



Satversmes tiesa

Press Release

Case No. 2021-24-03

11.03.2022.

Regulation that imposed restrictions on the operation of large shopping malls in circumstances of Covid-19 pandemic is incompatible with the *Satversme*

On 10th March 2022, the Constitutional Court delivered its judgement in case No. 2021-24-03 “On the compliance of paragraph 24¹⁸ of the Cabinet of Ministers Regulation No. 360 of 9 June 2020 “Epidemiological safety measures for the containment of the spread of COVID-19 infection” (in the wording that was in force from 7 April 2021 until 19 May 2021) with the first sentence of Article 91, the first and the third sentence of Article 105 of the *Satversme* of the Republic of Latvia”.

THE CONTESTED NORM

Paragraph 24¹⁸ of the Cabinet of Ministers Regulation No. 360 of 9 June 2020 “Epidemiological safety measures for the containment of the spread of COVID-19 infection” (in the wording that was in force from 7 April 2021 until 19 May 2021) stipulated that operation of shops in the shopping malls, the total area dedicated to trade of which exceeded 7000 m² (hereafter – a large shopping mall), was prohibited, except the categories of shops referred to in sub-paragraphs of this paragraph.

NORMS OF HIGHER LEGAL FORCE

- o First sentence of Article 91 of the *Satversme* of the Republic of Latvia (hereinafter – the *Satversme*): “All human beings in Latvia shall be equal before the law and the courts.”

- o Article 105 of the *Satversme*: “Everyone has the right to own property. Property shall not be used contrary to the interests of the public. Property rights may be restricted only in accordance with law. Expropriation of property for public purposes shall be allowed only in exceptional cases on the basis of a specific law and in return for fair compensation.”

THE FACTS

Several cases, initiated on the basis of applications by various commercial companies, have been joined in case No.2021-24-03.

The limited liability company “Jysk Linnen’n Furniture” (hereafter – Ltd. “Jysk”) is engaged in retail trading of household goods in specialised shops. The majority of the company’s shops are located in the premises of large shopping malls, and separate entrance to the shops from outside can be ensured.

This commercial company notes that it is a trader, whose shop has been set up in the premises of a large shopping mall with the possibility to ensure entrance from outside and to whose shops the exceptions, defined in the contested norm, do not apply (hereafter – the injured trader). Ltd. “Jysk” holds that the contested norm, in the wording that was in force from 7 April until 19 May 2021, ungroundedly restricts its right to property, included in the first and the third sentence of Article 105 of the *Satversme*, and also violates the principle of legal quality, included in the first sentence of Article 91 of the *Satversme*.

Whereas the limited liability company “VRPB” (hereafter – Ltd. “VRPB”) and the limited liability company “EfTEN Domina” (hereafter – Ltd. “Domina”) are the owners of large shopping malls which, in the course of their business, lease premises to traders and service providers.

These commercial companies are of the opinion that the contested norm, in the wording that was in force from 7 April to 1 June 2021, is incompatible with the first sentence of Article 91 and the first and the third sentence of Article 105 of the *Satversme* because it provided that only some shops could operate in the large shopping mall. Hence, the contested norm had ungroundedly restricted the rights of

the owners of a large shopping mall to property, included in the first and third sentence of Article 105 of the *Satversme*, and also the principle of legal equality, included in the first sentence of Article 91 of the *Satversme* is said to be violated.

THE COURT'S FINDINGS

I. On the limits of reviewing the claim and the sequence, in which the compliance of the contested norm with the *Satversme* will be examined

The Constitutional Court noted that the constitutionality of the wording of the norm contested in the case had been contested, i.e., the wording that was in force from 7 April to 9 April 2021 (the contested norm 1), the wording that was in force from April 10 to 19 May 2021 (contested norm 2) and the wording that was in force from 20 May to 1 June 2021 (contested norm 3). In all these wordings (hereafter, together – the contested regulation,) the contested norm established prohibition for all shops in a large shopping mall to operate, except for those shops, to which the exceptions set out within it applied and the enumeration of which was supplemented by each subsequent wording. [20.1.]

The Constitutional Court established that the arguments related to the restriction on the injured trader's fundamental rights, which followed from the contested norm 1 and the contested norm 2, were presented in the application submitted by Ltd. "Jysk". Whereas applications submitted by Ltd. "VRPB" and Ltd. "Domina" contain arguments regarding the restrictions on the rights of the owners of a large shopping mall that followed from the entire contested regulation. [20.1.]

