THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

JUDGMENT

in the name of the Republic of Latvia

Riga, March 11, 1998

on case No. 04 - 05 (97)

The Constitutional Court of the Republic of Latvia in the body of the Chairman of the session Aivars Endziņš, the justices Ilma Čepāne and Anita Ušacka and the secretary of the Court session Inese Rimdžus

in the presence of the representative of the party that has submitted the application, the Council of the State Control, I. Kalniņa

and the sworn advocate J. Rozenfelds, who represented the Ministry of Economics - the institution that had issued the normative act which is disputed

under Article 85 set by the Satversme (Constitution) of the Republic of Latvia as well as Article 16, paragraph 4 and the second part (paragraph 7) of Article 17 of the Constitutional Court law

in a public hearing on February 25, 1998 reviewed the case

" On Conformity of the Joint Interpretation by the Ministry of Finance (No.047/475 Certified on April 30,1993) and by the Ministry of Economic Reforms (No.34-1.1.-187, Certified on May 4,1993) " On Revaluation of Fixed Assets by Enterprise and Entrepreneur Company Accountancy"" and Interpretation by the Ministry of Economy No. 3-31.1-231 of December 28, 1993 "On the Procedure of Application of the Joint Interpretation by the Ministry of Finance and the Ministry of Economic Reforms "On Revaluation of Fixed Assets

by Enterprise and Entrepreneur Company Accountancy"" with the law " On the Procedure of Privatisation of Objects (Enterprises) of the State and Municipal Property " as well as other laws.

The Constitutional Court established:

The submitter of the application questions conformity of the part of the Joint Interpretation by the Ministry of Finance (No.047/475, certified on April 30, 1993) and by the Ministry of Economic Reforms (No.34-1.1.-187, certified on May 4, 1993) " On Revaluation of Fixed Assets by Enterprise and Entrepreneur Company Accountancy" (hereinafter referred to as the Joint Interpretation) referring to transfer of investments into buy-out payment during privatisation process as well as conformity of the Interpretation by the Ministry of Economy No. 3-31.1-231 of December 28, 1993 "On the Procedure of Application of the Joint Interpretation by the Ministry of Finance and the Ministry of Economic Reforms "On Revaluation of Fixed Assets by Enterprise and Entrepreneur Company Accountancy"" with:

1.) Article 9 of the law "On the Procedure of Privatisation of Objects (Enterprises) of the State and Municipal Property",
2.) Article 6 of the law "On Privatisation of the Objects of the State and Municipal Property",
3.) Articles 8 and 20 of the law " On Lease and Lease Buy-out Payment of the State and Municipal Enterprises".

The submitter of the application points out that the above laws determine that during the process of privatisation lats and privatisation vouchers shall be used for payment , but no method of privatisation has envisaged to make use of investments with an aim to reduce the buy-out payment of the object. And just such a procedure, that is not in compliance with the above laws, is established by the Joint Interpretation. It states, that the difference between the preceding value of the fixed assets and the value, established by the Privatisation Commission can be drawn up as a loan without interest, and, if the privatisation project of an object (an enterprise), the purchase and sale agreement or the agreement on lease buy-out of an object envisages investment, that covers the above difference and if all the conditions have been observed on the term the lease buy-out envisages or - in case of purchase and sale agreement- in a year after the agreement has become effective, the institution ,which has signed the agreements, adopts a decision to write the difference off. The Interpretation has established a completely new dealing with state property during the process of privatisation- concluding a loan agreement without interest and reduction of the purchase price because of investments or preservation of posts.

On the basis of the Joint Interpretation, the Ministry of Economy passed another Interpretation on December 28, 1993, establishing that the loan without interest is to be considered a side agreement or a special item is to be included in the certified privatisation agreement. The amount of the loan is to be established as the difference between the value of the fixed assets before revaluation and the price fixed by the Privatisation Commission. The above document envisages that the leaseholder does not have to settle the buy-out payment in the amount of the granted loan. The Council of the State Control is of the opinion that the above Regulations to the ministries include unregulated by law provisions and the issue shall be settled by Amendments to the law.

At the Court session, the representative of the party, that had submitted the application, additionally pointed out that in compliance with the Decision of the Supreme Council of March 3, 1992 " On the Concept and Preparation Programme on Privatisation of State and Municipal Property" programmes, elaborated by the government had to be further developed, regulating the basic issues by laws or normative acts, passed by the government. However, as the result of unlawful activities of ministry officials, when transferring investments into buy-out payment of enterprises to be privatised without authorisation by the legislator, the state financial assets were in fact granted.

