Decision No. 721 on June 30th 2010

I herewith refuse to proclaim the Establishment of Price Restrictions on Monopolies Act adopted by the Riigikogu on 17 June.

I find that the amendments to the Public Water Supply and Sewerage Act planned by the said Act are in conflict with §§ 10, 11, 13 and subsection 32 (2) of the Constitution of the Republic of Estonia (hereinafter the Constitution) and that the planned subsection 141 (5) of the District Heating Act is in conflict with subsection 3 (1), §§ 31 and 32 and subsection 94 (2) of the Constitution.

Since the legislature has aimed at achieving the implementation of public water supply and sewerage subscription fees and water supply service prices based on new principles, depending on the region, only as of May or November 2011, it is possible to establish the Establishment of Price Restrictions on Monopolies Act in the constitutional form without giving up the aim.

I. Unconstitutionality of the amendments planned in the Public Water Supply and Sewerage Act

1. The legislature replaces the procedure regulating the price of the water supply and sewerage service (hereinafter water service) and the public water supply and sewerage subscription fees (hereinafter the subscription fees) with an entirely new procedure that is to enter into force as of

15 July 2010. Upon entry into force of the Act, the rules of calculation of the water service prices and subscription fees set by local authorities become invalid as of 15 July 2010, because the Act annuls the respective provisions delegating authority.

2. As of 15 July 2010 the right to establish the water service price and subscription fee calculation methodology will transfer to the water company and is no longer within the competence of local authorities. Considering subsection 6 (1) of the Local Self-Government Organisation Act a competence provision, the referred regulations of local authorities cannot be left in force on other grounds. It is not a matter of the autonomy of local self-government. Local authorities cannot leave the current water service prices in force until the implementation of the new regulation on the basis of subsection 17 (4) of the Competition Act either. On the basis of subsection 17 (4) of the Competition Act, if the procedure for price regulation applicable to undertakings with special or exclusive rights or in control of essential facilities which provide services within the territory of a local government has not been established by an Act or legislation established on the basis thereof or if the procedure does not extend to such undertakings, the local authority may establish the corresponding procedure by a regulation. Since the new procedure has been established as of 15 July 2010, albeit its actual implementation having been planned for a later time, this ground is not usable for temporary regulation of prices.

3. The duty of water undertakings to coordinate the methodology of calculation of the subscription fee and the prices of the water service with the Estonian Competition Authority in advance (by way of an exception the price of the water service and the methodology of calculation of subscription fees must be coordinated with the local authority; hereinafter these cases have not been pointed out for the purposes of making it easier to follow the text of the decision) will, according to the Act, enter into force only in 2011. The legislature presumes that in reality the subscription fees and water service prices based on the new principles will enter into force as of 1 May 2011 in the case of large water undertakings (the area of activity is located in a waste water collection area whose pollution load is over 10,000 human equivalents) and as of 1 November 2011 in the case of small water undertakings (the area of activity is located in a waste water collection area whose pollution load is below 10,000 human equivalents). What water service prices and subscription fees are in force in the meantime has not been regulated by the Act.

4. According to the records of the sitting of the plenary assembly of the Riigikogu on 17 June 2010, the authors of the draft act proceeded from the fact that the present approved prices remain in force. However, water undertakings have not been obligated by law to continue providing the water service at the price established by the local authority by the time of entry into force of the Act.

5. Since one important condition of contracts of use of the water service, i.e. the price, has so far been set by the local authority, reference is made in the water service sales contract to the respective regulation or legislation without specifying the price. For instance, the following wording is used in such contracts: “the client undertakes to pay for the service consumed pursuant to the prices established by legislation”, as well as “the client is subject to the price established by the legislation of the local authority.” As of the entry into force of the Act the legislation that established the price will no longer be valid. If it has been agreed that in the case of a conflict between a provision of the water service sales contract and legislation the legislation is to be followed, there are no obstacles to the establishment of new prices by water undertakings and issue of invoices on the basis thereof without amendment of the contract made with the consumer.

6. According to subsection 141 (1) of the Public Water Supply and Sewerage Act, the water undertaking establishes the price of the water service and discloses it at least 30 days before it enters into force. Until the dates specified in the Act the water undertaking is not subjected to the preliminary supervision by the Competition Authority. Thus, it cannot be precluded that higher prices and fees will be established before the actual implementation of the new procedure for establishment of price restrictions.

7. The consumer’s situation is not improved by the possibility of the Competition Authority to make a precept to the Competition Authority under the overall public supervision procedure set out in the Competition Act. A precept to adjust the price made after establishment of a higher water service price or public water supply or sewerage subscription fee does not allow for effective protection of the consumer against the monopoly, because the supervision procedure is likely to last longer than the unregulated prices.

