THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF LATVIA

J U D G E M E N T

On Behalf of the Republic of Latvia

Riga, 14 March 2011

Case No. 2010-51-01

The Constitutional Court of the Republic of Latvia composed of the Chairman of the Court session Gunārs Kūtris, and justices Kaspars Balodis, Aija Branta, Kristīne Krūma, Vineta Muižniece and Viktors Skudra,

having regard to an application of the Council of the State Audit Office,

according to Article 85 of the Satversme (Constitution) of the Republic of Latvia and Article 16 (1), Article 17 (1) Indent 6, and Article 28.[1] of the Constitutional Court Law,

on 15 February 2011, in writing examined the case

"On Compliance of Article 10 (5) (6) of the Law on the Rights of Patients, insofar as It Fails to Establish the Right of the State Audit Office to Request Necessary Information regarding a Patient for the Performance of the Functions Specified by the Law with Article 1, Article 8, and Article 88 of the Satversme of the Republic of Latvia."

The Facts

1. Section 10 (5) (6) of the Law on the Rights of Patients (hereinafter – the Contested Norm) provides that upon a written request and receipt of a written permission

of the head of the medical treatment institution, information regarding the patient shall be provided to the following persons and institutions not later than 10 working days after receipt of the request to the court, the Office of the Prosecutor, inspectors of the State protection of children's rights, the Orphan's Court, the State Probation Service, the Ombudsman, as well as the pre-trial investigation institution – for the performance of the functions specified by the Law.

2. The applicant, the Council of the State Audit Office (hereinafter – the Applicant) holds that Section 10 (5) (6) of the Law on the Rights of Patients fails to comply with Article 1, Article 87, and Article 88 of the Satversme of the Republic of Latvia (hereinafter – the Satversme).

It has been indicated in the application that the State Audit Office is the supreme audit institution and its independency has been enshrined in the Satversme. The State Audit Office verifies actions with the State and local government financial resources and property and acts in the interests of the society. Acquisition of all kinds of information for performing audits is aimed only at reaching of the aim of the State Audit Office. However, the Contested Norm denies the State Audit Office the right to obtain full information on a patient.

The Contested Norm establishes persons and institutions to which information on a patient is provided upon a written request and receipt of a written permission of the head of the medical treatment institution for the performance of the functions specified by the Law. The State Audit Office has not been included into the list of institutions having the right to obtain the above mentioned information; therefore execution of its functions is hampered.

When interpreting in conjunction with Article 87 and Article 88 of the Satversme, it can be concluded from Article 1 of the Satversme that legal regulatory framework regarding competence of the State Audit Office should be established in a manner that it would permit verifying lawfulness, accuracy and effectiveness of the use of State budget resources. For instance, the budget of the Ministry of Health in 2009 was more than 450 million lats, whilst in 2010 – more than 479 million lats. In 2009, about 346 million lats and, in 2010 – about 374 million lats were allocated for treatment of

patients, covering of expenses of compensated medicinal products and centralized purchase of medicinal products.

For services provided, medical treatment institutions receive are disbursed from the State budget. Only after having acquired information on the patient, the State Audit Office is able to verify lawfulness and effectiveness of the use of State budget resources by medical treatment institutions. After performing audits in certain medical treatment institutions, the State Audit Office has established that State budget resources allocated have been used in an unlawful manner, for instance, technical support was issued to deceased persons.

The State Audit Office needs information on a patient only in frameworks of particular audits; moreover, it is needed only at the extent ensuring reaching of the purpose of the audit. The aim of the State Audit Office is to obtain information of used State budget resources that probably are not received or are received only partially by respective medical treatment institutions or persons as the result of an unlawful action, rather than to acquire information on particular patients. Such information is necessary to ensure whether actions taken with State budget resources have been lawful and economically adequate, as well as to take measures to establishing of breaches of normative acts and prevention of mismanagement.

The State Audit Office is not only a supplementary instrument for control of usefulness and lawfulness of use of State budget resources. Although other institutions that perform audits of different kind exist, the State Audit Office is able to verify the way of functioning of the system for use of State budget resources.

The State Audit Office has a large experience in the work with information containing state secret and requiring special protection. Pursuant to Section 58 (2) of the State Audit Office Law, data of closed audits shall not be disclosed. Pursuant to Section 59 of the State Audit Office Law, however, officials and employees of the State Audit Office are not entitled to disclose information, which has become known to them in the performance of their duties of office, without the permission of the Auditor General.

The work of the State Audit Office is aimed at protecting the rights and interests of patients, provided that a part of them cannot defend their rights due to their physical status of financial condition. If the State Audit Office would be granted the authority to obtain information on the patient, such regulatory framework could not be regarded as a

non-proportional restriction of the rights of a person. Namely, an independent audit of the use of State budget resources for treatment of patients is needed. Consequently, this would protect the rights of person who have received medical care and those who have the right to receive State-funded services.

3. The institution that issued the contested act, **the Saeima** does not share the viewpoint of the Applicant and holds that the Contested Norm does comply with Article 1, Article 87, and Article 88 of the Satversme.

