also reviews the legality of an institution's decision; *inter alia*, compliance with procedural requirements. The third way envisages a court's competence to review an institution's decision on its merits, verifying all facts that are significant in the case. Whereas in the fourth one, the court reviews all facts of the case and has the right to substitute the institution's reasoning with its own. Hence, the model chosen in Latvia is said to comply with the models used in practice by foreign countries and even ensure a higher standard for protecting a person's rights than these models.

4. The summoned person – the Ministry of Justice – holds that the contested norm complies with the first sentence of Article 92 of the *Satversme*.

A court's control over the decisions by the executive power is said to be one of the basic principles of a democratic state governed by the rule of law. Therefore, the matter of an administrative court's competence over and review of the actions of the executive power should always be examined in compliance with the principle of separation of powers. The system of "checks and balances" of the principle of separation of powers has the aim to prevent the tendencies to usurp power in all three branches of power.

The legislator has envisaged the court's competence to amend an administrative act and determine the content thereof only in exceptional cases because making considerations regarding usefulness is the task of the institution, not that of a court. If the court made considerations regarding usefulness that would be intervening in the functioning of public administration. The court may review, whether the institution's decision is legal, and, if necessary, can revoke it.

The legal norms that currently regulate the field of competition do not envisage a court's competence to amend an administrative act. It follows from the case law, in turn, that the contested norm is applicable also in other areas not only in the field of competition. However, the courts, in their rulings, have consistently found that at present the legislator has not granted to them the competence to amend an administrative act. The Supreme Court has recognised that it could be useful to grant such competence; however, the regulation that is currently valid is the legislator's choice and the court should respect it.

The Ministry of Justice does not have at its disposal information regarding considerations, which had served as the basis for adopting the contested norm. Likewise, problems in the application of the contested norm and the need to amend the contested norm had not been discussed in working groups, established at the Ministry, which had worked on possible amendments to the Administrative Procedure Law.

5. The summoned person – **the Ombudsman** – holds that the contested norm complies with the first sentence of Article 92 of the *Satversme*.

ECtHR has recognised that the penalties applied in cases of violations of competition law are of criminal law nature. However, these cases cannot be

regarded as being “classical” criminal cases, therefore the criminal law safeguards are not always applicable to them in the strictest way. The State has the discretion to choose the procedure, in which competition cases are examined; however, the court should have such competence that ensures certain safeguards that are typical of criminal procedure.

The legislator has granted to the Competition Council discretion in determining monetary fines, giving it the right to adjust the amount thereof to the competition policy and the facts of the particular case. The court, in turn, in examining the facts of the case, verifies, whether the Competition Council has chosen the amount of penalty in accordance with the criteria included in legal norms and within the framework set therein. In situations, where errors in exercising the institution’s discretion cannot be established, the court has limited possibilities to amend the institution’s decision. Thus, the scope of judicial review in competition cases differs from the scope of review in criminal cases.

A person’s right to a fair trial may be violated if the court does not have “full jurisdiction” over reviewing the facts and legal reasoning in the case. ECtHR, in examining cases with respect to such violations, takes into consideration: 1) the area of dispute; 2) whether the court, in conditions of limited competence, is able to review the case effectively; 3) the way, in which the court reached its decision. Also in the present case, the core issue is linked to the content of the concept “full jurisdiction”. The court, having “full jurisdiction” should have the right to revoke an institution’s decision in all aspects thereof – both with respect to matters of fact and of law. However, “full jurisdiction” does not mean that the court should mandatorily have the right to change the content of the decision on applying a fine.

The Constitutional Court has already noted that an administrative court has the right to review both the facts and the legal reasoning in a case. Moreover, pursuant to Section 235 (6) of the Administrative Procedure Law, an administrative court may instruct the institution to issue a new administrative act, also restricting by this an institution’s discretion in defining the penalty. Hence, the contested norm does not prohibit a court from ensuring a person’s right to a fair trial.

6. The summoned person – the Competition Council – holds that the contested norm complies with the first sentence of Article 92 of the *Satversme*.

The right to a fair trial, defined in Article 92 of the *Satversme* and Article 6 of the Convention, are applied differently in cases of various offences of criminal law nature. Likewise, two types of the aforementioned offences have been singled out in ECtHR's ruling: "classical" violations of criminal law and other offences of criminal law nature, for example, violations of competition law. With respect to violations of competition law, the safeguards of Article 6 of the Convention are not applicable in the same scope as with respect to the "classical" violations of criminal law.

