Regulating the Right of Entrepreneurial Freedom in the Area of Liquid Fuel in Estonia and Across European Countries

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I. Introduction and Background

Writing on the topic of regulating the right of entrepreneurial freedom in the area of liquid fuel is motivated by doubts and potential conflicts with the principle of legal certainty arising from section 10 of the Constitution *(Põhiseadus)*[1] upon legal regulation of the area of liquid fuel, by the effect of the regulation on the formation of monopolies, slowdown in the development of technology and reduction of tax evasion. It is important to find legal solutions in the area of liquid fuel that are less restrictive and less burdensome for business than security deposit requirements, thus enabling filling stations to design the procedure for submitting information associated with automotive fuel and increasing the liability based on the reliance of the handlers. Establishing the qualification requirements of a person renders restricting business less burdensome, makes taxation with excise duty more precise and enables identifying persons who engaged in value added tax evasion.

The act that provides the bases and procedure for handling liquid fuel, liability and arrangements for exercising state supervision is the Liquid Fuel Act *(Vedelkütuse seadus)*.[2] Over the last four years, the Liquid Fuel Act has been amended 15 times. In ten years, all the sections of the act have undergone amendments. The objective of the majority of the amendments has been to ensure the collection of national taxes. In terms of the principle of legal certainty, it is not clear why the legislator has failed to draft the technology standard in subsection 8 (1) of the Liquid Fuel Act and why the power to establish it has been given to the minister responsible for the area without providing any detailed clarifications (without clarifying the purpose, content and scope of the regulatory power), even though these have already been established with a regulation according to subsection 58 (2) of the Ambient Air Protection Act *(Välisõhu kaitse seadus)*.[3] The legal terminology of the area requires more appropriate expressions that take the official language into account when determining the meaning and content of definitions in order to ensure legal clarity; in many ways, the person who drafted the draft amendments has failed to take into account the observations of the Institute of the Estonian Language *(Eesti Keele Instituut)* and suggestions of experts in the area. Adhering to good legislative practices requires using clear, unambiguous and accurate terms when specifying definitions in legislation. If a definition is used in a meaning that differs from one that has been specified in legislation so far or if the definition can have several meanings, the specification of the definition shall have to include the expression "for the purposes of this Act". If a definition appropriate in a draft for amending an act has already been defined in another act, reference shall have to be made to the act for the purposes of which the term is used in order to ensure legal clarity.

Although section 113 of the Constitution (establishing national taxes), put into practice in conjunction with section 31 of the Constitution (right of entrepreneurial freedom), as a consequence establishes restrictions on business the process of collecting any national taxes and payments should not promote the formation of monopolies. The current regulation applicable in the area only promotes an operator that has a comprehensive security deposit[4] upon operating as a handler of automotive fuel. Despite this, supervisory agencies have identified value added tax evasion incidents that continue to be excessive. The circumstance refers to a consequence. Current restrictions on the right of entrepreneurial freedom, disproportionately large security requirements in the legislation may be excessively burdensome on an operator wishing to actually operate in the area, at the same time leaving the state unprotected against value added tax fraudsters and those who only seemingly operate in the area.

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[1] RT 1992, 26, 349; RT I, 27.04.2011, 2; hereinafter referred to as Cx or Constitution.

[2] RT I 2003, 21, 127; RT I, 20.02.2015, 7; hereinafter referred to as LFA or Liquid Fuel Act.

[3] RT I 2004, 43, 298; RT I, 20.02.2015, 9; hereinafter referred to as AAPA or Ambient Air Protection Act.

[4] For example, the fuel supplier's security deposit upon releasing fuel for consumption and upon ceasing tax warehousing is 1,000,000 euros. By relying on risk assessment, the Estonian Tax and Customer's Board has the right to require the fuel supplier to have a higher security deposit and to revisit an already established security (subsections 42 (1) and (4) of the LFA). In practice, security deposit is made up of the capital of the company, cash equivalent of security without an appraisal guideline and business reputation of the person of the owner and members of his/her management and control bodies and business partner together with their future intentions as well as cases of breaching taxation laws, customs rules and the Liquid Fuel Act.

Although the state is not obligated to ensure a profit for entrepreneurs,[5] it is becoming economically more and more questionable whether or not the sale of automotive fuel is possible in sparsely populated areas using some other legal form other than by creating a municipal filling station, due to the great effect of right of recourse on the competitive conditions. Entrepreneurs owning small individual filling stations cannot meet the volume of securities established in the law. At the same time, large chains of filling stations are not focused on supporting local life with the help of less profitable filling stations. Aggravation of this situation has a negative effect on the formation of competition conditions and the interaction of vital infrastructures in a sparsely populated area. The aforementioned line of reasoning shows how dependent functional economy may be on law-making and on emphasised adherence to legal principles arising from the Constitution. Collecting taxes is very important for the state to exist, but ensuring the collection of taxes must be carried out in a way that burdens entrepreneurship to a smaller degree. The Supreme Court has specified and emphasised the principle of proportionality several times in its decisions. The second sentence of section 31 of the Constitution, which provides that the law may establish the conditions and procedure of using entrepreneurial freedom, gives the legislator great freedom to regulate the conditions of using entrepreneurial freedom and to establish restrictions thereto. Any reasonable cause is enough to circumscribe entrepreneurial freedom. The cause must result from public interest or the need to protect the rights and freedoms of other persons, and it must be weighty and legitimate as a matter of course. The more intense the interference in entrepreneurial freedom, the more significant the reasons justifying the interference shall have to be.[6] Taking into consideration the principle of proportionality, the reasons for establishing restrictions on entrepreneurship in the law have to be clarified first, i.e. for the benefit of the rights or collective benefits of which persons did the legislator decide to circumscribe the right of a person to engage in business. It is then possible to assess whether or not circumscribing entrepreneurial freedom adheres to the requirements provided for in clause 11 of the Constitution, which permits circumscribing rights and freedoms only in the event that the circumscriptions are necessary in a democratic society and they do not distort the nature of the rights and freedoms circumscribed. If it is not possible to determine the reason why entrepreneurial freedom has been interfered with, it is also not possible to weigh up the need for interference in a democratic society or whether or not the nature of law has been distorted. Such interference is in conflict with the principle of proportionality provided for in the Constitution.