Supplementing the Law on the Rights of Patients with the right of the State Audit Office to receive information on the patient would constitute restriction to the fundamental rights of a person, and the aim of such supplementation would be ensuring performance of functions of a single public institution. However, it should be taken into account that Article 96 of the Satversme requires that information on patients is strictly protected. Limited access to information on health of patients is necessary for protection of patient data and preservation of trust into health care system in general and physicians in particular. Should there be no such protection, persons would have the right to refuse providing their personal data, in the result of which they would fail receiving the necessary health care.

The European Court of Human Rights (hereinafter – the ECHR) has indicated that legal norms granting authority to public institutions to obtain data on private life of a person should comply with certain quality requirements. Namely, at all times it is necessary to perform careful assessment and information can be provided only in exceptional cases whet it is indeed indispensible.

In the present case, the way of acquiring the data by the institution rather than the fact that the State Audit Office cannot obtain patient data is of importance. In cases mentioned in Section 10 (5) of the Law on the Rights of Patients, patient information is basically issued on individual basis; however, the State Audit Office would perform mass processing patient data. Consequently, equating of the State Audit Office with other institutions or officials enumerated in the Contested Norm would fail to comply with the aim of the norm, as well as would constitute mass processing of personal data contrary to Article 96 of the Satversme.

Control of financial means allocated for health care sector can be performed even without a thorough examination of patient information. Moreover, such actions are performed by other institutions, e.g. the Health Payment Centre (*Veselības norēķinu centrs*, hereinafter – the HPC) and the Health Inspection (*Veselības inspekcija*). Moreover, each institution and company has the duty to establish a proper inner control system ensuring adoption of lawful and useful decisions. The State control, in fact, serves only as an important supplementary instrument for fulfilling of such instrument and performs post-control rather than basic or additional control.

Protection of personal data in the modern democratic society is a higher value if compared to a desire of any public institution to increase its scope of authority even if the latter is done for just purposes. Therefore, normative acts establish mechanism that balances, as far as possible, protection of patient data and authority necessary for implementing control functions.

Article 87 and Article 88 of the Satversme establish only the legal status of the State Audit Office by providing for the procedure for appointing and dismissing the Auditor General. The above mentioned norms set no requirements in respect to jurisdiction of the State Audit Office. Moreover, Article 88 of the Satversme envisages that jurisdiction of the State Audit Office shall be established by law. The Saeima assumes that constitutionality of such law might be verified, which would considerably restrict the capability of the State Audit Office to implement the tasks established in the Satversme. However, the Contested Norm does not establish such restrictions for the State Audit Office not to be able to perform inspections in the health care sector.

Pursuant to the Satversme and based on political and legal considerations, this is the Saeima that establishes authority, rights and duties of public institutions, and such action of the Saeima cannot be verified by litigation.

4. The Saeima Committee of Social and Labour Affairs informs the Constitutional Court that based on the latter of the State Audit Office, the issue regarding granting of the right to the State Audit Office to accede to patient information has been discussed at the meeting of 23 September 2008 by the Saeima Committee of the Social and Labour Affairs. The above mentioned issue was once more discussed at the Committee meeting of 18 May 2010.

The Committee has not discussed other institutions that are not mentioned in Section 10 of the Law on the Rights of the Patient, except for the State Audit Office. Pursuant to the requirements of the Saeima Rules of Procedure, the suggestions regarding inclusion of the State Audit Office into Section 10 (5) of the Law on the Rights of Patients has not been supported.

5. The summoned person, **the Ombudsman of the Republic of Latvia** (hereinafter – the Ombudsman) indicates that two general legal principles establishing the administrative process and procedures of State administration are contrasted in the present case, namely, administrative rights as concretization of the fundamental rights and the rights of the State as internal organization of the State. The purpose of the first is guaranteeing of the human rights, whilst that of the latter – ensuring of effectiveness of public administration.

The Ombudsman office has assesses the desire of the State Audit Office to perform digital processing of patient data base of medical treatment institutions. It clearly follows from case materials and the opinion of the Ombudsman that such restriction of private life of patients must be established by law. In order to ensure effectiveness of public administration and legitimacy of the public power, the State Audit Office must have appropriate resources and procedural possibilities to control budget use. The consideration that certain audits are performed "within" a certain public department is insufficient. Post-control of lawfulness and usefulness of the use of budget resources outside a particular sector is necessary.

Should the State Audit Office be granted any authority in the field of sensitive data processing, then this *a priori* could not be regarded as a non-proportional restriction of the patient rights. However, this is the legislator that has to determine the political and legal solution. The Saeima can restrict the scope of competence of the State Audit Office by law, especially with the purpose to protect the human rights.

There is no need to supplement the Law on the Rights of Patients by special provisions aiming to ensure reasonable actions by the State Audit Office with patient data. However, the legal regulatory framework on the rights of the State Audit Office might differ in respect to certain patient categories. Such regulatory framework would, in fact, prevent making patient information available to public.