The Constitutional Court decided to examine at the same time the constitutionality of the entire contested regulation, verifying its compatibility with the *Satversme* both with respect to the injured trader and the owner of a large shopping mall, indicating separately those aspects of the review that apply only to a particular wording or subject of the contested regulation. [20.1.]

The Constitutional Court decided to examine, first and foremost, the compliance of the contested regulation with the first and the third sentence of Article 105 of the

Satversme and, after that, its compliance with the first sentence of Article 91 of the *Satversme*. [20.2.]

II. On the restrictions on the injured trader's fundamental rights

On the compliance of the contested norm 1 and the contested norm 2, insofar they apply to the injured trader, with the first and the third sentence of Article 105 of the *Satversme*

On the restriction on fundamental rights included in Article 105 of the *Satversme*

The Constitutional Court concluded that, pursuant to the contested norm 1 and the contested norm 2, the injured trader could not engage in trade in its shop that had been set up in the premises of a large shopping mall. Thus, the contested norm 1 and the contested norm 2 affected the injured trader's commercial activities and restricted its right to property, included in the first and the third sentence of Article 105 of the *Satversme*. [21.]

On whether the restriction on fundamental rights had been established by a legal norm adopted in the procedure set out in regulatory enactments

The Constitutional Court recognised that the contested norm 1 and the contested norm 2 had been adopted within the framework of the Cabinet's mandate, defined in law, and were accessible in accordance with statutory requirements, as well as was defined with sufficient clarity, allowing a person to understand the content of rights and obligations following from them, as well as the consequences of application thereof. [24.]

The Constitutional Court noted that, pursuant to the principle of good legislation, in ordinary circumstances, in the process of drafting legal regulation, the Cabinet had to clarify the opinions of various stakeholders and look for the best possible balance between various conflicting rights and interests. [24.1.]

However, in circumstances of Covid-19 pandemic, the State, in accordance with the precautionary principle, should not wait for the moment when real damage has been already inflicted. Namely, in a unique and unclear situation, the State has the right to make decisions, which are, firstly, based on a reasonable assumption and, secondly, aimed at the protection of fundamental rights. [24.1.]

The Constitutional Court underscored: merely the fact that an emergency situation had not been declared in the state, did not mean that such significant threats to persons' health and life did not exist that would require urgent actions by the State. Information heard at the Cabinet's sittings, *inter alia*, the expert opinions heard, allow concluding why the contested norm 1 and the contested norm 2 were drafted. In view of the need, caused by Covid-19 pandemic, to act immediately and respond to changes in the situation, the fact that, in the process of drafting the contested norm 1, the Cabinet, aiming at fast adoption of effective decisions, conducted only the most necessary research and consultations, cannot be the grounds for concluding that the principle of good legislation had been violated. [24.3.]

Thus, the Constitutional Court recognised that substantial violations in the procedure of drafting and adopting the contested norm 1 and the contested norm 2 could not be identified and that the restriction on the injured trader's fundamental rights had been established by a legal norm, adopted in the procedure set out in regulatory enactments. [24.3.]

On the legitimate aims of the restriction on fundamental rights

The Constitutional Court recognised that the restriction on the injured trader's fundamental rights that followed from the contested norm 1 and the contested norm 2 was aimed at restricting gathering of people in the large shopping malls, as well as decreasing the mobility of people and the load on the public transport related to going to the large shopping malls, to curb the spread of Covid-19 infection. Thus, this regulation is aimed at ensuring a person's right to health and it has a legitimate aim, i.e., protection of other persons' rights. [25.1.]

Fast, uncontrolled spread of Covid-19 infection is related to several significant threats for the entire society, i.e., uncontrolled spread of Covid-19 could cause overburdening of the health sector and jeopardise the continuity of health care and medical services. Thus, protection of public welfare is also the legitimate aim of the restriction on fundamental rights [25.2.]

On the compliance of the restriction on fundamental rights with the proportionality principle

The Constitutional Court concluded that the non-pharmaceutical measures, envisaged in the contested norm 1 and the contested norm 2, i.e., restricting the operation of large shopping malls, allowed reducing effectively persons' risk to become ill with Covid-19 and subject other persons to this risk. Moreover, by not allowing fast increase in the number of Covid-19 patients, the risk of overburdening the health care system is reduced. Thus, the ability of the health care system to function in the circumstances of Covid-19 pandemic and to provide, to the extent possible, the necessary health care also to patients with other health disorders is ensured. Hence, the measures chosen by the Cabinet are suitable for reaching the legitimate aims of the restriction on the injured trader's fundamental rights. [27.]