The Constitution therefore permits circumscribing entrepreneurial freedom[7] only according to the terms and conditions and the procedure provided for in the law, without giving the legislator or the executive power unlimited right regarding thereof. Which less burdensome options that take fundamental rights into consideration are there? Why are these not appropriate to replace the positive law in the near future, also taking into consideration potential situations that may arise in the future? A well-functioning legal provision that protects societal benefits is ready to protect the benefits now and in the future.

II. European Union-wide regulation in the area of liquid fuel

Any energy product may be treated as fuel. Specifying a more accurate type of fuel must first take into consideration the location of use, safety of using the product in an energy converter, which is used to also prove the similarity and substitution of fuel. Circumscribing the marketing of an energy product as fuel differs from classification. Permission to market is strictly regulated using the precautionary principle through European Union[8] regulations, guidelines and decisions.

Specification first arises from the European Council Regulation (EEC) no. 2658/87[9]; subsection 1 (1) is used to establish the nomenclature of goods.[10] Section 27 of annex 1 to the Commission Implementing Regulation (EU) no. 927/2012[11] provides explanations for mineral fuels. There is nothing that says that technically a product belonging to another group cannot be used as liquid fuel. For example, this applies to biodiesel starting with 3826 in the miscellaneous chemical products group 38. Fuel-water-emulsion[12] has a specific product code, but no name that refers to it being a fuel. Designating a CN number depends on the discretion of the person issuing the certificate of conformity and is based on the descriptions submitted

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[5] RKHKo 20.12.2011, 3-3-1-59-11, c. 19.

[6] RKPJKo 10.05.2002, 3-4-1-3-02, c. 14.

[7] RKÜKo 09.12.2013, 3-4-1-2-13, c. 106.

[8] Hereinafter referred to as EU or European Union.

[9] EÜT L 256, 7.9.1987, p. 1.

[10] Hereinafter referred to as CN.

[11] ELT L 304, 31.10.2012, p. 1.

[12] Hereinafter referred to as LWE.

by the manufacturer that may originally not provide a reference to the options of using the product as liquid fuel. As such, LWE may be sold as product CN 38249097 (prepared binders for foundry moulds or cores). At the same time, incorrect statistical data is collected at the EU level. LWE cannot be designated as automotive fuel on the basis of group 27 of 927/20/2012/EU, because it has to be addressed as heavy oil on the basis of additional note 2 (d). The reason for this is a large quantity of water in the product, which does not enable carrying out a fractional composition measurement using the ISO 3405 method. This fact is important for understanding why it is not reasonable to establish the types of liquid fuel at a national level only on the basis of CN. Free movement of goods may, therefore, be restricted, and new equivalent products may not be deemed to be fuels for the purposes of the Liquid Fuel Act.

With the objective of harmonising excise duty, the designation of a CN number to fuel is addressed in article 2 and annex I to Regulation 2003/96/EC.[13] Technically, fuel can be any energy product during the use of which the energy converter can be operated in compliance with the minimum requirements arising from its technical specifications. This can also be derived from the purpose of section 1 of BImSchV[14] (2014), which provides that the suitability of an energy product for an energy converter must be identifiable. Generally, an equivalent product to automotive fuel may also be successfully used in place of light or heavy fuel. Not the other way around, however, because that would damage an energy converter that specifies higher requirements for fuel.

Upon establishing restrictions on handling energy products, the Committee may according to subsection 114 (3) of the Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union[15] take a high level of protection as a basis, ensuring health, safety, environmental protection and consumer protection. The person who drafts legislations is obligated to adhere to the precautionary principle when establishing restrictions on the indicators of the properties of an energy product.

In order to get a better overview of environmental requirements, Regulations 98/70/EC[16], 2003/17/EC[17], 2009/30/EC[18] and 2011/63/EU[19] must be viewed in conjunction. A lack of legal clarity lies in the references used therein. There are instances where reference is made to a table that has already been substituted with another reference. The reference method is not misleading, but the meaning is not sufficiently clear. An example is an amendment of subsection 8 (1) of 98/70/EC (subsection 1 (7) of 2009/30/EC), which establishes the use of analytical methods provided for in standards EN 288:2004 and EN 590:2004 for carrying out supervision on automotive fuels. 2011/63/EU leaves the year when the standard enters into force unchanged, but establishes 98/70/EC, specifying EN 228:2008 and EN 590:2009 for adhering to test methods. As such, both the older and the revised publication of the standard must be adhered to at the same time. At the moment, both publications of the standards are invalid due to an entry into force of their amendments. The task of member states is to use legislation to establish mandatory compliance with test methods, not the values of indicators describing the properties that are found therein. Values of indicators that are mandatory to comply with are established in the same regulations, but there is no reference made to them being associated with standards. Manufacturers and distributors of liquid fuel must prove the method of sample checking to market supervisory agencies, and provide results of these tests upon request in order to ensure that the product being marketed is safe. A certificate of conformity or a test protocol drafted in order to prepare the certificate of conformity may include other data describing the properties of automotive fuel that the manufacturer deems necessary, the conformity of which does not have to be certified pursuant to subsection 3 (2) and subsection 4 (1) of Regulation 98/70/EC.

Pursuant to subsection 13 (3) of Regulation (EC) no. 1907/2006 of the European Parliament and of the Council,[20] tests for identifying the properties of any substance must be established by the Committee, a respective other committee or recognised by the European Chemicals Agency. The requirement for collecting evidence in the matter is established by the

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[13] ELT L 283, 31.10.2003, p. 51.