6. The Ministry of Justice indicates that Section 10 (5) of the Law on the Rights of Patients provides an exhaustive enumeration of cases when patient information can be transferred to a public institution for purposes not related to health care. When applying this norm, it is also necessary to observe requirements of the Personal Data Protection Law elaborated and adopted pursuant to the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter – the Directive 95/46/EC).

When assessing whether the benefit gained by the society is greater than detriment caused to persons, the Ministry emphasizes that, when establishing criteria for processing of sensitive personal data, the legislator has included certain stipulated institutions, to which the right to process such data would be granted. Consequently, the fundamental rights of persons established in Article 96 of the Satversme are protected.

The State control can exercise the necessary audits by applying other mechanisms and without thoroughly examining patient information. For instance, such audits are already executed by the HPC. An alternative for the right of the State Audit Office to accede to patient information could be ensuring anonymous data provision for purposes of control. This would prevent the possibility to infringe the right of persons to data protection.

7. The Ministry of Health informs that the need of institutions mentioned in the Contested Norm for patient information has an exceptional character because their functions cannot be exercised by other institutions.

Processing of patient information without their consent is regarded as restriction of personal life, and the above mentioned information is generally recognized as specially protected one. Consequently, the scope of institutions and the amount of information to be furnished to must be restricted. Namely, access to such information must be ensured to the institutions performing urgent actions for protection of interests of particular persons and preventing of infringements of rights, or fulfilment of functions of which are directly related with processing of patient information by thus ensuring provision of medical care services.

Among public administration institutions subject to the Ministry of Health, finance, lawfulness and usefulness audits in medical treatment institutions is performed by the Health Inspection. However, the HPC monitors the use of State budget resources allocated for administration of medical treatment institutions. Consequently, there is no necessity to request fulfilment of the same functions by several different State administration institutions, which would constitute overlapping of functions because this would result in increase of number of institutions having access to patient information.

8. The Health Payment Centre indicates that it implements State policy in ensuring accessibility of health care services and administrating State budget resources allocated to health care sector. The HPC has the right to request medical treatment institutions and pharmacies to present different overviews and certified copies of documents. It also has the right to ask the Health Inspection to perform audits in medical treatment institutions and pharmacies having contractual relations with the HPC. However, the HPC does not have the duty to perform any audit or control in medical treatment institutions or pharmacies.

9. The summoned person, **a foundation *"Pacientu ombuds"*** indicates that the issue regarding security of patient data has been discussed at several meetings and workshops of specialists. In the frameworks of the above mentioned discussions, it has been stated that the range of institutions established in the Law on the Rights of Patients and having the right to access to patient information is too broad. Also in complaints received, patients often mention problems of confidentiality of data included into the medical treatment documents.

To perform its functions in the field of control of the use of financing for health care, the State Audit Office suffices authority already granted. However, effective use thereof is possible only in case if an effective cooperation between the HPC, the Health Payment Centre and the State Audit Office is ensured. The role of the State Audit Office in control of organization of health care and effectiveness of funding thereof is supportable. However, this does not give sufficient grounds for the need of the State Audit Office to accede to information on patients who are protected by the Law on the Rights of Patients.

Unlike other institutions mentioned in the Contested Norm, the State Audit Office does not perform individual processing of patient information, whilst mass treatment, storage and analysis of such information would cause additional risk. Moreover, information on a patient, e.g, his or her diagnosis, term of treatment, and medicinal operations performed, or medicinal products used cannot be technically or formally compared. Even if the State Audit Office would have the right to accede to the above mentioned data, such mass assessment of data would not be fully objective and precise, whilst patient data confidentiality would be threatened.

The Reasoning

10. The Applicant has included in its application a claim to assess compliance of the Contested Norm with Article 1, Article 87 and Article 88 of the Satversme. According to the Applicant, when adopting the Contested Norm, the legislator has acted contrary to the principle of separation of powers. Namely, a legal-political omission has been made in the Law on the Rights of Patients because the Saeima has failed to grant authority to the State Audit Office to obtain patient information.

10.1. It can be concluded from the materials of the case that the State Audit Office has several times addressed, to Saeima Committees, a request to introduce amendments into Article 10 (5) of the Law on the Rights of Patients to include the State Audit Office into the list of institutions provided therein. For instance, in the letter of 5 September 2008 to the Saeima Committee of Social and Labour Affairs and the Committee of Public Affairs and Audit were asked to introduce amendments into the Law on the Rights of Patients and to supplement the list of institutions mentioned in Section 10 (5) (6) thereof by the State Audit Office (*see: case materials, Vol. 1, pp. 15 – 18*).

It can be concluded from the case materials and the information available at the Saeima home page that, exercising the right established in Section 79 (1) of the Saeima Rules of Procedure, on 19 May 2010, several members of the 9th Saeima submitted, to the Saeima Executive Council, a draft law "Amendments to the Law on the Rights of Patents". It provided supplementation of Section 10 (5) (6) by words "the State

http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/0/F59612539182D3A1C2257728004623A5?OpenDocument, consulted on 25 February 2011).