The Ministry of Finance in its written reply explains, that it had prepared the part of the Joint Interpretation, that was in compliance with the title of the document and that the State Control was not questioning it. As the Interpretation had to be approved by the Ministry of Economic Reforms, just the above part was submitted to the Ministry. In order not to delay specification of certain parts of fixed assets to be re-valued, the Ministry of Finance agreed to supplements on certain issues that, in compliance with Items 3.5 and 3.6 of the Regulations No. 100 "On Regulations of the Ministry of Economic Reforms", passed by the Cabinet of Ministers on February 26, 1993, were in the competency of the Ministry of Economic Reforms.

The Ministry of Economy, in its written reply to the Constitutional Court points out, that the Government policy of those years, that has been expressed in the programme of immediate activities for stabilisation of national economy " On State Property and the Basic Principles of its Conversion", accepted by the Council of Ministers on March 12, 1992 (Protocol No.11, paragraph 3), was directed to maximum support of entrepreneurial activity, when rendering investments, subsidising and crediting on favourable terms.

The Ministry of Economy, in its turn, explains that on March 8,1993 at the session of the Council of Ministers, issues on acceleration of the privatisation process were conceptually reviewed. Ministries were charged with the task of preparing and submitting respective proposals. The Joint Interpretation was passed, to observe the obligation, expressed in Item 2, paragraph 1 of the Protocol and thus, no Amendments were made to Regulations No. 67 of the Council of Ministers of February 10, 1993 ”On Re-valuation of Fixed Assets”.

Besides the Ministry of Economy points out, that Regulations by the Ministry of Finance, certified by the Decision of the Council of Ministers No. 369 of December 20, 1991 and Regulations by the Ministry of Economic Reforms, certified by the Decision of the Council of Ministers No. 100 of February 26, 1993 envisage that ministries shall have the right to pass legal acts, binding for state and municipality institutions, as well as enterprises and entrepreneur companies.

The Ministry of Economics stresses, that investments and loans without interest, mentioned in the Joint Interpretation, are issues on the price of the enterprise to be privatised, but not issues on the payment procedure and negotiable instruments, subject to Article 9 of the law ”On the Procedure of Privatisation of Objects (Enterprises) of the State and Municipality Property”.

The Ministry of Economy explains that the Interpretation of December 28, 1993 was passed to establish a more precise mechanism for implementation of the Joint Interpretation. The Ministry of Economics stresses, that ”regardless of the fact whether the purchase price is paid at once or gradually, the deferred payment does not influence the negotiable instruments or the privatisation method, as was groundlessly pointed out by the party, submitting the application.”

Besides, the Ministry of Economy points out, that Article 20, part 8 of the law ” On Lease and Lease Buy-out of the State and Municipal Enterprises” establishes, the that the lease-holder has the right of receiving lease charge and buy-out charge of the first year as a credit for entrepreneurship development. As the legal norm did not establish the procedure and mechanism of crediting, the Joint Interpretation and Interpretation of December 28, 1993 defined it more exactly.

At the Court session, the representative of the Ministry of Economy denied that by passing the Joint Interpretation and the Interpretation of December 28 any existing laws on privatisation had been violated. He explained that it was unacceptable to consider, that when carrying out activities not envisaged by law ,one violates the law.

The representative of the Ministry of Economy also pointed out, that applicant's reference to discrepancy of the Joint Interpretation and Interpretation of 28 December, 1993 to the law "On Privatisation of Objects (Enterprises) of the State and Municipal Property" was unfounded as the above law was passed by the Saeima only on February 17, 1994. The representative of the Ministry of Economy argued, that interpretation of any law or normative act referred only to the normative acts, effective at the moment of proclamation of the interpretation. One is able to decide on compliance of the interpretation with the laws only when taking into consideration the laws that have been effective at the time of proclamation of the interpretation.

The Constitutional Court, evaluating compliance of the Joint Interpretation and the Interpretation of December 28, 1993 with Article 9 of the law "On the Procedure of Privatisation of Objects (Enterprises) of the State and Municipal Property" and Article 6 of the law "On Privatisation of Objects of State and Municipal Property" as well as with Articles 8 and 20 of the law " On Lease and Lease Buy-out of the State and Municipal Property"

acknowledging that the claim of the applicant is well-grounded came to the conclusion:

1. In compliance with the Regulations of the Ministry of Finance, certified by the Decision of the Council of Ministers No. 369 (Item 7.5.1.), the Ministry of Finance experiences the right to elaborate and - after co-ordination with the Methodical Commission of Accountancy - to adopt binding for all enterprises, entrepreneur companies, establishments and organisations regulations, instructions, recommendations, regarding the procedure of settling accountancy issues as well as confirm the necessary interpretations on application of the above Regulations. In compliance with Item 11.2 , the Minister of Finance under terms of reference and observing effective laws and other normative acts, has the right of passing orders, instructions and guidelines, obligatory to all ministries, unions, establishments, enterprises and organisations, regardless of their subordination as well as to the citizens. In case of necessity, the Ministry of Finance together with other ministries of the Republic of Latvia has the right of passing joint normative acts.