[14] Erste Verordnung zur Änderung der Verordnung über die Beschaffenheit und die Auszeichnung der Qualitäten von Kraft- und Brennstoffen; BGBl. I 2014, S.1890.

[15] ELT C 83, 30.3.2010, p. 1. Hereinafter referred to as TFEU.

[16] EÜT L 350, 28.12.1998, p. 58.

[17] ELT L 76, 22.3.2003, p. 10.

[18] ELT L 140, 5.6.2009, p. 88.

[19] ELT L 147, 2.6.2011, p. 15.

[20] ELT L 396, 30.12.2006, p. 1.

third paragraph of subsection A.2 of the annex to Regulation (EC) no. 440/2008[21]: "All information and remarks relevant for the interpretation of results have to be reported, especially with regard to impurities and physical state of the substance." This sentence provides the grounds for requiring the assessment of losses upon determining fraction composition. Good practice for such losses does not exceed 2%. The operation of engines at idle speed is technically affected by losses of automotive petrol exceeding 5%. Spontaneous shutdown can occur at losses exceeding 7%. The operation of a fuel pump is affected as only vapour that has evaporated from fuel and not liquid itself reaches the pump.

Leaving aside the technical and non-legal analysis of whether or not the restriction established on an indicator of a property is sufficient, the opportunity to consider the requirements arising from the generally accepted principles of manufacturing fuel and energy converters must be analysed. The term "... may ... only if it complies with ..." requires interpretation.[22] In the event of complying with the requirement, the handling of new products is given sufficient freedom for consideration. The wording of the amended subsection (1) a) of Regulation 98/70/EC refers to taking the technical requirements of an engine into consideration. The term does not release the seller from the obligation to comply with other requirements arising from the generally accepted principles of manufacturing automotive fuel and engines and does not make it mandatory to comply solely with the limit values of sizes provided for in the annex to the regulation. Taking this into consideration, the sellers have to account for not only environmental requirements, but also provisions arising from the aforementioned generally accepted principles. Upon deciphering the meaning provided for in the legislation, the background of the future that has a very significant role in the development of technology has to be widely considered. Although automotive fuels are chemical products, the provisions of subsection 20 (2) of Regulation 765/2008/EC[23] shall have to be taken into account when creating a measure arising from the hazardousness of the product. The product may not be removed from the market, prohibited or circumscribed in terms of its availability due to legislation if there are replacement products that are less hazardous according to a risk assessment. The results of a risk assessment are decisive. It is not important whether or not the effect of the hazardous substance is direct.

Taking Regulation 2014/94/EU[24] into account, the implementation of new technologies that are more environmentally sustainable has to be made possible. Complying with the obligation provided for in subsection 4 (1), member states have had to have put in place recharging points for electric vehicles accessible to the public by 31 December 2020 and hydrogen refuelling points for servicing both vehicles with a fuel cell as well as regular internal combustion engine by 31 December 2025. Particular attention has been given to notifying users as provided for in article 7. Holders of vehicles must be given more efficient information on which fuel is suitable to use for operating an engine. As such, the Commission has requested the CEN/TC 19 Committee to draft a harmonised European standard on marking automotive fuel.[25] Estonia has already submitted its consent to draft the standard.

The issuing of a certificate of conformity for liquid fuel is regulated by Regulation (EC) no. 765/2008 of the European Parliament and of the Council that supplements Regulation 768/2008/EC.[26] Taking into consideration the *lex specialis* principle of interpretation, only the requirements of environmental protection have to be taken into account when issuing a certificate of conformity for automotive fuel at the EU level. According to article R8 of 768/2008/EC, products that comply with the harmonised standard or part thereof shall be presumed to be compliant. According to article R6, the importer or distributor shall in some cases be treated as a manufacturer. Such treatment is necessary to identify the area of responsibility. If the importer/distributor uses its name/brand on the product or makes changes to the properties of an automotive fuel already on the market, which might affect compliance with the requirements provided for in the legislation, the importer/distributor will be subject to obligations applicable to the manufacturer. To which circumstances it is possible to implement the aforementioned article or when it has to be implemented with regard to automotive fuel have to be interpreted.

According to subsection 3 (1) of Regulation 2001/95/EC[27], the manufacturer may only market safe products. Subsection 5 (1) specifies an obligation for the manufacturer to carry out sample checks on its products. With regard to automotive fuel, it is highly justified upon storage in case of pollution and changes to properties arising from transport. Sample checks enable

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[21] ELT L 142, 31.5.2008, p. 1.

[22] Reference 15, subsection 3 (2).

[23] ELT L 218, 13.8.2008, p. 30.

[24] ELT L 307, 28.10.2014, p. 1.

[25] Online: http://standards.cen.eu/dyn/www/f?p=204:7:0::::FSP_ORG_ID:6003&cs=1FAF2D8F6A6FE92BF5C85E6AAFDBDD16D. (1 February 2015).

[26] ELT L 218, 13.8.2008, p. 82.

[27] EÜT L 11, 15.1.2002, p. 14.

the distributor to acquire information on whether or not the product complies with the requirements. The distributor is obligated to not deliver products that do not comply with the requirements.

III. National regulation in the area of liquid fuel

The legislation of the Republic of Estonia regulates the handling of liquid fuel with the following acts in its jurisdiction: Liquid Fuel Act *(Vedelkütuse seadus)*; Ambient Air Protection Act *(Välisõhu kaitse seadus)*; Liquid Fuel Stocks Act *(Vedelkütusevaru seadus)*;[28] Fiscal Marking of Liquid Fuel Act *(Vedelkütuse erimärgistamise seadus)*;[29] Alcohol, Tobacco, Fuel and Electricity Excise Duty Act *(Alkoholi-, tubaka-, kütuse- ja elektriaktsiisi seadus)*.[30] Before classifying fuel in the legislation, it would be wise to consider if and when preparing an overview of different technological materials is necessary upon setting out and establishing thereof with the law. An issue to consider is, for example, how weighty is the classification of technological materials upon ensuring safe operation of the place of use, establishing environmental requirements and collecting national taxes.