The Contested Norm establishes the right of certain public institutions to receive patient information. According to the Applicant, the Contested Norm fails to provide regulatory framework, pursuant to which the State Audit Office would have the authority to request patient information. However, the Constitutional Court admits that, in fact, the above mentioned authorities of the State Audit Office could be included in other norm of the Law, for instance, in other indent of Section 10 (5) of the Law on the Rights of Patient or the State Audit Office Law.

10.2. The purpose of the right of the State Audit Office to address the Constitutional Court differs from the purpose of a constitutional complaint because a constitutional complaint is primarily aimed at protection of the fundamental rights of a particular person and it is submitted for the interest of a particular person. However, the State Audit Office as a constitutional institution does not have any interests and the aim of applications submitted to the Constitutional Court by subjects of abstract control, including the State Audit Office, is to protect public interests (*see: Judgment of 26 November 2002 by the Constitutional Court in the case No. 2002-09-01, Para 3.1*). It has also been reiterated in the application and its supplements that the State Audit Office does not have its proper interests and it acts only in the interests of the society. Likewise, it has been indicated in law that the State Audit Office acts based on its own initiative by primarily protecting objective lawfulness and interests of the State (*see: Dišlers K. Ievads Latvijas valststiesību zinātnē. Rīga: A. Gulbis, 1930, pp. 194)*.

In fact, the State Audit Office holds that the Contested Norm restricts its scope of competence established in the Satversme and breaches the principle of separation of powers. Although the Constitutional Court cannot act on behalf of a democratically legitimized legislator and undertake the legislative competence, it has not only the right but even the duty to prevent anti-constitutional situation if established.

Consequently, the Constitutional Court has to assess whether the Contested Norm complies with what has been established in the Satversme in respect to the competences of the State Audit Office.

11. Article 1 of the Satversme establishes: „Latvia is an independent democratic republic.” Article 87 of the Satversme provides that “The State Audit Office shall be an independent collegial institution”, whilst Article 88 of the Satversme establishes: “Auditors General shall be appointed to their office and confirmed pursuant to the same procedures as judges, but only for a fixed period of time, during which they may be removed from office only by a judgment of the Court. A specific law shall provide for the organization and responsibilities of the State Audit Office.”

11.1. It has been indicated in the Applicant that the duty of the legislator to regulate competence of the State Audit Office in a way that the State Audit Office would have access to any information regarding the use of State budget resources, including patient information, follows from the principle of separation of powers and the principle of mutual control of branches of powers included in Article 1 of the Satversme.

Article 87 of the Satversme shall be regarded as the constitutional basis for formation of the State Audit Office and it allocates to the State Audit Office the status of a constitutional institution and establishes independence and good fellowship of the institution as the elements characterizing its work. The constitutional status of the State Audit Office is closely related with the necessity to ensure effective fulfilment of its functions. Pursuant to the State Audit Office Law, its basic functions is performing of audits in all fields wherein State budget resources are used; however, fulfilment of such functions would not be possible if the State Audit Office would have limited possibilities to accede to information at the disposal of institutions to be audited.

It has been indicated in the application that jurisdiction of the State Audit Office is controlled by the second sentence of Article 88 of the Satversme, whilst the Contested Norm restrict application of the State Audit Office Law. Due to this reason the Contested Norm restricts jurisdiction of the State Audit Office following from the Satversme, as well as the possibilities to exercise the jurisdiction in an independent manner. However, the claim included in the application does not apply to the first sentence of Article 88 of the Satversme regulating procedures for appointing, confirmation and dissolving of auditors.

Consequently, in the case under consideration, compliance of the Contested Norm insofar as it does not establish the right of the Applicant to receive patient

information with Article 1 of the Satversme in conjunction with Article 87 and the first sentence of Article 88 of the Satversme.

11.2. Jurisdiction of the State Audit Office is established in the State Audit Office Law. The State Audit Office in performing financial and efficiency audits, as well as examining the conformity of transactions and activities with regulatory enactments and the planned results, shall control revenues and expenditures of the State budget and local government budget resources, utilization of the resources of the European Union and other international organizations or institutions, and actions with State and local government property or a part thereof. Control of use of resources of the European Union and other international organizations or institutions also falls within the jurisdiction of the State Audit Office. Consequently, the State Audit office is a constitutional institution that, when making audits, implement control function in respect to use of resources of the State, local governments, the European Union and other international organizations or institutions in the State (*see: Judgment of 25 November 2010 by the Constitutional Court in the case No. 2010-06-01, Para 14.2*).

