

U. no:126/2010-0-0

Date:11/10/2010

## Preface

The Constitutional Court of the Republic of Macedonia, by virtue of Article 110 of the Constitution of the Republic of Macedonia, and Article 70 of the Rules of Procedure of the Constitutional Court of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia", no. 70/1992), on its session held on November 10, 2010, adopted the following

## RESOLUTION

### Text

1.A PROCEDURE IS NOT INSTIGATED for appraisal of the constitutionality of Article 33, paragraphs 1, 2 and 6 of the Law on Public Health ("Official Gazette of the Republic of Macedonia" no. 22/2010).

2. The Chamber of Crafts from Skopje submitted an initiative to the Constitutional Court of the Republic of Macedonia for instigating a procedure for appraisal of the constitutionality of provisions of the Law on Public Health, marked in point 1 of this Resolution.

According to the allegations in the initiative, Article 33 of the Law stipulated the performing of cosmetic activity, which according to all criteria and legal regulations was classified as service activity. Namely, in the National Classification of Activities, code 96.02-Hair salon and beauty parlour (facial massage, manicure, pedicure and make-up) and code 96.04 – Activities for care and maintenance of the body (activities for improvement of physical condition and relaxation, such as: Turkish Spa Bath, sauna, steam baths, indoor sun beds-solarium, spas, weight loss salons, massage, fitness centres etc.) belong to group 6. Health and body care, in accordance with the Rulebook for determination of activities that can be performed by craftsmen ("Official Gazette of the Republic of Macedonia". no. 87/2004, 14/2008 and 44/2009).

On this basis, the Chamber of Crafts -Skopje, in the submitted initiative, reacts to the adoption of the named Law, above all because of the inclusion of cosmeticians, as performers of an activity from Article 33 of the Law, because of the necessity to obtain a working permit for the activity from the Ministry of Health. The reason is that the application for the permit increased the duties of the performers of the named activity, who on the other hand already had adequate diplomas for vocational training, and were exposed to costs for work approvals, unnecessary absenteeism, that could have resulted in dissatisfaction among customers. On the other hand, performing the cosmetic activity was regulated with the Law on Performing Craftsmanship Activity ("Official Gazette of the Republic of Macedonia", no. 62/2004 and 55/2007), where in Article 4 paragraph 4 it was clearly stated that the cosmetic service is a craftsman activity, and in Article 6 it was stated that the craftsman is obliged to fulfil the minimal technical conditions determined by the Rulebook for minimal technical conditions for performing craftsmanship activity ("Official Gazette of the Republic of Macedonia", no. 87/2004). Articles 7 and 10 of the named Law were also important, in which other conditions for performing the above named activity were determined.

From the above stated, one can see that in the Law that stipulates completely different activity (referring to the Law on Public Health), provisions for regulating the cosmetic activity were inserted, which according to the quoted legislation is a service activity. If bearing in mind the term public health as defined in Article 3 paragraph 1 point 1 of the Law on Public Health, it

turned out that the cosmetic activity could not be covered by the term public health and that there were no common grounds with what was subject of stipulation in the named law. Also, public health was a completely different area from cosmetic activity and it would be wrong to insert it in the Law that referred to something so different and incomparable to the other.

Further, cosmetic activity was to be performed by a person that had completed appropriate vocational training, who passed the master's exam, had the necessary equipment and space (obtain[Hygienic-Technical Certificate] (HTC)) and is registered in the craftsman registry, but with the contested provision the existing legislation for craftsmanship was invaded, as a separate area and the craftsmen-cosmeticians were obliged to perform their activity with a work permit issued by the Ministry of Health. The Ministry, on the other hand, was obliged to provide care for the illnesses of citizens, and not for the care and beautifying, which was the cosmeticians' activity.

Hence, for providing quality cosmetic activity it was not necessary to acquire new permits and additionally burden the small enterprises by introducing a new fee, by virtue of obtaining permit from the Ministry of Health, as this was not the ministry responsible for craftsmanship.

Based on the above said, the submitter of the initiative requests that everybody has the equal opportunity to work under the same conditions for business guaranteed by the Constitution, because in the current economic condition, with the contested provisions, the small businesses were exposed to new financial requirement and approvals, which further created conditions for termination of activity. Given that the contested provisions created unfavourable and different craftsmanship business conditions, the legal solution was unconstitutional and it violated the right to equal legal position for all entities on the market, as stipulated in Article 55 paragraph 2 of the Constitution.