8. Establishment of a temporary water service price by the Competition Board on the basis of the planned subsection 16 (9) of the Public Water Supply and Sewerage Act is not a solution that can be used to solve the aforementioned problems. The practical applicability of the provision is doubtful, because temporary establishment of a price is permitted only after a precept of the Competition Authority has not been followed and the terms for challenging the precept have expired. According to provision of law, a precept can be challenged by declaring an appeal unlawful and in such an event the term for challenging the precept is three years pursuant to subsection 9 (5) of the Code of Administrative Court Procedure. Thus, it would not be possible to establish a temporary price in three years after the failure to follow the precept of the Competition Authority.

9. If the aim of the legislature had been not to regulate the water monopolies in the period between the entry into force of the Act and the entry into force of the obligation to approve new prices (on the basis of the rules of the Competition Act it is not possible to protect consumers against monopolies in a timely manner and effectively; it is also the reason for establishment of the special rules of the Public Water Supply and Sewerage Act), the time given to the consumer for adapting to the new situation would have been too short. The failure to regulate the exact procedure for the transition to new water service prices by law harms the consumers' expectation that the price restrictions of water monopolies remain in place and is thus in conflict with §§ 10 and 13 of the Constitution. The Supreme Court has noted that according to subsection 13 (1) of the Constitution everyone is entitled to protection by the state and law, which means that the state's duty is to ensure using, above all, competition rules that the required goods and services are available to most people at affordable prices. In such areas as communications, public transport, education or banking as well as power, heat and water supply, which are essential for people, the freedom of contract of undertakings providing public services must inevitably be limited both with regard to entry into contracts as well as terms and conditions of contracts (Civil Chamber of the Supreme Court, 4 March 2010, judgment 3-2-1-164-09).

10. Uncertainty is also caused by the planned subsections 16 (8) and (11) of the Public Water Supply and Sewerage Act. While the methodology of calculation of the subscription fee must be coordinated with and disclosed by the Competition Authority as of 1 January 2011 (the planned subsection 16 (6)), there is no sensible reason to allow for calculation of the subscription fee on a basis different from the methodology and possibly also more unfavourable to the consumer until 1 May or 1 November 2011 as permitted by the planned subsection 16 (8). It is stated in subsection (11) of the same section: "If the local authority has established a lower price for natural persons on the basis of § 14 of this Act…". After the entry into force of the new Act the said § 14 will have a new wording and will no longer regulate the establishment of water service prices by local authorities.

II. Conflict of subsection 141 (5) of the District Heating Act with the Constitution

11. The new subsection 141 (5) of the District Heating Act delegates the establishment of the

basis of mandatory refusal from coordination of entry into long-term contracts of purchase of heat and cancellation of such contract to the Minister of Economic Affairs and Communications. By doing so the rights of consumers and undertakings are unconstitutionally harmed. According to the Constitution, any and all important issues of restriction of the fundamental rights must be established by an act. It appears from the documents reflecting the reading of the draft act (incl. the explanatory memorandum submitted to the plenary assembly of the Riigikogu for the purpose of continuing the second reading) that the possible unconstitutionality of the given provision delegating authority has been noted by the Riigikogu itself.

12. The Supreme Court has repeatedly emphasised that subsection 3 (1) and § 11 of the Constitution allows for restricting the person's fundamental rights and freedoms only in the events and pursuant to the procedure provided by law. The legislature must decide all the issues that are essential from the point of view of the fundamental rights on its own and must not delegate their specification to the executive. The executive may only clarify the restrictions of the fundamental rights and freedoms established by an act. In the given case the establishment of mandatory grounds for refusal to coordinate contracts has been delegated to the minister. By refusing from approval or cancelling a contract the freedom of enterprise provided for in § 31 of the Constitution and the right to freely posses, use and dispose of one's ownership provided for in § 32 of the Constitution are restricted. The Constitution allows for restriction of the freedom of enterprise and the fundamental right of ownership (subsection 32 (2) of the Constitution allows for establishment of restrictions by an act and notes that ownership must not be used against the overall interests), but only on the basis of an act. Thus, the grounds for refusal of approval and cancellation of contracts must be regulated by an act.

13. In the new subsection 141 (5) of the District Heating Act the minister is allowed to establish the methodology for evaluation of the compliance of entry into long-term contracts and investments with the established conditions only on the basis of a respective recommendation by the Competition Authority. Upon absence of a recommendation, the minister does not have the right. According to subsection 87 (6) of the Constitution, the Government of the Republic shall issue regulations on the basis and for the implementation of law. This is both a right and a duty. Binding the ministerial right of regulation to the deed or step of a government authority reporting to the ministry disperses the liability of the Competition Authority and the minister and non-permissibly narrows the powers of the minister arising from subsection 94 (2) of the Constitution.

I find that it is necessary to discuss the Establishment of Price Restrictions on Monopolies Act adopted on 17 June 2010 again and bring it into compliance with the Constitution of the Republic of Estonia.

Basis: § 107 of the Constitution of the Republic of Estonia

Toomas Hendrik Ilves