The special role of the State Audit Office was already emphasized by the Constitutional Assembly (*see: Transcript of 20th meeting of IV session of the Latvian Constitutional Assembly of 9 November 1921*). Likewise, it is indicated in the legal doctrine that the State Audit Office fulfils control function that is indispensible for a law-governed and democratic state (*see: Dišlers, pp. 194*). The Administrative Case Department of the Senate of the Supreme Court of the Republic of Latvia has also recognized that the task of the State Audit Office is fulfilment of independent state audit (control) function, whilst its purpose is to establish whether disposition with State and local government property is lawful, correct, economic and effective. Results of such audits serve as the basis for recommending measures taken by the State Audit Office, whilst its conclusions and recommendations have authoritative force (*see: Judgment of 22 April 2009 by the Administrative Case Department of the Senate of the Supreme Court of the Republic of Latvia in the case No. 5-14/2-2009, Para 8 and 9*).

Although the State Audit Office is a constitutional institution, the aforesaid does not change what has been established in the second sentence of Article 88 of the Satversme, namely, that jurisdiction of the State Audit Office in exercise of the legislative function shall be established by the legislator.

11.3. Legislation means adoption off laws, i.e. the right to regulate a particular issue by means of a law (*see: Judgment of 16 December 2005 by the Constitutional Court in the case No. 2005-12-0103, Para 12*).

Observing the principle of separation of powers that follows from Article 1 of the Satversme, this is the legislator that determines jurisdiction of constitutional institutions insofar as it is not established in the Satversme. Issues regarding jurisdiction of constitutional institution can basically be regulated in two ways; namely, the legislator *expressis verbis* establishes, by a law, authority of a constitutional institution and the procedure for exercise thereof, or the legislator abstains from granting any authority to a constitutional institution. However, the principle of separation of powers cannot be understood in a way that subjective rights of constitutional institution to require granting of desired authority would be derived from it.

Although the freedom of action of the legislator also when deciding on the extent of authority to be granted to other constitutional institution, is not absolute, though based on legal and political considerations. Law and policy are closely related terms of the Satversme. In a law-governed state politics may not be free from law and the legislative power and the executive power are also connected with the provisions of the Satversme. In a law-governed state the main duty of the Satversme is to ensure that the state power authorised to democratically created institutions becomes mandatory only then, when a law expresses it (*see: Judgment of 16 December 2005 by the Constitutional Court in the case No. 2005-12-0103, Para 17*). However, political decisions, too, are restricted by the Satversme; therefore the limits of action of the legislator, when adopting decisions in the field of social rights, must comply with norms and principles of the Satversme (*see: Judgment of 1 December 2010 by the Constitutional Court in the case No. 2010-21-01, Para 13.2*). The legislator has the right to deliberately establish authority of constitutional institutions. Namely, the duty of the legislator is to grant authority necessary to constitutional institutions for implementing its functions and to fulfil its duty to protect, observe and ensure the fundamental rights of persons.

Consequently, the Constitutional Court has to establish whether the Contested Norm complies with what has been established in the Satversme in respect to the Status of the State Audit Office and the fundamental rights of persons.

12. The State Audit Office indices the following: if the right to obtain patient information is not included into its jurisdiction, then the ability of the State Audit Office to verify lawfulness and usefulness the use of State funding in the field of health care is limited.

However, the Saeima holds that the Contested Norm does not provide any restrictions to the State Audit Office by preventing the latter to perform financial, lawfulness and usefulness audits.

Pursuant to Section 48 of the State Audit Office Law, the State Audit Office shall determine the audited entity, and the time, type and task of audit. The Law grants the State Audit Office broad authority to determine a period of time, within which planned audit should be implemented, and the aim of such audit, as well as to establish requirements to institutions to be audited in respect to information required for implementation of the audit.

12.1. The Constitutional Court establishes the following: it follows neither from the application nor from the case materials that the Contested Norm would provide restriction of authority of the State Audit Office by thus preventing the above mentioned constitutional institution from executing financial, lawfulness and usefulness audits in the field of health care. Although the State Audit Office has not been included into the Contested Norm, it cannot be acknowledged that the field of health care falls outside the scope of competence of the State Audit Office. When auditing usefulness of procurements made and financial means used by medical treatment institutions in the fields that are not related with legal norms regulating patient data protection, the State Audit Office has the possibility to audit expenses from institutions' budgets.

In order to make sure that financial resources allocated to the field of health care are spent in a useful manner, the State Audit Office has the right to obtain information from medical treatment institutions insofar as it does not apply to patients. However, in order to verify effectiveness and usefulness of expenses, the State Audit Office has the right to receive data on services furnished by medical treatment institutions insofar as they do not contain information on services furnished to identifiable patients. Consequently, without obtaining information from patient health file and that on health care services received, the State Audit Office can obtain sufficient information on

lawfulness, effectiveness and usefulness of expenses by using State budget resources by health care institutions.