The Constitutional Court underscored that the Cabinet did not identify noteworthy risks related to the spread of Covid-19 infections with respect to trade in shops set up in separate premises because people move between these shops outdoors, where the risk of COVID-19 infection spreading is said to be minimal. The Constitutional Court concluded that, in terms of the risk of Covid-19 infection spreading, there were not significant differences between a shop in a large shopping mall, which had been zoned off from the shopping mall's premises in common use and to which entrance from the outside had been ensured, and from any other shop set up in separate premises that had separate entrance from outside. [28.]

The Constitutional Court recognises that such legal regulation, which would allow to continue operating a shop in a large shopping mall, which had been zoned off from the shopping mall's premises in common use and to which entrance from the outside could be ensured, would allow reaching equally effectively the legitimate aims of the

restriction on fundamental rights, included in the contested norm 1 and the contested norm 2. Hence, other measures exist that would restrict the injured trader's fundamental rights to a lesser extent and that would allow reaching the legitimate aims of the restriction on such trader's fundamental rights in the same quality [28.]

Therefore the Constitutional Court concluded that the contested norm 1 and the contested norm 2, insofar it applied to the injured trader, were incompatible with the first and the third sentence of Article 105 of the *Satversme*. [28.]

On the compliance of the contested norm 1 and the contested norm 2, insofar they apply to the injured trader, with the first sentence of Article 91 of the *Satversme*

Since such shops in a large shopping mall, which can be zoned off from the shopping mall's premises in common use and to which entrance from the outside can be ensured, in terms of the risk of Covid-19 infection spreading, do not differ significantly from the shops set up in separate premises, the Constitutional Court recognised that the injured trader was in similar an, according to certain criteria, comparable circumstances with a trader that sold the same goods in a shop set up in separate premises. [34.]

The contested norm 1 and the contested norm 2 prohibited the operation of those shops in a large shopping mall, to which the exceptions defined in this norm did not apply, irrespectively of whether separate entrance from outside could be ensured for the particular shop. Whereas shops set up in other trading venues, *inter alia*, shops set up in separate premises, could continue their operations, abiding by the requirements of epidemiological safety. Hence the contested norm 1 and the contested norm 2 envisaged differential treatment of the injured trader, compared to a trader that sells the same goods in a shop set up in separate premises. [34.]

The Constitutional Court noted that the differential treatment, set out in the contested norm 1 and the contested norm 2, had been established by a legal norm adopted in the procedure defined in regulatory enactments. [35.]

However, the Constitutional Court established that the Cabinet, in the procedure of drafting legal regulation, did not even consider the possibility that separate entrance from outside could be ensured to particular shops in large shopping malls and, hence, did not assess, whether the differential treatment of the respective traders, caused by the contested norm 1 and the contested norm 2, was justified. [36.]

The Constitutional Court did not find that the differential treatment, envisaged in the contested norm 1 and the contested norm 2, of groups of persons who were in similar and, according to certain criteria, comparable circumstances, could be justified by objective facts or arguments. Hence, this differential treatment lacks a legitimate aim. [36.]

Hence, the Constitutional Court recognised that the contested norm 1 and the contested norm 2, insofar they applied to the injured trader, were incompatible with the first sentence of Article 91 of the *Satversme*. [36.]

III. On the restriction on the fundamental rights of the owner of a large shopping mall

On the compliance of the contested regulation, insofar it applies to the owner of a large shopping mall, with the first and the third sentence of Article 105 of the *Satversme*

The Constitutional Court recognised that the possibility for the owner of a large shopping mall to benefit from leasing the premises of a large shopping mall was closely connected to the tenants' rights to use these premises for trading. Thus, substantially, the contested regulation prevented the owner of a large shopping mall from exercising its right to lease the premises of a large shopping mall and gain benefit from it. Hence, the restriction of the property rights of an owner of a large shopping mall, included in the first and the third sentence of Article 105 of the *Satversme*, follows from the contested regulation. [21.]