3. At its session, the Court determined that, Chapter VI of the Law on Public Health, titled: "Special Provisions" and subsection: "Traditional and Complementary Medicine, Tattooing, Piercing, Permanent Make-up, Acupuncture and Care and Beautifying Activities" contains Article 33, from which paragraphs 1, 2 and 6 are subject of contest.

According to the contents of the contested Article 33 paragraph 1 of the Law, a legal or natural person can perform activities connected with traditional and complementary medicine, skin activities (using solariums, permanent hair removal and other activities for care and beautifying) or activities that include skin penetration (tattooing, piercing, permanent make-up and acupuncture, application and usage of Botox, nonsurgical liposuction and usage of laser) only if they have a permit from the Ministry of Health.

According to the contested paragraph 2 of the same Article of the Law, the permit from paragraph 1 of this Article is issued only if the conditions for space, equipment and trained staff are fulfilled.

In the contested paragraph 6 of Article 33 of the Law it is stipulated that the specific conditions and criteria related to space, equipment and trained staff for performing the activities from paragraph 1 of this article, are determined by the Minister of Health.

4. According to Article 55 of the Constitution, the Republic provides equal legal position for all entities on the market.

According to Article 1 of the Law on Public Health, the subject of stipulation of this Law is the implementation of the basic functions and tasks of public health, the system of public health, emergency situations in public health, as well as financing of the public health.

According to Article 2 of the same Law, the goal of the Law on Public Health is:

- 1) To preserve and promote the health of the population;
- 2) To facilitate implementation of the basic functions and tasks of the public health through organized measures and activities that are undertaken by the state bodies, institutions, units of the local self-government and other legal and natural persons in cooperation with the health care facilities;
- 3) To promote and strengthen the interdepartmental cooperation in the implementation of the basic functions of public health;
- 4) To promote and strengthen the cooperation between the competent ministries and the units of the local self-government and the public and the private sector and the citizens in the preservation and promotion of the health of the population;
- 5) To provide appropriate response in the case of public health need and emergency and occurrence of public health emergency circumstances;
- 6) To provide implementation of international health regulations and
- 7) To stipulate specific matters of public health which are not stipulated by any other law.

According to Article 3 point 1 of the Law, the term “Public Health” is a system of knowledge and skills to prevent illnesses, to prolong life and promote health through organized efforts of the society. The public health system is used for monitoring and analysis of the health condition of the population in order for it to be improved through the influence on the risk factors on the health, such as environmental factors, causes for illnesses, lifestyle and socio-economic factors.

The Law on Performing Craftsmanship Activity (“Official Gazette of the Republic of Macedonia”, no. 62/2004, 55/2007 and 115/2010) among other, stipulates the conditions and the means of performing craftsmanship activity, such as the degree of education, the professional ability, minimal technical and other conditions that need to be fulfilled by the persons performing craftsmanship activities.

According to Article 2 paragraph 1 of the named Law, craftsmanship activity can be performed by any natural person who is registered in the Craftsman Registry (hereinafter: craftsman). Sole proprietor or trade company can also perform craftsman activity (hereinafter: provider of the craftsman activity) under the conditions and means determined by the Company Law and this Law (paragraph 2).

Article 62 paragraph 1 of the Company Law (“Official Gazette of the Republic of Macedonia”, no. 28/2004, 84/2005, 25/2007, 87/2008, 42/2010 and 48/2010) specifies that a trade company can perform all activities that are not forbidden by law. According to paragraph 3 of this Law, if certain activities can be performed only with prior consent or permit, or can be performed only based on other act of a state body or other authority, the entry of this activity in the trade registry will be performed only on the basis of the consent, permit or the respective act of that body.

According to Article 63 of the Company Law, the trade company can begin performing the activity which is subject of activity of the company only after its entry into the Trade Register, and upon receiving the approval of the authorized body for fulfillment of the determined conditions for performing the activity within the frame of the registered subject of activity, if specified by law.

The National Classification of Activities (["Nacionalna Klasifikacija na Dejnostite"] (NKD)) is a national standard synchronized with the European Classification of Activities (NACE) which is used for identification, grouping and delineation of activities according to which the classification of business entities is performed (legal and natural persons), as well as for other administrative purposes and also, in statistics, for gathering, processing and publication of statistic data. The activity in the class in the National Classification of Activities-NKD Rev. 2, in line with Introductory Guidelines Nace Rev. 2, Eurostat (guidelines of the European Statistical Office), was formed on the basis of similarities between several different categories of activities, which were stipulated and performed according to the national legislation.