12.2. It can be concluded form the information provided to the Constitutional Court that the State Audit Office had launched lawfulness audit "Availability of Psychiatric In-Patient Treatment and Compliance of Ensuring thereof with Requirements of Normative Acts" ["*Psihiatriskās palīdzības stacionārās aprūpes pieejamība un tās nodrošināšanas atbilstība normatīvo aktu prasībām*"]. In order to execute the audit, the State Audit Office had to obtain information on a patient; therefore it asked the Heal of the medical treatment institution to issue a copy of the data base on patients registered in the in-patient and out-patient treatment department of the psychiatric medical treatment institution for the period from 1 January 2007 to 30 June 2008. The data base should contain the name and surname of patients, their personal numbers, code of their declared places of residence, date of hospitalization or date of using out-patient treatment services, date of discharge from in-patient treatment department, his or her diagnosis, number of in-patient or out-patient treatment card, title of in-patient or out-patient treatment department, wherein a particular patient has received health care services (*see: Case materials, Vol. 2, pp. 8 and 16*). The State Audit Office wanted to obtain the above mentioned information for more than ten thousand patients (*see: Case materials, Vol. 2, pp. 60*).

However, by referring to the fundamental rights established in Article 96 of the Satversme, as well as on the fact that the law does not grant the State Audit Office the authority to receive such information, the Head of the medical treatment institution refused providing the requested information to the State Audit Office (*see: Case Materials, Vol. 2, pp. 5 – 7*). Since the State Audit Office could not obtain patient data and reach the aim of the particular audit, the above mentioned audit was terminated.

Consequently, the Constitutional Court has to investigate whether the Contested Norm can be justified by the duty of the legislator to protect, observe and ensure the fundamental rights of persons.

13. Article 96 of the Satversme provides among the rest hat everyone has the right to inviolability of private life. When interpreting the right to private life established in Article 96 of the Satversme, the Constitutional Court has already indicated in its case-

law that these rights apply to different aspects. It protects the physical and moral integrity, honor and reputation, use of person's name and identity, personal data of a person. The right to private life means that the individual has the right to its private home, the right to live as he likes, in accordance with his nature and wish to develop and improve the personality, tolerating minimum interference of the state or other persons (*see: Judgment of 26 January 2005 by the Constitutional Court in the case No. 2004-17-01, Para 10*).

Consequently, Article 96 of the Satversme includes the right to protection of personal data.

The Republic of Latvia has also undertaken international liabilities, the aim of which is protection of private life of persons, including that of their personal data. The first part of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) provides that everyone has the right to respect for his private and family life, his home and his correspondence. The second part of the same article provides, however, that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

When interpreting Article 8 of the Convention, the ECHR has established that the term "private life" has a broad meaning, and it cannot be exhaustively defined. The term includes many aspects of physical and social identity of a person. Information on a person, including information regarding his or her health, no doubt falls within the scope of the above mentioned Article. Protection of personal data plays a decisive role for the person to be able to exercise the rights established in Article 8 of the Convention (*see, e.g.: Judgment of 25 February 1997 by the ECHR in the case „Z. v. Finland", application No. 22009/93, Para 95 and 96, Judgment of 27 August 1997 in the case „M.S. v. Sweden", application No. 20837/92, Para 41, and Judgment of 4 December 2008 by the Grand Chamber in the case „S. and Marper v. the United Kingdom", application No 30562/04 and Nr. 30566/04, Para 66 and 103*).

The duty to protect personal data has also been established, for instance, in the Council Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data ratified by Latvia on 30 May 2001. The purpose of this convention is to secure in the territory of each Party for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him.

Also in the frameworks of the European Union, the Member States have the duty to ensure personal data protection. Such duty of the Member States has been established in the Directive 95/46/EC, as well as in the Article 8 of the EU Charter on Fundamental Rights.

Article 8 of the Directive 95/46/EC regulates processing of special category data. Such special category data are data revealing health or sex life of persons. The Directive prohibits the Member States to process the above mentioned data unless permitted by the Directive.

As an authoritative source regarding the issue on the fundamental principles of use and protection of person data, the United Nations guidelines co concerning Computerized personal data files and the Council of Europe, Committee of Ministers, Recommendation Rec(1997)5 of the Committee of Ministers to member states on the protection of medical data are to be mentioned [*see: United Nations guidelines concerning Computerized personal data files, adopted by the General Assembly Resolution No. 45/95 on 14 December 1990; Council of Europe, Committee of Ministers, Recommendation Rec(1997)5 of the Committee of Ministers to member states on the protection of medical data]*.

At the national level, regulatory framework on data protection is concretized by the Personal Data Protection Right. Section 2 (8) of the Law defines sensitive personal data and establishes that, among the rest, these are personal data which provide information as to the health of a person. The above mentioned enumeration *grosso modo* complies with the special category data regulated in Article 8 of the Directive 95/46/EC. Section 11 of the Personal Data Protection Law introduces a fundamental principle that processing of sensitive personal data is prohibited unless any of the stipulated cases when data processing is indispensible occur. It can be concluded from Section 2 (5) of the Law

that data processing means any operations carried out regarding personal data, including data transfer.

Consequently, legal acts provide special preconditions for processing of sensitive personal data, and the Constitutional Court shall identify the fundamental principles that are the most directly applicable to the case under review.