Thus, on the basis of Protocol No.12 of the session of the Council of Ministers (of March 8, 1993) and in compliance with Resolution No.67(by the Council of Ministers of February 10,1993), the Ministry of Finance had the right to pass the part of the Joint Interpretation, that corresponded

to its title and regulated issues on revaluation of fixed assets by accountants of enterprises and entrepreneur companies.

2. The Minister of Economic Reforms, on the basis of Item 7.4 of the Regulations of the Ministry of Economic Reforms, certified by the Council of Ministers on February 26, 1993 and taking into account the effective laws and other normative acts of the Republic of Latvia , had the right to issue orders, obligatory to all ministries and other state and municipal institutions, enterprises (entrepreneur companies) and organisations, but only as far as it had been authorised to do so.

At its session of March 8, 1993, the Council of Ministers

commissioned the Minister of Economic Reforms "… together with the respective ministries to work out proposals on speeding up the process of privatisation of state enterprises , to consider possibilities of selling or privatising state enterprises without announcing competition, if economically profitable

offers were submitted (Protocol of the session No. 12, item 1), and " together with the concerned ministries, taking into consideration the exchange of opinions, to work out and submit to Government proposals on Amendments to the Resolutions No. 67 by the Council of Ministers of February 10, 1993 " On Revaluation of Fixed Assets"; envisaging not to apply the ratio of revaluation of fixed assets to enterprises that are to be privatised or sold " (Protocol of the session No.12, paragraph 1, item 2). However, no Amendments to Regulations 67 by the Council of Ministers of February 10 "On Revaluation of Fixed Assets" were introduced. Instead , the Joint Interpretation was passed , thus violating the authorisation limited by the Council of Ministers at a session.

3. The Ministry of Economy on the basis of the Joint Interpretation passed its Interpretation on December 28, 1993.

In compliance with Article 15 of the law of July 15, 1993 "On Restoration of the Law of April 1, 1925 " Structure of the Cabinet of Ministers"", that was effective at the time of passing the Interpretation of December 28, 1993, State Privatisation Minister of the Ministry of Economy had no right to pass a generally binding (external) normative act. Besides, Interpretation of December 28, 1993, was not published, and that - publication - is one of the compulsory demands of a generally binding (external) normative act becoming effective.

4. The Constitutional Court, while analysing the laws:" On the Procedure of Privatisation of Objects (Enterprises) of the State and Municipal Property", "On Lease and Lease Buy-out of the State and Municipal Enterprises", " On Privatisation of State and Municipal Property", as well as the law "On the Procedure of Valuation of Objects (Enterprises) of the State and Municipal Property and Possessions to be

Privatised" has come to the conclusion, that the contents and notion of the above laws shall be read together with Article 64 of the Satversme.

Evaluating the rights of the ministries to pass debatable normative acts, as well as their contents, the Constitutional Court is of the opinion, that the principle of separation of power, that in itself includes separation of competency between the legislative power and the executive power, shall be taken into consideration.

In a democratic country, the legislative power belongs to the people and the legislator. The other state institutions have the right to pass generally binding (external) legally based normative acts only in case, if the above right has been delegated by the law. Consequently, the principle of legality of management envisages that the government institution shall carry out its activities, taking into consideration the existing laws.

Article 1 of the Satversme, establishing that Latvia is an independent democratic Republic, was effective at the time when the Joint Interpretation was passed. On July 6, 1993. the complete Satversme became effective. In compliance with Article 64 of the Satversme, legislative rights in the Republic of Latvia belong to the Saeima, as well as to the people in accordance with the procedure envisaged by the Satversme .

To come to the conclusion in whose competence it is to regulate the process of privatisation, when creating a new economic system in the Republic of Latvia, it shall be remembered that the issue is of utmost importance and therefore it is necessary to settle it with the help of legislation. The Constitutional Court is of the opinion that the above issue is in the competency of the legislator.

The will of the legislator was expressed in the Resolution of the Supreme Council of March 3, 1992 " On the Concept and Preparation Programme of Privatisation of State and Municipal Property". The Council of Ministers had an obligation to elaborate draft laws on issues of privatisation and submit them to the legislator (Item 6). Item 8 of the Resolution establishes that the programme of privatisation of state and municipal property shall be further developed and specified by every law (provided for by Item 6) and prospective normative acts of the Council of Ministers of the Republic of Latvia on issues of privatisation.