ECtHR has recognised that several circumstances must be reviewed to establish, whether a court has "full jurisdiction". I.e., whether the court is able to review effectively the facts and the law that was applied, the evidence, on which the decision was based, the correctness and proportionality of the institution's assessment. The court should have the right to revoke in full an institution's decision and the assessment of facts and law included therein. The fact, whether the court has been granted the right to change the amount of fine, is not decisive in recognising that the right to a fair trial has been respected.

An administrative court should be considered as a court with "full jurisdiction". In addition to the review of facts and legal circumstances, an administrative court can indirectly substitute an institution's assessment by its own, by instructing the institution to issue a new administrative act, *inter alia*, also with respect to the amount of fine. Allegedly, the case law proves that the administrative court conducts an effective review of the Competition Council's decisions and this review is not limited to formal verification of the criteria for imposing a fine. The court also provided an in-depth analysis in those cases, where one of these criteria had been applied erroneously or had not been taken into account. The scope of judicial review over the legality or validity of the fine is the same as with respect to reviewing the violation of competition law. Hence, the contested norm does not prohibit the administrative court from conducting a comprehensive review of the Competition Council's decisions.

The legislator has granted to the Competition Council the right to develop a policy regarding monetary fines to be imposed for violations of competition law. The discretion given to the Competition Council allows it, in determining the penalty, to use, alongside the criteria for calculating the monetary fine established in the Cabinet Regulation, also other considerations, which are important from the perspective of competition policy, protection of competition and the general market situation. If the court's competence were broadened, by granting it the right to change the Competition Council's decisions in the part regarding the amount of the fine, it would hinder the Competition Council in the implementation of competition policy and in adjusting it to the actual situation in the internal market.

7. The summoned person – ***Dr. iur. h. c., assessor iur.*** **Egils Levits** – holds that grammatical interpretation of the contested norm could collide with the first sentence of Article 92 of the *Satversme*. However, the concept "law", used in the contested norm, should be interpreted broadly, understanding by it also the general legal principles, in this case – the principle of effectiveness, which could ensure that a person's right to a fair trial is realised more effectively.

In accordance with the principle of separation of powers, the court's task is to control the institution but not decide instead of it. If the court identifies an error made by the institution it revokes the institution's decision and returns the case to the institution for re-examination. In re-examining the case, the institution must take into account the court's opinion as to why the revoked decision had been erroneous. This separation of the court's and the institution's competence follows from the fact that the institution decides on the usefulness and legality of the decision, whereas the court – only about the legality. The institution's considerations are future-oriented, whereas the court is making *post factum* considerations.

However, the principle of separation of powers is not absolute. In an exceptional case, a court may even decide instead of the institution if it establishes that the institution may adopt only one correct decision, i.e., if the institution's discretion has been reduced to zero. If it clearly follows from the

court's considerations with respect to the legality of the institution's past actions what kind of act, as to its content, the institution must issue, then instructing the institution to issue an act with this content is said to be a redundant formality. In this instance, the principle of effectiveness should be given priority over the principle of separation of powers. The same actions are required in the case, where penalty must be imposed in the amount specified in law and all factual elements, which are the basis for the penalty, are known to the court and it does not have to clarify anything else. However, if the court finds that the penalty imposed by the institution is incompatible with the offence but additional information is necessary to impose the correct penalty, the court should return the case to the institution.

The following example serves as an illustration for the above. If the court, in verifying the institution's considerations that had been the basis for applying a monetary fine in the amount of 6000 EUR, finds that another penalty is the correct one – 3000 EUR, then the court, one the one hand, having found that the penalty imposed by the institution is incorrect and has to be revoked, and, on the other hand, already has set the "correct" amount of penalty. Thus, the court's review has led to the conclusion that the correct amount of the monetary fine is only 3000 EUR, not 2999 EUR or 3001 EUR. Hence, the institution no longer has any discretion. In such a case, the principle of effectiveness requires the court to set the penalty.

8. The summoned person –*Dr. iur.* Vadims Mantrovs, Docent at the Civil Law Department of the Faculty of Law, the University of Latvia – holds that the contested norm complies with the first sentence of Article 92 of the *Satversme*.

Neither the contested norm nor other regulatory enactments grant to the court the competence to amend the Competition Council's decision on determining the offence, the legal obligation and on imposing a monetary fine. In accordance with the findings made by CJEU and the Constitutional Court, the penalties imposed in the area of competition law are of criminal law nature.

Therefore, in competition law cases regarding imposing monetary fines on market players are said to differ from other cases to be reviewed in administrative procedure, and, in these, a court's competence to amend the Competition Council's decisions should be envisaged.