The Constitutional Court recognised that it was not necessary to examine separately, whether the restriction on the fundamental rights of an owner of a large shopping mall that followed from the contested norm 1 and the contested norm 2 had been established by a legal norm, adopted in a procedure set out in regulatory enactments,

because the Constitutional Court's findings made with respect to the restriction on the injured trader's fundamental rights were equally applicable to the restriction on the fundamental rights of an owner of a large shopping mall. [29.]

The Constitutional Court did not find any substantial violations committed in the process of drafting and adopting the contested norm 3. In view of the above, the Constitutional Court concluded that the restriction on fundamental rights of an owner of a large shopping mall had been established by a legal norm adopted in a procedure set out in regulatory enactments. [29.]

The Constitutional Court also recognised that its conclusions regarding the legitimate aims of the restriction on the injured trader's fundamental rights and the suitability of the measures chosen by the Cabinet for reaching these aims were equally applicable also to the restriction on the fundamental rights of an owner of a large shopping mall. Hence, also the restriction on fundamental rights of an owner of a large shopping mall that follow from the contested regulation has legitimate aims, i.e., protecting other persons' rights and public welfare, and the measures chosen by the Cabinet for reaching these aims are suitable for reaching these legitimate aims. [29.]

Hence, the Constitutional Court examined separately only the necessity of the restriction on fundamental rights of an owner of a large shopping mall, as well as verified whether the benefit gained by society from the restriction on the fundamental rights of an owner of a large shopping mall outweighed the infringement inflicted upon its rights. [29.]

On compliance of the contested regulation with the proportionality principle

The Constitutional Court recognised, on the basis of scientific research, that gatherings and meetings of persons were always linked to the risk of Covid-19 infection spreading. Therefore such regulation, which would allow all shops of a large shopping mall to continue their operations, i.e., would allow gatherings and meetings of people in these trading venues, even if stricter epidemiological safety requirements had been set for the large shopping malls in general, *inter alia*, regarding the quality of air, the number of visitors and control over the flow of visitors, could not be recognised as being a more

lenient measure that would allow reaching the legitimate aims of the restriction on the fundamental rights of an owner of a large shopping mall in the same quality. [30.]

Hence, the Constitutional Court recognised that there were no more lenient measures that would allow reaching the legitimate aims of the restriction on the fundamental rights of an owner of a large shopping mall in the same quality. [30.]

The Constitutional Court concluded that the contested regulation prevented the owner of a large shopping mall from exercising its rights to use its property, in all its aspects, according to its will. It is also clear that commercial activities are important for the development of the national economy and obstacles to commercial activities leave negative impact not only upon the traders and owners of trading venues but also the national economy in general. [31.1.]

However, the Constitutional Court also underscored that, in the present case, the importance of the rights and legitimate interests protected by the contested regulation should be taken into consideration. The entire society benefits from the contested regulation, moreover, in various aspects, because it protects both people themselves from falling ill and the system of health care from overload. In view of the spread of the virus causing Covid-19 infection and the threats it poses for the health care system, the legitimate interests of some commercial companies cannot be placed above the interests of the entire society. [31.1.]

The Constitutional Court also concluded that the Cabinet, in adopting the contested regulation, had not violated the principle of legitimate expectations. [31.2.]

Thus, the Constitutional Court recognised that the contested regulation, insofar it applied to an owner of a large shopping mall, complied with the first and the third sentence of Article 105 of the *Satversme*. [31.2.]

On compliance of the contested regulation, insofar it applies to an owner of a large shopping mall, with the first sentence of Article 91 of the *Satversme*

The Constitutional Court recognised that a large shopping mall, in terms of its size and, accordingly, also epidemiological safety, is comparable to such shops set up in separate premises, the area of which exceeds 7000 m² (hereafter – a large shop). Hence, an owner of a large shopping mall is in similar and, according to certain criteria, comparable circumstances was an owner of the premises of a large shop. During the term of validity of the contested regulation, trading was allowed in the premises of a large shop, abiding by the epidemiological safety requirements. Whereas in the premises of a large shopping mall, pursuant to the contested regulation, trade was not allowed, except for the stress, to which the exemptions defined in the contested regulation were applicable. Hence, the contested regulation envisaged differential treatment of groups in persons who were in similar and, according to certain criteria, comparable circumstances. [37.]

The Constitutional Court noted that this differential treatment had been established by a legal norm adopted in the procedure set out in regulatory enactments. [38.]