How national supervision is to be carried out in the event that the company only engages in selling and/or manufacturing equivalent fuel needs to be interpreted. Pursuant to subsection 66 (18) of the ATFEEDA, the state can collect excise duty on any liquid energy product. The legislator has not specified the difference in the definitions "specialty and unconventional fuel-like mineral oil" and "liquid combustible substance" used in the ATFEEDA in more detail. Using the method of grammatical interpretation, it is possible to derive that specialty and unconventional fuel-like mineral oil is intended to replace commonly used fuels, while also being designated with specific CN ranges, and liquid combustible substances are all other equivalent fuels.

According to subsection 58 (1) of AAPA, fuel is "… combustible materials or substances which are used in combustion plants for the purposes of obtaining energy…" Leaving liquid fuel without specific classification, it is possible to classify equivalent fuel according to the environmental requirements once the technical circumstances have been determined. Harmonising Regulation 98/70/EC is reflected in the regulation of the minister responsible for the area prepared on the basis of subsection 58 (2) of the AAPA,[31] which is used to specify environmental requirements for fuels in the list specified with CN codes.

With the purpose of subsection 1 (1) of the LFA, the legislator has not excluded the possibility of classifying other energy products as liquid fuel, although subsection 2 (3) of the LFA gives the authority for more detailed classification to the minister of the area. The legislation specifies *expressis verbis* that "...specific list /.../ is established by..." On the basis of the legislation, the minister has, while adhering to the same provision, established the list of fuels[32] with one regulation and requires the registration of a company[33] with another. Additionally, CN has been used to assist the designation of fuel in the AAPA, LFSA and ATFEEDA.

Pursuant to subsection 3 (1) of the LFA, a person engaged in fuel handling must have the necessary technical equipment and staff. One task of the staff is manufacturing suitable fuels, selecting them for trading, understanding the need to organise conformity assessment regarding methods for sample checks and changes to properties of fuel, and performing the explanation obligation. Existence does not necessarily mean possession, rather making it available. A sufficient level thereof has to be ensured with available means and methods. It is not prohibited to guarantee any obligation[34] with agreements. Specifying a requirement for the necessary staff presumes developing a certain methodology that must already be done according to the LFA.

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[28] RT I 2005, 13, 66; RT I, 12.07.2014, 153; hereinafter referred to as LFSA.

[29] RT I 1997, 73, 1201; RT I, 12.07.2014, 18.

[30] RT I 2003, 2, 17; RT I, 30.06.2015, 1; hereinafter referred to as ATFEEDA or Alcohol, Tobacco, Fuel and Electricity Excite Duty Act.

[31] Regulation of the Minister of the Environment no. 45 of 21 June 2013 "Environmental requirements for liquid fuel, sustainability criteria for biofuel, procedure for monitoring and reporting on the compliance with environmental requirements of liquid fuel, and methodology of determining the reduction of emission of greenhouse gases arising from the use of biofuel and liquid biofuel"; **RT I, 28.06.2013, 7**; RT I, 29.07.2014, 10; hereinafter referred to as Regulation no. 45 in the text.

[32] Regulation of the Minister of Economic Affairs and Communications no. 46 of 30 June 2014 "Detailed list of fuels"; RT I, 02.07.2014, 3; hereinafter referred to as Regulation no. 46.

[33] Regulation of the Minister of Economic Affairs and Communications no. 37 of 4 May 2012 "List of fuels that require registration for handling"; RT I, 09.05.2012, 3; RT I, 05.08.2014, 20.

[34] Section 2 of the Law of Obligations Act, RT I 2001, 81, 487; RT I, 11.04.2014, 13, hereinafter referred to as LOA.

Pursuant to subsection 4 (5) of the LFA, the seller is required to ensure that the consumer has access to the information upon the sale of fuel. Such wording must be viewed as a broader definition. Submitting information to the consumer requires the service staff to have certain skills. It is necessary to perform the explanation obligation regarding the information included in the test report that enables determining conformity with the requirements of fuel and other important information regarding the intended purpose. Explaining other important information regarding the intended purpose of fuel requires a certain understanding of technology. It is important to find calculated indexes using the values of properties included in the test report, analysing the heating, starting and acceleration properties of the engine arising from fuel.

In subsection 4^2 (4) of the LFA, the reasons for increasing a security deposit, including reviewing or reconsidering the amount of a security which has already been determined, which are due to *expressis verbis* "... business plan or any other activity plan; ... solvency and timely payment of tax amounts which have fallen due; ... business reputation of business partners; ..." should be noted. The legislator has given the authority carrying out national supervision great discretionary power, which gives rise to developing relevant methods for assessing companies, thereby increasing administrative obligations and the burden of the Tax and Customs Board *(Maksu- ja Tolliamet)*.

Although requiring a security deposit is not in conflict with the purpose of article 5 of EU Regulation 98/70/EC and does not restrict the marketing of fuel complying with environmental requirements as a measure, it may be a technical standard that the Commission must be notified of in connection with limiting the principle of free trade. Upon carrying out the administrative proceeding of the Tax and Customs Board,[35] the business reputation of business partners of market entrants from other member states, other activity plans, or the ability of a member of a management or control body to operate in the sector of handling fuel pursuant to subsection 4^2 (5^1) of the LFA may not be applicable, because the provision is null and void.

Basic requirements for fuel result from Regulation no. 46 of the responsible minister established on the basis of subsection 8 (1) of the LFA, and environmental requirements result from Regulation no. 45 established on the basis of subsection 58 (2) of the AAPA. The objective of establishing basic requirements is to ensure the compliance of fuel with the purpose of using thereof and the environmental requirements. The legislator has provided the option to establish two types of environmental requirements for fuel. As such, the content of regulations has to be interpreted simultaneously in order to comply with the environmental requirements. It may be concluded that fuels specified with the law are also subject to other environment requirements in addition to the ones provided for in EU Regulation 98/70/EC. At the same time, the legislator of the Republic of Estonia, *Riigikogu*, has the right to facilitate or circumscribe the marketing of products that have not been regulated with EU law, using national technical standards to do so.