It follows from the first sentence of Article 92 of the *Satversme* that already the ruling by the first instance court should ensure full settlement of the case. I.e., in the first instance court, the particular matter of dispute should be examined in full to prevent the need for re-applying to a court. If the court only has the competence to revoke the Competition Council's decision in the part regarding determining the monetary fine and can return the case to the Competition Council for its re-examination and the court does not have the right to amend the initial decisions, although it needs to be amended then final settlement of the matter is impossible. This is said to be incompatible with the outcome of a fair trial procedure, moreover, decreases the possibility to hear the case within a reasonable term.

Allegedly, the contested norm restricts a person's right to a fair trial; however, this restriction has been established by law and has a legitimate aim – to exclude judicial intervention in the work of public administration. By amending the Competition Council's decision in the part regarding the monetary fine the court would not perform the task of public administration but would perform a judicial review of the application of a penalty with criminal law nature. The specifics of competition law require the court, in case of necessity, substitute the Competition Council's decision on imposing a monetary by its own reasoning. Therefore the restriction included in the contested norm does not reach its legitimate aim.

9. The summoned person – applicants in the administrative case No. A43009415 SE "Moller Baltic Import", limited liability company",,Moller Auto Krasta", limited liability company "Moller Auto Ventspils" and limited liability company Moller Auto Latvia" (hereinafter – *Moller* Group) – hold that the contested norm is incompatible with the first sentence of Article 92 of the *Satversme*.

Allegedly, the first sentence of Article 92 of the *Satversme* in interconnection with Article 6 of the Convention guarantees to a person that a case regarding a violation of competition law is heard by a court with "full jurisdiction". ECtHR has noted that a court with "full jurisdiction" is a court with the competence to examine the appropriateness of imposing a monetary fine or decreasing the monetary fine. The contested norm, however, prohibits an administrative court from examining the Competition Council's decisions in the part regarding application of a monetary fine.

The contested norm is said to be an exception to the court's competence, defined in Section 253 (1) of the Administrative Procedure Law. *Moller* Group does not uphold the statement made by the *Saeima* that the contested norm serves to implement the principle of the separation of powers. An exception to the principle of the separation of powers cannot be appropriate for implementing this principle. Even if the legitimate aim of the restriction included in the contested norm is implementation of the principle of the separation of power, this aim could be reached in a more effective way by envisaging a court's right to decrease the monetary fine imposed by the Competition Council. If the court does not require additional facts or information to make considerations regarding usefulness then, in order to exercise effectively the right to a fair trial, the court should have the right to make such considerations of its own and to provide the final settlement in the case, to conclude legal proceedings with a solid judgement. Also ECtHR, in examining what should be given the preference – the principle of the separation of powers or the right to a fair trial, has recognised that in cases with criminal law nature the right to access to a court takes priority over maintaining the principle of the separation of powers. Currently, only four countries from 28 Member States of the European Union, Latvia being one of them, have not provided to courts authorisation to examine anew (*de novo*) the penalties imposed by competition supervisory institutions or to adopt new decisions.

In practice, administrative courts seldom revoke the Competition Council's decisions and only once – in the judgement of 20 August 2014 by the Administrative Regional Court in case No. A43010913 or the so-called "Drogas

Case" – the Competition Council had been given exact instructions on the calculation of the monetary fine. Moreover, "Drogas Case" is only one of four cases, in which a court has revoked a decision by the Competition Council. In all other cases, administrative courts predominantly provide a short opinion on the applicants' reasoning but do not review the amount of the monetary fine and do not point to the Competition Council's errors.

The Findings

10. The Applicant holds that the contested norm restricts the administrative court's competence in cases with respect to unfavourable administrative acts issued by the Competition Council and, thus, prohibits from ensuring a person the fundamental rights defined in the first sentence of Article 92 of the *Satversme*.

The *Saeima* notes that the contested norm is one of the basic rules of the administrative procedure and part of the legal regulation, which separates the competence of an institution and that of the court in administrative procedure. In its written reply, the *Saeima* mainly provides arguments as to why the contested norm does not prohibit the court from reviewing the administrative acts issued by the Competition Council.

In reviewing a case that has been initiated on the basis of an application by a court, the Constitutional Court must examine the situation insofar it is necessary for adjudicating the particular administrative case (*see, for example, Judgement of 7 July 2014 by the Constitutional Court in Case No. 2013-17-01, Para 19*). However, at the same time, the Constitutional Court must ensure comprehensive and objective examination of the case, as well as procedural economy and the existence of such legal system that would prevent, as fully and comprehensively as possible, the existence of regulation that is incompatible with the *Satversme* (*see Judgement of 24 November 2017 by the Constitutional Court in case No. 2017-07-01, Para 12.2.*).