The Constitutional Court pointed out: it already recognised in this judgement that the differential treatment of groups of traders in comparable circumstances that followed from the contested norm 1 and the contested norm 2 lacked a legitimate aim. These conclusions are equally applicable also to the differential treatment, caused by the contested regulation, of an owner of a large shopping mall, compared to an owner of a large shop. [38.]

In view of the fact that, in terms of the risk of Covid-19 infection spreading, there are no significant differences between a large shopping mall and a large shop, the Constitutional Court did not identify objective facts or arguments allowing to conclude that the differential treatment of an owner of a large shopping mall and an owner of a large shop, caused by the contested regulation, had a legitimate aim. Hence, the Constitutional Court recognised that the contested regulation, insofar it applied to an owner of a large shopping mall, was incompatible with the first sentence of Article 91 of the *Satversme*. [38.]

IV. On the date, as of which the contested regulation is to be recognised as void with respect to the applicants

The Constitutional Court noted that recognising the contested regulation as being void from the moment when the infringement on fundamental rights occurred was the only possibility for protecting the applicants' fundamental rights. Therefore, with respect to Ltd. "Jysk", the contested norm 1 and the contested norm 2 shall be recognised as being void from the moment when the infringement on its fundamental rights occurred. Similarly, also with respect to Ltd. "VRPB" and Ltd. "Domina", the contested regulation shall be recognised as being void as of the moment when the fundamental rights of these commercial companies were infringed. The date when the contested norm 1 entered into force, i.e., 7 April 2021, shall be considered the date when the infringement on the applicants' fundamental rights occurred. [39.]

The Constitutional Court held:

1. To recognise Paragraph 24¹⁸ of the Cabinet of Ministers Regulation No. 360 of 9 June 2020 "Epidemiological safety measures for the containment of the spread of COVID-19 infection", in the wording that was in force from 7 April 2021 until 19 May 2021, insofar it applies to a trader whose shop has been set up in the premises of a large shopping mall and for which separate entrance from outside can be ensured, and to which the exceptions defined in this norm do not apply, as being incompatible with the first sentence of Article 91, as well as the first and the third sentence of Article 105 of the *Satversme* of the Republic of Latvia.
2. With respect to the limited liability company "Jysk Linnen'n Furniture", to recognise Paragraph 24¹⁸ of the Cabinet of Ministers Regulation No. 360 of 9 June 2020 "Epidemiological safety measures for the containment of the spread of COVID-19 infection", in the wording that was in force from 7 April 2021 until 19 May 2021, insofar it applies to a trader whose shop has been set up in the premises of a large shopping mall and for which separate entrance from outside can be ensured, and to which the exceptions defined in this norm do not apply, as being void from 7 April 2021.
3. To recognise Paragraph 24¹⁸ of the Cabinet of Ministers Regulation No. 360 of 9 June 2020 "Epidemiological safety measures for the containment of the spread of COVID-19 infection", in the wording that was in force from 7 April 2021 until 19 May 2021, insofar it applies to an owner of a large shopping mall, as being compatible with the first and the third sentence of the *Satversme* of the Republic of Latvia.

4. To recognise Paragraph 24¹⁸ of the Cabinet of Ministers Regulation No. 360 of 9 June 2020 “Epidemiological safety measures for the containment of the spread of COVID-19 infection”, in the wording that was in force from 7 April 2021 until 19 May 2021, insofar it applies to an owner of a large shopping mall, as being incompatible with the first sentence of Article 91 of the *Satversme* of the Republic of Latvia.

5. With respect to the limited liability company “VRPB” and the limited liability company “EFTEN Domina”, to recognise Paragraph 24¹⁸ of the Cabinet of Ministers Regulation No. 360 of 9 June 2020 “Epidemiological safety measures for the containment of the spread of COVID-19 infection”, in the wording that was in force from 7 April 2021 until 19 May 2021, insofar it applies to an owner of a large shopping mall, as being void from 7 April 2021.

The Constitutional Court’s judgement is final and not subject to appeal, it enters into force on the day of its publication.

The text of the judgement is available on the Constitutional Court’s homepage:

https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/06/2021_24_03_Spriedums.pdf

The press release was prepared to inform society about the Constitutional Court’s work. More detailed information about recent developments, cases initiated and heard by the Constitutional Court is available on the Constitutional Court’s webpage www.satv.tiesa.gov.lv. Please follow also information published on the Court’s *Twitter* account [@Satv_tiesa](https://twitter.com/Satv_tiesa) and *Youtube* [channel](#).

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