Subsections of section 9 of the LFA use the definitions "certificate of conformity" and "declaration of conformity". A certificate of conformity is a certificate issued by a conformity assessment body that attests the manufacturer's ability to manufacture fuel in compliance with EU Regulation 98/70/EC. The definition of the declaration of conformity is not in compliance with articles 3 and 4 of the same legislation. A declaration of conformity is a declaration of the manufacturer that attests the conformity of the product with all the requirements of EU legislations. According to article 5 of 768/2008/EC, the manufacturer must certify the compliance of the product with a declaration if so required by EU legislation. The submission of the manufacturer's declaration of conformity is associated with certifying the CE conformity marking, which is an integral part of this process. The objective of the CE-marking is to visibly present information on the basis of which it is presumed that the product is in compliance with the requirements provided for in EU legislation. Pursuant to article R2, obligations of the manufacturer include first drafting technical rules and then carrying out the conformity assessment procedure. Fuels belong in the area where conformity must be certified. Because the state has to ensure compliance with the requirements, this presumes comparing test protocols to applicable requirements. Although subsection 9 (6) of the LFA provides that the certificate of conformity assessment has to be reviewed every six months, EU law provides that this will also have to be carried out by a distributor if the distributor is treated as a manufacturer. A new conformity assessment procedure must be carried out upon making changes to the properties of fuel. This usually constitutes harmonising some property with a requirement or improving a property. While, in the first case, the procedure involves a sample check carried out by the distributor, the second one requires creating a new product.

In the event that there is no applicable EU legislation, the member states may establish regulations for the area of liquid fuel through national legislations. However, mutual recognition of products must be applied to ensure the free movement of goods. To ensure this, the Commission has to be notified of technical requirements that circumscribe economic activity pursuant to subsection 6 (1) of the General Part of the Economic Activities Code Act *(Majandustegevuse seadustiku üldosa*

[35] Hereinafter referred to as TCB.

seadus)[36] in conjunction with subsection 8 (1) of Regulation 98/34/EC.[37] Although it is not permitted to establish additional restrictions on the indicators of properties at a national level, the permissibility of establishing other technical requirements is not excluded.

IV. Legal practice of the European Court of Justice upon interpreting legislation of the area

The practice of the European Court of Justice arising from combined cases C-43/13[38] and C-44/13[39] interprets subsection 2 (3) of Regulation 2003/96/EC. Upon defining the term "equivalent fuel", it must be first identified how the product has been used and only then can conformity with the properties provided for in the tables of the annex to the same regulation be certified. This ensures the principle of equal treatment and that products performing the same task have been taxed at the same level. Technically, this enables not complying with the established test methods when assessing similarity, basing it instead on the technical requirements of an energy converter, bases of safe operation, which are supplemented with other measures of the precautionary principle.

The compliance of dual use fuel with environmental requirements does not have to be certified as long as it is not marketed as liquid fuel. The definition of the dual use of liquid fuel is provided for in clause 23 of decision C-426/12:[40] "... used for a purpose other than as automotive fuel or heating fuel."

In the proposal of the Advocate General of 19 July 2014 in case no. C-26/11,[41] the term of free circulation arising from article 5 of Regulation 98/70/EC on liquid fuel is interpreted in conjunction with other EU legislations. Establishing additional terms and conditions for marketing fuel compliant with the requirements of the regulation according to the principle of limiting fundamental freedom required interpretation. In his teleological interpretation, the Advocate General provides reasons for: why only the changes to the values of technical requirements have to be taken into consideration, according to the purpose of the regulation; why the purpose of the regulation is not harmonising the marketing of the whole fuel economy but rather only harmonising technical requirements across the EU. The objective of harmonisation is to prevent the use of technical requirements arising from applying different standards as a barrier to trade. As such, the restriction provided for in article 5 must only be applied to legislation that affects technical requirements. Had it been a wide-reaching prohibition on circumscribing, the legislation would have had to come up with an exception that takes the effect of article 6 into account. The exception would also have had to account for price regulation, formation of liquid fuel stock and advertisements. It is the effect of article 6 that enables the member state to establish stricter environmental requirements in its legislation, but only doing so in compliance with subsections 114 (5)–(7) of the TFEU, which requires approval from the Commission.

The preliminary ruling procedure of case C-343/09[42] addresses the precautionary principle. The complexity of taking a stand in technical matters is illustrated by the explanation provided for in clause 28: "...in particular as to the assessment of highly complex scientific and technical facts ... whereas review by the Community judicature has to be limited to verifying whether ... the legislature has manifestly exceeded the limits of its discretion." A lack of scientific information that would verify its harmful effect is not decisive upon permitting a fuel, component or additive that differs from the norm to be placed on the market. Establishing a restriction according to this principle enables preventing hazards, even though the actuality of hazards has not been fully proven, instead having been proven only to a small extent.

The sale of liquid fuel does not presume that all of the fuel being sold is transported to one place of business of the distributor and then onwards from there on the basis of accompanying documents. While subsections 6 (1), (3), (4), (6) and (7) do provide the option for the authority carrying out supervision to require the existence of documents at the registered office, it does not exclude the transfer of the object being sold on the basis of section 93 of the Law of Property Act.[43] Although the legislator is obligated to comply with the reporting requirements in order to ensure the identification of the volume of fuel

[36] RT I, 25.03.2011, 1; RT I, 29.06.2014, 8.

[37] EÜT L 204, 21.7.1998, p. 37.

[38] ELT C159, 26.5.2014, p. 9.

[39] *Ibid*.

[40] Online: http://eur-lex.europa.eu/legal-content/ET/TXT/?qid=1424888396281&uri=CELEX:62012CJ0426 (25 February 2015).

[41] The European Case Law Identifier (ECLI): ECLI:EU:C:2012:480.