Hence, also the Constitutional Court, taking into account the considerations referred to above, must specify the extent to which it is going to review the contested norm.

11. The contested norm has been included in the part of the Administrative Procedure Law, which determines the procedure for rendering a judgement at a first instance court. Section 253 of this Law determines the content of a judgment by which an administrative act is revoked or declared invalid. Moreover, pursuant to Section 307 (1) of the Law, unless Section 307 provides otherwise, also the appellate instance court renders its judgement in the procedure set out in Section 253.

The contested norm provides that, in cases specified in the law, a court may change an administrative act and determine its specific content. Pursuant to the practice of applying the contested norm, a court, for instance, may not change the monetary fine imposed on a person for violations of competition law, monetary fine for tax offences, as well as the monetary fine imposed by the Financial and Capital Market Commission (*see applications in Case Materials, Vol. 1, pp. 2 and 24, as well as information provided by the Supreme Court in Case Materials, Vol. 3, p. 114*). It follows from the case materials that until now the legislator has not adopted such special legal norms, by which a court had been granted the right to change an administrative act and determine its concrete content (*see additional explanations by the* Saeima *in Case Materials, Vol. 3, p. 106*).

Hence, the contested norm defines the scope of a court's competence in rendering a judgement in cases with respect to all unfavourable administrative acts. The legal consequences of the contested norm do no change, depending upon the institution, which issued the contested administrative act.

Additionally, it should be taken into consideration that, on the basis of Para 3 of Section 274 (3) of the Administrative Procedure Law, legal proceedings have been suspended also in several other cases, in which, as the administrative court holds, the contested norm should be applied. Thus, the Applicant has informed the Constitutional Court that legal proceedings have been suspended in an administrative case regarding a decision by the State Revenue Service, as well as a case regarding revoking or changing a decision by the Financial and Capital Market Commission. The Administrative District Court, in turn, has suspended legal proceedings in two cases regarding revoking

or amending a decision by the Consumer Rights Protection Centre (*see Case Materials, Vol. 3. pp. 126-127*). A situation where the Constitutional Court would have to initiate and review new cases pertaining to the same issue of constitutional law that can be adjudicated in the framework of the present case would be contrary to the principle of procedural economy (*compare Judgement of 24 November 2017 by the Constitutional Court in Case No. 2017-07-01, Para 12.2.*).

Hence, the Constitutional Court will examine the compliance of the contested norm with the first sentence of Article 92 of the *Satversme*, irrespectively of the institution, which issued the administrative act regarding which a judgement is rendered in the administrative case.

12. The first sentence of Article 92 of the *Satversme* provides: "Everyone has the right to defend his or her rights and lawful interests in a fair court."

The Constitutional Court has repeatedly recognised that the interpretation of the right to a fair trial, established in the first sentence of Article 92 of the *Satversme*, can be influenced by the norms included in international documents on human rights and the practice of application thereof (*see, for example, Judgement of 3 June 2009 by the Constitutional Court in Case No. 2008-43-0106, Para 10*). Therefore the first sentence of Article 92 of the *Satversme* must be interpreted in interconnection with Article 6 of the Convention (*see, for example, Judgement of 28 March 2013 by the Constitutional Court in Case No. 2012-15-01, Para 12*). Moreover, the *Satversme* may not provide for a narrower scope in the protection of fundamental rights compared to the Convention; therefore, in interpreting the norms of the *Satversme* and the Convention, a solution that would ensure harmony between them must be sought (*see, for example, Judgement of 14 September 2005 by the Constitutional Court in Case No. 2005-02-0106, Para 10).*

12.1. The first part of Article 6 of the Convention provides: if a decision by the executive power determines a person's civil rights and obligations then the person has the right to have this decision reviewed by such judicial institution, which has "full jurisdiction" and ensures that Article 6 of the Convention is complied with (*see, for example, ECtHR Judgement of*

10 February 1983 in Case "Albert and Le Compte v. Belgium", applications No. 7299/75 and No. 7496/76, Para 29).

It has been recognised in ECtHR's rulings that the requirement regarding a court with "full jurisdiction" is met if the judicial institution has ensured "sufficiency of review" of the contested decision (*compare, for example, ECtHR's Judgement of 27 October 2009 in Case "Crompton v. the United Kingdom", application No. 42509/05, Para 71 and Para 79*). In examining, whether the judicial review that is available to a person is sufficient, ECtHR takes into account the authorisation of the respective judicial institution: the subject matter of the contested decision, *inter alia*, whether the decision pertains to an area that demands specific professional knowledge and experience to deal with matters at hand, whether and the extent to which the adoption of the decision is linked to administrative discretion; the way in which the decision was arrived at, and the procedural safeguards that were ensured; the content of the dispute as well as the desirable and actual grounds for appeal (*see, for example, ECtHR Judgement of 22 November 1995 in case "Bryan v. the United Kingdom", application No . 19178/91, Para 45, and Judgement of 4 October 2001 in case "Potocka and Others v. Poland", application No. 33776/96, Para 55*).