The decision of the Government of the Republic of Macedonia to introduce the National Classification of Activities NKD Rev.2 is published in the "Official Gazette of the Republic of Macedonia", no. 147/2010. According to the classification, other personal service activities were classified in group no. 96, hair salons and beauty parlors in the class no. 96.2, and activities for care and maintenance of body are in the class no. 96.4.

NKD Rev.2, according to its subject of stipulation and character, does not represent and act that determines or awards certain rights and authority, as these are determined by existing legislation (notion of the Constitutional Court in case number U. no. 260/2008).

Starting from the analysis of the existing legislation, it becomes evident that performing cosmetic activity above all is a craftsman personal service activity, performed under the conditions and in the manner stipulated by the Law on Performing Craftsmanship Activity, but also under conditions and in the manner specified by other laws, which arises from Article 62 paragraph 3 and Article 63 of the Company Law, as well as from the contents of the contested provisions from the Law on Public Health. Namely, according to the above stated provisions of the Company Law, certain activities can be performed only on the basis of consent, permission or any other act or approval by a state body or another authority, which serve as a proof of fulfillment of the stipulated conditions for performing the activity within the frame of the registered subject of work if specified by law, and the contested provisions of the Law on Public Health confirm this determination of the legislator.

Hence, not only that the contested provisions stipulate that a legal or natural person can perform activities related to traditional and complementary medicine, skin activities and activities involving skin penetration, only if they have the necessary permit from the Ministry of Health, but also the Company Law stipulates requesting additional permits for performing trade activity when stipulated by a special law, such as in this case.

Bearing in mind the goals set in the Law on Public Health, and at the same time having in mind that the cosmetic personal service activity is performed through application of traditional and complementary medical skin activities (using solariums, permanent hair removal and other care and beauty activities) or activities involving skin penetration (tattooing, piercing, permanent make-up and acupuncture, application and usage of Botox, nonsurgical liposuction and using lasers), in our opinion, there is a constitutional and legislative justification for determination of the special conditions for performing the above mentioned activity through obtaining an appropriate permit from the Ministry of Health for performing the named activity. This, above all, serves as a consideration that the unskilled application of the care and beauty methods, which constitute medical cosmetology, can cause infections and other side effects to the health of the people, that can be of temporary, but also of permanent character, and thus, their performance cannot be left at citizen's own risk to be subject to such activities performed by persons who, among other things, do not have the necessary permit from the Ministry of Health. In this way,

the state fulfills its protective role in the occurrence and prevention of communicable and non-communicable diseases which can cause serious damage to the health of the people who, led by the contemporary lifestyle and socio-economic factors, become more frequent visitors to care and beauty parlors.

According to this, it is not a coincidence that even the Minister of Economy, in the Rulebook for specifying the activities that can be performed by craftsmen, in the list of activities covers hair and beauty parlours (151. S/O 96.02), as well as care and body maintenance activities (152. S/O 96.04), and places both to group 6 – Health and body care.

Indeed, according to Article 39 of the Constitution, every citizen is guaranteed their right to health care. The citizens have the right and the duty to protect and promote their own health and the health of others. Thus, with obtaining the adequate permit from the Ministry of Health, the performers of the cosmetic activity fulfil their constitutional duty to protect the health of others while performing their activity.

On the basis of the above stated, the Court marked that, with the contested provisions, the legislator reached an equilibrium between the individual interest for performing the cosmetic service activity and the obligation to protect the health of citizens as public interest.

Having into consideration that for performing cosmetic activity through actions on the skin (on skin surface or involving skin penetration) the legislator stipulated possession of permit issued by the Ministry of Health, it becomes obvious that all craftsmen providing this activity who want to provide services to people related to skin beautifying must fulfil equal conditions, and hence, according to the Court, the allegation in the initiative, which states that the legal solution is unconstitutional and violates the right to equal legal position to all entities on the market stipulated in Article 55 paragraph 2 of the Constitution, is unfounded.

On the basis of the above stated it becomes evident that the contested Article 33 paragraphs 1, 2 and 6 of the Law are in accordance with the Article 55 paragraph 2 of the Constitution.

5. By virtue of the above stated, the Court decided as in point 1 of this Resolution.

6. This Resolution was delivered by the Court in the following composition: President of the Court Branko Naumoski and judges Natasha Gaber–Damjanovska PhD, Ismail Darlishta, Trendafil Ivanovski PhD, Liljana Ingilizova-Ristova, Vera Markova, Igor Spirovski, Gzime Starova PhD and Zoran Sulejmanov PhD.

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November 10, 2010  
Skopje  
m.p.

PRESIDENT  
of the Constitutional Court of the Republic of Macedonia  
Branko Naumoski