14. First, these are the general personal data protection principles that follow from international documents for the protection of human rights referred to in Para 13 of the Judgment, these principles being lawfulness, justice, minimality, and anonymity. In the context of the above mentioned principles, the legislator has a constitutional duty to adopt such legal acts that would guarantee data security, as well as establish proportional restrictions to the use thereof.

Lawfulness includes a precondition that the use and transfer of personal data for purposes other than those initially established when acquiring data can take place only based on consent of a person or a law. For patient information used for his or her treatment to be obtained and transferred to a data recipient, a clear and transparent procedure established by law is needed.

The principle of justice requires that obtaining and processing of information would take place in a way that would exclude any non-proportional intervention with privacy, autonomy and integrity of data subjects. This means that patient information shall be transferred to a data recipient only at a minimum extent and based on an established and justified purpose of information processing. Consequently, it is necessary to provide a well-justified substantiation by the institution willing to obtain patient information for purposes other than those initially established.

The principle of minimality provides that personal data treatment is prohibited unless it is necessary to reach material and established aims of data processing. Namely, taking into account the role of proper data storage, use of data is permitted only for fulfilment of especially important tasks in order to protect certain important legal interests.

The principle of anonymity, however, provides that, when processing or transferring patient information for purposes that are not related with medical treatment, the information should be kept anonymous as far as possible to exclude the possibility to

identify data subjects. Anonymity of information means that it is impossible to relate certain information to any particular data subject. For instance, it has been indicated in the opinion of the Ombudsman that, in case of patient data transfer, a special access in the aspect of information anonymity would be necessary in respect to issues dealing with treatment of addictions (*see: Case materials, Vol. 2, pp. 76*).

In the field of personal data protection, the principle of participation and that of transparency is of great importance, them requiring for a person to be informed on the purposes, for which his or her data are collected or transferred, and to be able to control the processes. Even if case if data are obtained and processed based on a law, the person must be informed on such possibility insofar as the law provides otherwise.

Personal data protection principles are based on the necessity to procure that information provided for medical treatment purposes is primarily used only for purposes related with health care. Neither legal regulatory framework, nor the practice of application of legal norms in medical treatment institution cannot cause a person fear for security of information at the disposal of such institutions.. It is crucial not only to respect the privacy of a patient but also to preserve his or her confidence in the medical profession and in the health service in general (*see: Judgment of 2 November 2010 by the ECHR in the case „Gillberg v. Sweden", application No. 41723/06, Para 96*).

Taking into account the nature of such information, actions appropriate for the fundamental rights are of great importance for persons not to lose their trust into medical treatment institutions, to be able to address the institutions and take care of their health that possesses not only of personal but also of social value (*see: Judgment of 26 January 2005 by the Constitutional Court in the case No. 2004-17-01, Para 14.1*).

Consequently, the Constitutional Court has to investigate whether the Contested Norm can be substantiated by the principles of personal data protection.

15. The Constitutional Court admits that, when the draft Law on the Rights of Patients was elaborated, namely, since 2005 the issue regarding transfer of patient data to public administration institutions has been discussed in details. Section 12 of the draft law, later Section 10 of thereof included the fundamental principles that have remained unchanged during elaboration of the draft law. Namely, patient information is provided to a particular institution and only for the particular purposes established by law. Procedure

based on the above mentioned principles has also been enshrined in Section 50 of the Medical Treatment Law effective before 1 March 2010.

After having got acquainted with documents related with the draft Law on the Rights of Patients contained in the court file, it is possible to conclude that the legislator has not included the State Audit Office into the Contested Norm because it legislated in favour of protection of the fundamental rights of persons. Namely, the Saeima discussed the suggestion of the State Audit Office regarding addendum to the Contested Norm; however, priority was granted to the regulatory framework protecting the fundamental rights of persons.

The Saeima Committee of Social and Labour Affairs has organized several discussions to evaluate suggestion of the State Audit Office regarding introducing addendum to Section 10 of the draft Law on the Rights of Patients. However, these discussions resulted in favour of the opinion expressed by the Ombudsman and the Ministry of Health, namely, that inclusion of the State Audit Office into the above mentioned list would not be proportional and would breach requirements of Article 96 of the Satversme. In the discussions, it was emphasized that it is possible to reach the aim of the State Audit Office without obtaining information permitting identifying patients (*see: Case materials, Vol. 1, pp. 119 – 120, 167 – 171, and Vol. 2, pp. 50*).

Consequently, the legislator has considered the possibility to supplement the Contested Norm and concluded that, in this case, protection of personal data is a greater constitutional value if compared to the will of the State Audit Office to obtain access to patient information.

16. The State Audit Office indicates that in case if they would have the right to obtain patient information, data processing performed by it would comply with all requirements of law, particularly, with those of the Personal Data Protection Law.