By choosing this approach, ECtHR has taken into account the system for reviewing decisions by administrative institutions typical of the majority of the Member States of the Council of Europe. In cases of appealing against an administrative decision, the courts of the Member States of the Council of Europe, predominantly, review the facts to a limited extent, i.e., courts do not decide on the facts but review the internal procedure. It can be concluded from ECtHR's judicature that such decisions must be respected that are adopted by institutions on the basis of considerations regarding usefulness and that require certain professional knowledge or experience, as well as are related to exercise of administrative discretion for broader political aims (*see, for example, ECtHR Judgement of 14 November 2006 in Case "Tsfayo v. the United Kingdom", Application No. 60860/00, Para 46*).

Article 6 of the Convention does not have the purpose to ensure access to such a court that could substitute the institution's opinion by an opinion of its

own. However, the court should have the right to rule on the main subject matter of the dispute and, if necessary, return the case for re-examination to the same or to another institution (*see, for example, ECtHR Judgement of 21 July 2011 in Case "Sigma Radio Television Ltd v. Cyprus", applications No 32181/04 and Nr. 35122/05, Para 153 and Para 157*). However, in cases that are not linked to areas requiring specific professional knowledge and experience to solve relevant matters or to exercising of administrative discretion, Article 6 of the Convention demands broader competence of the court, and it must comprise all matters of fact and law that are important for the outcome of the dispute to be resolved in a court (*see, for example, ECtHR Judgement of 17 April 2012 in Case "Steininger v. Austria", application No. 21539/07, Para 55; Harris D., O'Boyle M., Bates E., Buckley C. Harris, O'Boyle & Warbrick: Law of the Europe Convention on Human Rights. Third edition. Oxford: Oxford University, 2014, p. 395*).

12.2. The concept of "a fair court", included in the first sentence of Article 92 of the Satversme, means both an independent institution of the judicial power that hears the case and a due procedure, compatible with a state governed by the rule of law, in which this case is heard. I.e., the respective norm of the *Satversme* requires establishing an appropriate system of judicial institutions and adopting the procedural norms that are needed for fair administration of justice (*see, for example, Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 2 of the Findings, and Judgement of 1 November 2012 in Case No. 2012-06-01, Para 10*).

The Constitutional Court has noted that an institution of the judicial power, in order to be recognised "a fair court" in the meaning of the first sentence of Article 92 of the *Satversme*, must meet several requirements. First and foremost, this institution must be independent, unbiased and competent (*see, for example, Judgement of 18 October 2007 by the Constitutional Court in Case No. 2007-03-01, Para 22.3.*). Moreover, competence means not only professional expertise but also jurisdiction and the right to review and decide on certain matters or authorisation of a certain scope.

The basic task of an administrative court in the administrative procedure is to ensure an effective judicial review of the legality and usefulness of the actions (failure to act) conducted by the executive power. In a broader sense, the

task of the court in the administrative procedure is to review the legality (usefulness) of exercising the authorisation granted to the executive power (*see Judgement of 4 January 2005 by the Constitutional Court in Case No. 2004-16-01, Para 10*). This review is an essential element in each state governed by the rule of law, therefore it should be comprehensive – as to the procedure and the content of it – and all actions by the State that apply to a particular person should be subject to this review (*see, for example: Levits E. 2. pants. Likuma pamatmērķi. Grām.: Administratīvā procesa likuma komentāri. A un B daļa. Autoru kolektīvs Dr. iur. J. Briedes zinātniskajā redakcijā. Rīga: Tiesu namu aģentūra, 2013, 101. lpp.*).

In order to ensure a person's right to a fair trial, an administrative court, in reviewing decisions by the executive power, should have the right to review all essential circumstances in the case and to review the contested decision both from the perspective of facts and of the law. Ensuring a person's right to a fair trial requires revoking of a decision by the executive power or certain actions by public administration that are incompatible with legal norms. If, for any reasons, an administrative act issued by an institution is incompatible with legal norms, the court must eliminate the consequences thereof with respect to the person.

Hence, in the administrative procedure, comprehensive judicial review of the decisions by the executive power must be conducted and, as the result of this review, consequences of an administrative act that is incompatible with legal norms must be eliminated with respect to a person.