[42] European Court Reports 2010 I-07027, ECLI:EU:C:2010:419.

[43] RT I 1993, 39, 590; RT I, 08.07.2014, 7; hereinafter referred to as LPA.

being sold and of the buyer, this does not affect the actual location of liquid fuel at the moment of sale. Upon complying with handling requirements, the Liquid Fuel Act does not expressly exclude the option to use provisions provided for in the LOA and LPA in the course of sale.[44] It follows that parties may comply with and implement all agreement forms when concluding their transactions, incl. authorisation, upon selling liquid fuel.

Security deposit has a legitimate purpose.[45] Security deposit is a measure that protects against value added tax evasion and is, therefore, sure to serve the public interest. However, a reasonable amount of time has to be taken into consideration when establishing, increasing and decreasing a security deposit. A person engaged in business should have enough time to create a security deposit. While an entrepreneur that is just starting out in business is able to take this into consideration already upon launching on the area of activity, this cannot be expected from an entrepreneur whose operations are already up and running. With regard to a person that is already engaged in handling liquid fuel, what is important is not just finding resources suitable to serve as a security, but also enabling the option to cease operating in the area of activity. Upon ceasing business in the sector, fuel that has already been purchased has to be sold, employment and other cooperation contracts have to be terminated or cancelled, and the company has to be deleted from the register. It is also not reasonable for the legislator to presume that entrepreneurs should already be aware of and adherent to a new law or a new provision included in already applicable legislation. *Vacatio legis* as legal certainty[46] must ensure reasonable adaptation to standards. Sufficient time for this should be clarified upon planning and carrying out necessary activities upon implementing the standard. The legislator has not given an administrative agency the obligation to establish a methodology or guideline for establishing, amending and increasing a security deposit. There is no obligation to lay down a uniform measure for establishing a security deposit. This is a shortcoming in the applicable law.

The provision and purpose of the Liquid Fuel Act should be interpreted to provide that the legislator has prescribed operating as a handler only in economic and professional activity. This can be derived from the requirements applicable to the handler. The handler must have the technical requirements and necessary staff. Expecting the consumer to comply with these requirements is not reasonable. As such, the compliance of fuel with the established requirements and the respective liability stemming from the LFA cannot be required in the event of transporting fuel intended for personal use.[47] This interpretation enables transporting a larger quantity of fuel by persons that are not handlers. Therefore, national supervision authorities cannot treat the transport of a larger quantity of fuel under a contract of partnership in a small area as handling of fuel. This also applies to fuel imported from another EU state.

V. Liability of a mandator upon establishing a supply chain

Relying on the Constitution, legal scholar Lasse Lehis highlights conflicts associated with the delegation of authorisation. These consist in the interaction between sections 4, 10, 11 and 19 of the Constitution.[48] In other words, the delegation of authorisation violates the principles of separation of powers, democratic government founded on the rule of law, circumscribing rights and freedoms, and self-realisation. The law, therefore, prescribes that liability for establishing a security for a handler lies with the TCB. Entrepreneurs actually operating with liquid fuel are, therefore, at the mercy of the TCB, who, having the respective right under specific circumstances, makes a considered decision on increasing or decreasing a security deposit. The LFA specifies neither an upper limit for a security, nor the obligation to draft a guideline for the amendment thereof. This situation facilitates the formation of monopolies, because new entrants are expected to engage in more fraud than competition. As Jõgi has pointed out, "...legal models are a very interesting chain where each following link is possible due to a previous one."[49] If the small effect of the requirement for the lower limit of share capital brought about the establishment of a requirement for a security deposit, consideration should be given to invalidating the requirement for share capital as an impractical measure, which would also facilitate competition.

The original text of the draft amendment of the LFA of 21 April 2011[50] proposed amending the terms and conditions for

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[44] RKKKo 27.09.2010, no. 3-1-1-63-10, c. 12.

[45] RKPJKo 31.01.2012, no. 3-4-1-24-11, c. 53.

[46] Constitution of the Republic of Estonia, annotated edition 2012, justification point 108 (4). Online: http://www.pohiseadus.ee/pg-108 (20 March 2015).

[47] RKKKo 09.03.2009, no. 3-1-1-4-09, c. 13.

[48] L. Lehis, Maksuõigus, Juura 2012, p. 39.

[49] Jõgi, P. Õigus ja eetika: teooriad õigusest ja õiglusest 20. sajandi õigusfilosoofias, Juura Õigusteabe AS 1997, p. 221.

[50] Draft act amending the Liquid Fuel Act 24 SE. Online: http://www.riigikogu.ee/?page=eelnou& op= ems2&emshelp=true&eid=1340790&u=20150311170459. (1 March 2015).

alleviating the seller's security upon releasing fuel for consumption from the excise warehouse. Section 4[2] of the LFA established a restriction that the TCB may consider this only after 1 January 2013. Among others, the Constitutional Committee of the *Riigikogu* has been asked to provide an opinion in the matter. In clause 2.2 of his response, Rait Maruste has deemed it necessary to explain the definition of lesser encumbrance through section 5 of the LFA, state supervision. Despite the use of existing verification measures, tax evasion continues to be intensive enough. It follows that the state has verified the provisions of section 3 of the LFA with sufficient efficiency, paying particular attention to organisational and technical conditions, and these have not been effective. However, in its following response, the Constitutional Committee admits that it is not possible to differentiate between the 370 companies entered in the register of economic activities according to areas of activity within the sector. In other words, it is not possible to differentiate between who engages in releasing fuel for consumption and who engages in tax warehousing. If this claim holds true, attention should first be given to finding out how the executive power has understood the purpose of the provision of the LFA prepared by the legislator and which measures have the supervisory authorities been using so far to identify conformity with the provision of section 3 of the LFA.