Section 49 of the State Audit Office Law provides that the State Audit Office shall have the right to obtain all necessary information for implementation of its functions. In the present case, this section must be considered in conjunction with Article 96 of the Satversme and norms of the Law on the Rights of Patients providing legal regulatory framework for cases related with the need to protect patient information. For a person or institution having patient information at its disposal to be able to transfer

personal data to a data recipient that is not directly related with health care field, the necessity of such information must be well-substantiated. Taking into account the fact that the fundamental rights are restricted when transferring the information, the amount of transferable information cannot exceed the purposes for the processing of such information. In any case, patient information *en masse* cannot be transferred to a data recipient that is not directly related with the field of medical treatment only based on suspicion and an assumption on a possible breach of legal norms, in respect to which it is *a priori* assumed that the offender is and could not be the data subject. For instance, according to the information furnished by the Applicant, during performance of the audit "Availability of Psychiatric In-Patient Treatment and Compliance of Ensuring thereof with Requirements of Normative Acts", information was requested on more than ten thousand patients. However, it can be concluded from the application that the number of breaches established in other audits if compared with the above mentioned case is proportionally low. If the number of breaches of legal norms compared to the amount of patient information processed is comparatively low, then the infringement of the fundamental rights of such data procession is non-proportional.

Consequently, the effective regulatory framework prohibiting the State Audit Office obtaining information on patients is justifiable pursuant to the duties established to the legislator in Article 96 of the Satversme.

17. It has been indicated in the application that the right to accede to patient information have been granted to several public supreme audit institutions. However, in its reply, the Saeima has mentioned countries where such supreme audit institutions are not granted the particular right. For instance, *Bundesrechnungshof*, the supreme audit institution of the German Federative Republic have not been granted such authority. However, in Hungary, mentioned as an example in the application, it is indicated in the 2008 report of the Data Protection Ombudsman that request of the Audit Chamber to transfer patient data of great amount or individually would be at variance with requirements of such data protection if there is no stipulated grounds for such request (*see: http://abiweb.obh.hu/abi/index.php?menu=beszamolok/2008&dok=beszamolok/2008, consulted on 28 February 2011).*

The Constitutional Court has reiterated that, when dealing with certain issues in the Latvian legal system, legal regulatory frameworks of other states cannot be directly

applied except for cases established by law. In the analysis of comparative rights, it is also necessary to take into account the different legal, social, political, historical and systematic context (*see, e.g.: Judgment of 8 June 2007 by the Constitutional Court in the case No. 2007-01-01, Para 24.1, and Judgment of 3 June 2009 in the case No. 2008-43-0106, Para 10.6*). Also in legal literature on personal data protection it is recognized that comparative analysis in this field plays a minor role, and it is easy to perform. Protection system of each state is closely related not only with formal norms, but also a range of informal national traditions and opinions that might be misunderstood (*see: Bygrave Lee A. Data protection law: Approaching its rationale, logic and limits. Hague: Kluwer Law International, 2002, p. 11).*

Application of comparative method cannot be completely excluded; however, even similar legal norms or legal institutions in different states may have different content. Taking into account peculiarities of constitutional system of each state, such differences can be established in respect to authority of different public institutions even if they implement *prima facie* similar functions. Legal norms establishing jurisdiction, authority and procedures for decision-making of constitutional institutions are the most difficult to be incorporated into legal systems of other states [*see: Kahn-Freund. On Uses and Misuses of Comparative Law // The Modern Law Review, Vol. 37, No. 1 (Jan., 1974), p. 17]*.

Although, in legal systems of several states, their supreme audit institutions are granted the right to access to patient information, this right as such cannot be considered separately from, for instance, the nature of information to be obtained or preconditions for exercise of it. Namely, states may have anonymous data registers or supreme audit institutions may have been granted the right to receive patient information only in individual cases, rather than to obtain the above mentioned information *en masse.* Consequently, the right of supreme audit institutions of certain other states to accede to patient information cannot serve as grounds for granting such right to the State Audit Office in the frameworks of the Latvian legal system if the legislator has already stipulated the contrary.

Consequently, the Contested Norm does not breach Article 1, Article 87 and Article 88 of the Satversme.

18. The Constitutional Court also indicates that the aforementioned does not restrict the right of the legislator to decide on introducing amendments to the Law on the

Rights of Patients or to adopt other legal acts with the purpose to grant the State Audit Office the right to request patient information. However, legal acts establishing personal data protection guarantees must comply with the principles governing in the field of data protection. They shall provide clear purposes, for which patient information is provided, and determine the most precise purpose of treatment of such information, as well as the extent and kind of information to be furnished.

The legislator also has the freedom of action to adopt such regulatory framework that would establish the right of the State Audit Office to receive patient information necessary for execution of audits by mediation of other public administration institutions, as well as to introduce such amendments to legal acts that would improve collaboration possibilities between the State Audit Office and other institutions.

The Constitutional Court

Based on Article 30 – 32 of the Constitutional Court Law,

h o l d s:

Section 10 (5) (6) of the Law on the Rights of Patients does comply with Article 1, Article 87 and Article 88 of the Satversme of the Republic of Latvia.

The Judgment is final and not subject to appeal.

The Judgment shall come into force as on the date of publishing it.

Presiding Judge G. Kūtris

Translated by E. Labanovska, translator of the Constitutional Court