13. To examine the compliance of the contested norm with the first sentence of Article 92 of the *Satversme*, the Constitutional Court must establish, whether 1) comprehensive judicial review of the decisions by the executive power is conducted in the administrative procedure; 2) as the result of this review, the court eliminates the consequences caused by an administrative act that is incompatible with legal norms with respect to a person.

13.1. The Constitutional Court has noted that, in accordance with the principle of a rational legislator and the principle of unity of the legal system, the legislator adopts legal norms that are aligned and function harmoniously within the framework of the whole legal system (*compare Judgement of*

8 March 2017 by the Constitutional Court in Case No. 2016-07-01, Para 25.2.). Therefore, in examining the constitutionality of the contested norm, first and foremost, its place within the legal system and connection with norms must be taken into account.

The administrative procedure determines the actions, which the public administration may take with respect to a person, and the rights that the person has to verify in court the legality of this action. In reviewing the actions of the executive power, the judicial power must abide by the principle of the separation of powers. The aim of the principle of separation of powers is to ensure that the fundamental values of a democratic state governed by the rule of law are implemented and protected (*see, for example, Judgement of 18 December 2013 by the Constitutional Court in Case No. 2013-06-01, Para 11*).

Pursuant to the principle of separation of powers, the initiation of an administrative case and issuing of an administrative act fall with the competence of an institution. A court, in turn, has the competence to decide on the legality of an administrative act. Upon reviewing the actions by the public administration, if the institution has been granted discretion, usually, the court may not indicate to the institution the most correct way of acting because that would be interference into the operations of public administration. Exceptions to this are those cases, where the institution does not enjoy discretion. In all other cases the court must verify, whether errors had been made in exercising the discretion – exceeding it, failure to exercise it or not abiding by the procedural requirements (*see: Briede J., Danovskis E., Kovaļevska A. Administratīvās tiesības. Mācību grāmata. Rīga: Tiesu namu aģentūra, 2016, 34. un 260. lpp.*). The administrative proceedings in the institution are more appropriate for making considerations regarding usefulness compared to administrative proceedings in a court; moreover, an institution can obtain more information and take into account a broader context than a court. I.e., to make considerations regarding usefulness is the task of an institution of public administration rather than that of a court (*see also the opinion of summoned person E. Levits in Case Materials, Vol. 3, p. 116).*

Hence, the administrative procedure simultaneously must ensure both protection of the person against unlawful actions by the executive power and

must implement the principle of separation of powers in the relationship between the executive and the judicial power.

13.2. In the court of administrative procedure, the regulation has been created to ensure that these tasks are performed. This is revealed in several norms of the Administrative Procedure Law. For example, in Para 2 of Section 2, which defines the purpose of the law, Section 103 (1) regarding the substance of the administrative proceedings in a court; Section 184 regarding the subject-matter of application, Section 253 to 256 on the types of administrative court's judgements, and other norms. The contested norm also belongs to the system that defines an administrative court's competence in reviewing actions by the executive power.

Pursuant to Section 253 (1) of the Administrative Procedure Law, if it recognises an application regarding revoking or recognising as being invalid of an administrative fact unfavourable for a person as being valid, it revokes the respective administrative act in full or in a part thereof or declares it invalid. If the court revokes an administrative act it sets the date as of which the administrative act is to be recognised as being revoked. The sixth part of the same section, in turn, provides: if necessary the court instructs the institution to issue a new administrative act instead of the administrative act that has ben revoked or declared invalid. In deciding on issuing a new administrative act, the institution takes into accounts the facts identified in the court's ruling and the legal reasoning provided therein.

A similar approach is included also in Section 254 of the Administrative Procedure Law, which defines the content of a judgement regarding issuing a favourable administrative act. The first part of this Section provides: if the court finds an application regarding issuing a favourable administrative act to be well-founded it instructs the institution to issue an appropriate administrative act. Pursuant to the second part of the Section referred to above, the court defines in the judgement the content of the administrative act and the term for issuing it only if the institution no longer has to make considerations regarding its usefulness. However, in accordance with the fourth part of this Section, also in this case, the administrative act must be issued by the institution; whereas the

court's judgement substitutes the administrative act only until the date when it is issued by the institution.

Hence, the legal regulation that defines the competence of an administrative court is the specification of the principle of separation of powers in the relationship between the executive and the judicial power.

14. The participants of the case have expressed different opinions regarding the scope of the administrative court's competence in reviewing the legality of an unfavourable administrative act.