In compliance with the above Resolution of the Supreme Council, the process of privatisation was subject to the passed laws, among them the law of June 16, 1992 " On the Procedure of Privatisation of State and

Municipality Objects (Enterprises) and the law of February 23, 1993 ” On Lease and Lease Buy-out of State and Municipal Enterprises”.

Neither Article 9 of the law ”On the Procedure of Privatisation of State and Municipal Objects (Enterprises)”, nor Articles 8 and 20 of the law ”On Lease and Lease Buy-out of State and Municipal Enterprises” - or any other Articles of the above laws - envisage application of investments during the process of privatisation with an aim of reducing buy-out payment of the object as it has been established by the Joint Interpretation and the Interpretation of December 28, 1993. No Article of the law of June 10, 1992 ”On the Procedure of Valuation of Objects (Enterprises) of the State and Municipal Property and Possessions to be Privatised” envisages a possibility like the above.

Legislative practice of that time proves, that the issue is in the competence of the legislator. If the legislator had wanted the government or any ministry to regulate the issue of including investments into the buy-out payment of objects to be privatised with an aim of reducing the price of the object, it would have been established by Resolutions on laws becoming effective either during the rule of the Supreme Council or by the Transition Regulations, adopted by the Saeima.

On February 17, 1994, already after promulgation of the disputable normative acts, a new law ” On Privatisation of Objects of State and Municipal Property” was passed , replacing the law ”On the Procedure of Privatisation of Objects (Enterprises) of State and Municipal Property ”. While evaluating compliance of the Joint Interpretation and the Interpretation of December 28, 1993 with that law, one should take into consideration the principle of the unity of the legal system of Latvia and the principle of the government performance and succession of rights, resulting from the Declaration of May 4,1990 ” On the Renewal of the Independence of the Republic of Latvia”, the Constitutional law of August 21,1991 ”On the Republic of Latvia Status as a State”, Resolution by the Supreme Council of August 29,1991 ”On Application of Legislative Acts of the Latvian SSR in the Territory of the Republic of Latvia”, as well as the hierarchy of legal norms, that is an important feature of the legal system of a democratic and law-based state. Therefore the Constitutional Court is of the opinion, that the request of the party, that has submitted the application, to decide if the Joint Interpretation and the Interpretation of December 28, 1993 is in conformity with the law of February 17, 1994 ” On Privatisation of Objects of State and Municipal Property” is well-grounded.

During the process of elaboration and adoption of the law ”On Privatisation of Objects of State and Municipal Property” the Cabinet of

Ministers had the possibility of submitting proposals to include investments into the buy-out payment of objects to be privatised (granting loans without interest, write offs), envisaged in the Joint Interpretation and the Interpretation of December 28, 1993. However, it was not established by the above law.

Taking into consideration the above, the Constitutional Court is of the opinion, that the Ministry of Economic Reforms ,when passing the part of the Joint Interpretation , referring to inclusion of investments into buy-out payment of the object of privatisation and the Ministry of Economy, when passing the Interpretation of December 28, 1993 groundlessly interfered in the sector of legislation. Therefore the above normative acts are *ultra vires* and unlawful.

5. While discussing about the date from which the debated normative acts could be declared null and void, the Constitutional Court considered the following principles: the principle of justice, the principle of legality, the principle of separation of power and the principle - trust in law. When comparing significance of the above principles, of really essential importance are the following elements of trust in law : influence of retrospective force of the verdict on public and private interests; longevity of legal relations, established on the basis of the Joint Interpretation; possible changes in the legal status of the subjects to be privatised who trusted in legality of the Joint Interpretation and the Interpretation of December 28, 1993 and others.

On the basis of Articles 30. -32. of the Constitutional Court Law

the Constitutional Court

decided:

to declare part of the Joint Interpretation ” On Revaluation of Fixed Assets by Enterprise and Entrepreneur Company Accountancy”, certified by the Ministry of Finance on April 30, 1993 (No. 047/475 and by Ministry of Economic Reforms on May 4, 1993 (No.34-1.1-187) referring to inclusion of investments into the buy-out payment during the process of privatisation as well as Interpretation by the Ministry of Economy No.3-31.1-231 of December 28, 1993 ”On the Procedure of Application of the Joint Interpretation by the Ministry of Finance and the Ministry of Economic Reforms ” On Revaluation of Fixed Assets by Enterprise and Entrepreneur Company Accountancy”” as not being in compliance with

Article 64 of the Satversme and null and void from the moment of the announcement of the Judgment.

The Judgment becomes effective from the moment of its announcement. The Judgment is final and allowing of no appeal.

The Judgment was announced in Riga, on March 11, 1998.

The Chairman of the Court session A.Endziņš

Justice of the Constitutional Court A. Ušacka

Justice of the Constitutional Court I. Čepāne