Taking the purchase of automotive fuel as the basis of an authorisation agreement enables identifying the actual creators of long supply chains, where intermediate distributors reduce the value added tax obligation by way of fraudulent invoices. Today, every buyer is able to justify his involvement in the scam only by giving an affirmative answer to the seller's offer and complying with the duty of care. Thereby he has met all the obligations arising from the law.

Subsection 3 (1) and clause 4 (1) 4) of the LFA in conjunction enable interpreting the legislator's will to obligate the distributor to show other technical rules that usually accompany the area in addition to complying with requirements of liquid fuel established by the responsible minister. Other important information regarding the use of liquid fuel can be identified and explanations can be given regarding thereof only by an expert in the area. The handler must, therefore, be more familiar with the most often described circumstances of liquid fuel being sold than the precepts arising from the EU legislations or standards provide for.

Finding adequate evidence is important for identifying tax evasion. Therefore, the best method for this is not identifying the supply chain but rather identifying the creator of the supply chain or a person who has caused the circumstances that enabled creating the supply chain. In other words, it must be possible to identify the mandator.

How parties have acted towards one another is not important for preventing tax evasion. What is important is whether the parties have entered into an authorisation agreement or some other type of agreement to purchase liquid fuel. In order to identify the circumstances of authorisation, it must be ruled out that the buyer who acts as a handler of liquid fuel has purchased what has been offered and has instead given the order to create or intermediate a product that has the properties unique to the fuel being distributed by him. Giving an order is described by giving instructions[51] on what the product to be purchased should be like. In this case, the mandatary can only mediate automotive fuel that meets the conditions established by the mandator. It is not important whether or not the manufacturer and distributor of liquid fuel have entered into an authorisation agreement, because the supply chain in this case is short and a deduction of input tax does not take place within a long supply chain, thereby being easier to check for the TCB. Giving an order is characterised by establishing standard indicators on liquid fuel by the distributor. The task of the distributor's staff is to identify these indicators, disclose them with technical means and give intermediaries or mandataries the task of purchasing them. The intermediary must comply with the duty of care and notification obligation before the mandator. As the LFA provides that the country of origin of liquid fuel must be known, the mandatary is obligated to identify the circumstances related to the fuel. For this, a certificate of conformity must be perused and carriers must be identified. Although the mandator may claim that the mandatary has failed to perform his obligations, he is connected to creating a supply chain and has chosen persons that act inappropriately to serve as mandataries.

Although exact verification of creating a supply chain may be too burdensome and complicated for an administrative authority, the TCB may consider increasing a security deposit without an established upper limit due to the distributor's failure to comply with the duty of care arising from the LFA. It must not be forgotten that each sale in a long supply chain must involve an expert that confirms the conformity of liquid fuel to the buyer's requirements. While a company may be established by any person with active legal capacity, working as an expert requires acquiring specialisation at a certain level.

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[51] Varul, P. jt. Võlaõigusseadus II. Kommenteeritud väljaanne, Tallinn, Juura, 2007, p. 2.

VI. Conclusions and proposals *de lege ferenda*

Proposals to amend the law are aimed at determining the area of handling fuel more exactly. According to the precautionary principle that is familiar from the European Union (including German) law, the state also has to adhere to the explanation obligation regarding the product when handling fuel. Since, pursuant to the applicable law, any type of fuel can be taxed according to its place of use, irrespective of the raw material and type of production, such handlers must be subject to the same security requirements and provisions accompanying the explanation obligation, taking into consideration the principle of equal treatment of persons. The option to establish qualification levels of competent staff have been added and legal questions that have arisen from the performance of the explanation obligation have been specified (including preparing standard indicators of fuel and submitting them before the purchase).

Although it should be possible to tie the legal decision to the law, it is necessary to use the entire subject matter that may influence the matter when making a fair decision.[52] New measures must be in accordance with the principle of proportionality arising from section 11 of the Constitution, while being appropriate, necessary and moderate. Public interest is achievable with a measure that is in accordance with the Constitution, that leads to achieving the objective, that is necessary in the society, that is the only existing solution, and that takes the importance of the objective into account compared to interference with fundamental rights.

Proposal 1. *Subsection 1 (1) of the LFA. The Act establishes the bases and procedure for handling fuel, the arrangements for exercising state supervision and the liability for violations of the Act.*

The amendment prescribes equal treatment of all handlers irrespective of the type of fuel. Taking into consideration the technical and environmental protection requirements of the energy converter, equivalent fuel requires regulation to at least the same extent as commonly used automotive fuel. Principles of calculating and collecting national taxes arise from other acts, and a more accurate registration of the competence of the handler's staff and persons operating on a broad area of activity is important.

Proposal 2. *Subsection 1 (3^2) of the LFA ... does not govern the sales of fuel, excl. with regard to the explanation obligation of standard conditions of fuel, by a government authority...*

The explanatory memorandum to the act[53] does not specify how the standard indicators of fuel can be identified and the obligation of explanation can be complied with. Government authorities may be released from performing the obligation of security and registration with regard to the requirements of non-technical equipment and personnel. Upon the sale of fuel, the state should be treated on equal grounds with the distributor.

Proposal 3. *Subsection 2 (3) of the LFA. Operating as a handler of fuel requires registration in the register of economic activities.*

The requirement to register a handler of any type of fuel enables identifying the availability of competent staff, the scope of complying with the obligation of explanation and the level of awareness among persons carrying out supervision. In comparison, according to section 1 of the German legislation BImSchV (2014), the area of activity has been described in addition to the CN code as follows: "zum Betrieb von … bestimmt ist".

Proposal 4. *Subsection 3 (1) of the LFA. Persons engaged in fuel handling (hereinafter, 'handlers') must have necessary technical equipment and staff to ensure compliance with the requirements arising from this Act. Competency level of staff performing the explanation obligations of fuel being handled and establishing the standard conditions is specified with a regulation by the responsible minister.*

Requiring certificates to verify qualification or professional skills is nothing extraordinary.[54] Issuing certificates can be organised by SA Kutsekoda, whose activities are supported by universities and other institutions of higher education. With a regulation, the minister can specify[55] the provided list of staff if it is set out accordingly in the legislation. The handler's compliance with

[52] Aarnio, A. Õiguse tõlgendamise teooria. Õigusteabe AS Juura 1996, p. 175.