The Applicant holds that its competence is restricted (*see Application in Case Materials, Vol. 1, pp. 2 and 24*). The *Saeima*, in turn, notes that an administrative court should be recognised as a court with "full jurisdiction" in the meaning of Article 6 of the Convention (*see the* Saeima's *written reply, Case Materials, Vol. 2, p. 91*).

14.1. The scope of reviewing the legality of actions taken by the executive power is regulated in Section 250 of the Administrative Procedure Law. The first part of this Section with respect to the scope of reviewing an administrative act provides that a court renders a judgment after having verified: 1) whether the administrative act has been issued in compliance with all procedural and formal preconditions; 2) whether the administrative act complies with the norms of substantive law; 3) whether the reasoning of the administrative act justifies the obligation imposed on the addressee or the rights that have been conferred, confirmed or denied to the addressee. I.e., the judicial review covers both the formal legality of the actions by the executive power and its usefulness content-wise (*see: Levits E. Par administratīvā procesa vietu un funkcijām Latvijas tiesību sistēmā. Jurista Vārds, 1998. gada 19. marts, Nr. 10/11*).

Moreover, in assessing the way, in which an administrative court reviews the legality of administrative acts, it should also be taken into account that the principle of objective investigation is an integral element of the administrative proceedings in court (*see also Decisions of 11 June 2010 by the Constitutional Court on Terminating Legal Proceedings in Case No. 2010-11-01, Para 8*). Pursuant to Section 107 (4) of the Administrative Procedure Law, to determine

the facts of the matter within the limits of the claim and to ensure legal and fair adjudication of the claim, the court gives instructions and recommendations to the participants in the proceedings as well as collects evidence on its own initiative. In administrative proceedings, the court must take an active position to protect a person's lawful interests against unlawful infringements by an institution (*see: Salenieks N. Par administratīvo procesu tiesā. Jurista Vārds, 1998. gada 19. marts, Nr. 10/11*).

Hence, an administrative court has the right to determine and review both the facts of the case and legal reasoning (*see also Judgement of 15 November 2016 by the Constitutional Court in Case No. 2015-25-01, Para 19.3.*).

14.2. Examination of rulings by administrative courts confirms that administrative courts review all matters of fact and law that are important in the case and examine the contested administrative acts both from the perspective of the procedure and the content thereof.

For example, in cases regarding the penalty imposed on a person by an administrative act, courts review the findings included in the decisions by institutions regarding the severity and duration of a person's offence (*see, for example, Judgement of 26 March 2014 by the Administrative Regional Court in Case No. A43013712, Para 12.4.5. , and Judgement of 3 November 2016 in Case No. A43009715, Para 13.punktu*), examine the reasoning provided regarding aggravating or mitigating circumstances (*see, for example, Judgement of 30 June 2016 by the Administrative Regional Court in Case No. A43015713, Para 20–21*) as well as the proportionality of the penalty (*see, for example, Judgement of 23 December 2010 by the Administrative Regional Court in Case No. A42469206, Para 10.3. and Judgement of 5 June 2012 in Case No. A42459006, Para 14*). I.e., in court, the applicants' arguments are examined in a detailed way and on their merits.

Thus, the administrative court, in exercising its competence, determines and assesses all significant facts in the case and also reviews the contested administrative act from the perspective of both facts and law.

Hence, comprehensive judicial review of the decisions by the executive power is implemented in the administrative proceedings.

15. The Applicant holds that, in order to ensure a person's right to a fair trial, an administrative court should have the right, derived from the contested norm, to amend an administrative act issued by an institution and to determine its particular content. I.e., by amending an administrative act issued by an institution, a court could eliminate the consequences of an unfavourable administrative act for a person.

15.1. The *Saeima* notes that a court has the right to amend an administrative act only if the legislator especially has envisaged this right in law. Allegedly, the contested norm grants to the legislator the discretion to establish an appropriate regulation, if necessary, in special legal norms (*see The* Saeima's *additional explanations, Case Materials, Vol. 3, p. 106*). Also, the Supreme Court has repeatedly noted that a court amends an administrative act and determines its particular content only if this competence has been envisaged in legal norms *expressis verbis* (*see, for example, Judgement of 3 June 2011 by the Department of Administrative Cases of the Supreme Court Senate in Case No. SKA-65/2011, Para 9*).

Thus, the contested norm includes a reference to other regulatory legal acts. If any regulatory legal act had granted to the court the competence to amend the administrative act then the court, on the basis of Section 3 (2) of the Administrative Procedure Law, would have the right to do so, although a norm with this content had not been included in the Administrative Procedure Law.