[53] Explanatory amendment to the draft act amending the Liquid Fuel Act and the Ambient Air Protection Act, SE 675. Online: http://www.riigikogu.ee/?page=eelnou&op=ems&eid=da929829-584b-495f-b983-4a949eff5f2b. (1 March 2015); c. 10.

[54] Obligation to ensure professional training for pharmacists and assistant pharmacists arising from subsection 45 (4^2) of the Medicinal Products Act – RT I 2005, 2, 4; RT I, 10.03.2015, 23.

[55] Subsection 78 (4) of the Electronic Communications Act" In order to ensure access to information, the minister responsible for the area may specify the content and form of information to be made available to the public pursuant to subsection (1) of this section and the manner of making the specified information available to the public." Electronic Communications Act – RT I 2004, 87, 593; RT I, 30.12.2014, 7.

the provisions of clause 4 (1) 4), subsection 4 (2) and sections 8 and 9 of the LFA presumes professional competency, e.g. knowing the technical properties of automotive fuel and engines. Taking into consideration the development of scientific equipment, it is not reasonable to provide the standard of technology as a final list in the legislation. A lay person does not have to understand why it is not recommended to use motor spirit when the RON-MON difference exceeds 10 or why would distributors benefit from using 90 kPA instead of the summertime requirement of vapour pressure of 70 kPa. The holder of a professional certificate has knowledge of the properties of fuel, including liquid fuel, which makes him the most appropriate person to draft the standard indicators of the distributor's automotive fuel and give explanations. Adhering to this, standard indicators take into consideration both the requirements provided for in Regulation 98/70/EC and specifications established by the state and the company itself. In the event of cases like this, there is no need to establish an obligation to comply with the standard in legislations in order to ensure quality, and the company is liable for complying with standard indicators established by the company itself upon selling fuel.

Proposal 5. *Subsection 4 (2) of the LFA. The seller is obligated to submit to the buyer standard indicators of fuel being sold, ensure the provision of explanations concerning the properties or substitutability or biofuel content. At places of business where service personnel is not present on site (automatic filling stations), information concerning the possibilities of obtaining additional information together with a corresponding telephone number shall be displayed in a visible place.*

Pursuant to clause 14^1 (1) 2) of the Law of Obligations Act, the buyer is obligated to provide information on the main characteristics of the item before conducting a transaction when trading with a consumer. According to this principle, the consumer must be able to obtain volumes characterising the properties arising from the manufacture of fuel to be purchased and from the use of the engine at the filling station before making the purchase. Earlier wording enabled the seller to provide explanations with a long delay, which meant that verifying the accuracy of information could have proved to be impossible due to the speed of consuming fuel in the energy converter.

Proposal 6. *Subsection 8 (1) of the LFA. The handler has and shall prepare standard indicators for fuel to be purchased, taking into consideration the development of technology, the opportunities of using as a fuel, and environmental requirements.*

The legislation must provide for conditions that help handlers to emphasise the quality of their fuel. Forwarding standard indicators of fuel to the customer and adhering to them is not complicated and excessively burdensome, considering the possibilities of contemporary information technology. This ensures a more exact compliance with the explanation obligation of the distributor. It must be presumed that when selecting values for standard indicators, the distributor's necessary staff has carefully considered which properties require the most attention for expressing the best properties of automotive fuel being sold. Environmental requirements of Regulation 98/70/EC to be harmonised have been established with a regulation of the Minister of the Environment on the basis of subsection 58 (2) of the AAPA. Repeating them by a minister of another area causes a lack of legal clarity. Establishing standard indicators creates a basis for identifying the liability of a mandator. The quality of fuel cannot be presumed upon complying with applicable requirements of liquid fuel, because there are no harmonised standards that would regulate the sector. Only significant limitations arising from environmental sustainability and the engine have been met, which does not specify whether the fuel has low, average or high quality. Analyses of motor oil refer to a content of residues in low quality automotive fuel. As such, oil must already be replaced before reaching 16,000 km and not at 32,000 km as required by manufacturers of engines. Composition of reliance refers to an objective part of the composition of liability based on reliance.[56] Estonian distributors of liquid fuel have distinguished the liquid fuel sold by them from other fuel only by the fuel additives added to the fuel. Disclosing the scope of other important properties characterising fuel such as standard indicators has been avoided. This situation enables selling a product that falls within the limits of EU requirements, but the effect of fuel additives has not been certified. Legislation of the Republic of Latvia has established an obligation to disclose standard indicators of fuel.[57]

The Supreme Court has not interpreted how the obligations of a manufacturer fall on/extend to a distributor of automotive fuel. According to article R6 of Regulation 768/2008/EC, the importer or distributor shall in some cases be treated as a manufacturer. The manufacturer will usually choose the liquid fuel to be used in testing of fuel additives with care. Grounds for careful selection are usually not available for Estonian distributors, and the staff of the fuel distributor is unable to give explanations regarding the selection. It is, therefore, not clear to what extent the improvement of properties has affected compliance with environmental requirements. The second circumstance of the obligation to disclose standard indicators that improves the situation is avoiding the sale of any found fuel by the distributor. Found fuel may be deemed to be liquid fuel that is compliant with environmental requirements. At the moment, any batch sold by the distributor may have a significantly different value, taken into compliance with a limit value of some property. In such cases, the actual manufacturer or the country of origin have not been verified.

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[56] U. Volens, Usaldusvastutus kui iseseisev vastutussüsteem ja selle avaldumisvormid. Tartu Ülikooli Kirjastus, 2011, p. 75.

[57] Clause 13.3 of the regulation established on the basis of article 7 of the Conformity Assessment Act. Online: http://likumi.lv/doc.php?id=11217. (27 March 2015).