15.2. Amending the administrative act means changing the legal consequences caused by the administrative act, i.e., the court revokes the legal consequences determined by the institution and determines itself new – different legal consequences (*see Judgement of 26 April 2017 by the Department of Administrative Cases of the Supreme Court in Case No. SKA-115/2017, Para 11*).

At the time when reviewing cases of administrative violations was within the competence of administrative courts, a court, on the basis of the contested norm and the respective norm of the Code, had the right to change the penalty for an administrative violation imposed by an institution. If, in reviewing a case of administrative violation, the court found that considerations regarding usefulness had not been made or had been done erroneously it had the right to

make considerations regarding usefulness and to decide on the punitive measure (*see, for example, Judgement of 27 September 2005 by the Department of Administrative Cases of the Supreme Court Senate in Case No. SKA-244, Para 8*). Hence, in the meaning of the contested norm, changing or determining new, different legal consequences is possible if the court makes considerations regarding usefulness instead of the institution; i.e., performs tasks that are typical of the executive power. Therefore the contested norm must be regarded as an exception to the principle of the separation of powers and the general regulation on the judicial competence in the administrative procedure (*see also the Ministry's of Justice opinion in Case Materials, Vol. 3, p. 2*).

Thus, the contested norm provides that in certain cases the legislator has the right to entrust to a court performance of such activities that are within the competence of the executive power.

15.3. It is noted in the applications that Section 289^{12} (2) of the Code grants to a court broader competence compared to the contested norm. I.e., in cases of administrative violations, the court has the right to not only revoke an institution's decision but also to amend the penalty imposed by the institution. The Applicant holds that this different legal regulation lacks grounds.

The Constitutional Court has repeatedly recognised that objective differences exist between various legal proceedings. Comparison of the legal regulation on different legal proceedings would, undoubtedly, allow finding several features that are common to all these proceedings. However, this cannot serve as the basis for demanding full equalisation of these proceedings (*see, for example, Judgement of 8 March 2017 by the Constitutional Court in Case No. 2016-07-01, Para 27.2.*).

The proceedings, in which cases of administrative violations are reviewed, are a special procedure that must be differentiated from the administrative proceedings. Substantially, cases of administrative violations are not the subject-matter of administrative proceedings (*see, for example, Judgement of 7 October 2010 by the Constitutional Court in Case No. 2010-01-01, Para 17*).

In administrative proceedings and the proceedings on administrative violations, the court examines different legal relationships. Hence, the

differences in legal regulation that determines a court's competence in administrative proceedings and proceedings on administrative violations follow from the aims and principles of the particular proceedings and are well-founded.

15.4. A court's judgement on amending an administrative act does not terminate the functioning of this act but changes the legal consequences of this act. Whereas a judgement on revoking an administrative act terminates the functioning of an administrative act or a part thereof (*see Judgement of 16 February 2015 by the Department of Administrative Cases of the Supreme Court in Case No. SKA-31/2015, Para 8 and 9*).

Thus, if a court, on the basis of the first sentence of Section 253 of the Administrative Procedure Law, revokes an administrative act unfavourable to a person in full or in part thereof or declares it invalid then the consequences caused to a person by this act are eliminated. By this, an effective final settlement is achieved in the administrative case. Consequently, there are no grounds to consider that it is the contested norm that has to be applied to eliminate the consequences caused by an unfavourable administrative act.

Additionally, it should be taken into account that in those instances, where the particular situation cannot remain without an unfavourable act, the court has the right to apply Section 253 (6) of the Administrative Procedure Law (*see, for example, Judgement of 25 November 2011 by the Department of Administrative Cases of the Supreme Court Senate in Case No. SKA-432/2011, Para 11*). I.e., if necessary, a court may instruct an institution to issue a new administrative act instead of the revoked administrative act, complying with the considerations made by the court.

A regulation, in accordance with which a court revokes or declares invalid an administrative act rather than issues instead of an institution another unfavourable act is more compatible with the nature of the administrative procedure. Likewise, the right to a fair trial does not require the court, in reviewing the legality of an administrative act unfavourable to a person, always to make considerations regarding usefulness itself and to determine, on the basis of these considerations, new content of the administrative act.

Hence, the contested norm complies with the first sentence of Article 92 of the *Satversme*.

The Substantive Part

On the basis of Section 30–32 of the Constitutional Court Law, the Constitutional Court

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to recognise Section 253 (3) of the Administrative Procedure Law as being compatible with the first sentence of Article 92 of the *Satversme* of the Republic of Latvia.

The judgement is final and not subject to appeal.

The judgement enters into force on the date of its publication.

Chairperson of the court hearing

I. Ziemele