Land and Money

The business environment is diverse. Therefore, this chapter covers agricultural support and related proceedings, land use conditions, construction and planning, as well as access to basic payment services, and financial supervision.

The selection of the Chancellor's activities during the reporting year 2019−2020 below mostly highlights topics about which the Chancellor was contacted more often than previously. Often, problems are so complex that, in order to achieve a result, they need to be dealt with over several years in a row. The last reporting year is characterised, in addition to a thorough analysis of the pension system (read in the chapter on "Social security"), by a considerably increased number of petitions concerning problems of agriculture and rural life. Estonian farmers are patient and peaceful, they do not wish to argue with the state or simply have no time for this. However, information received while resolving petitions by farmers shows an increase of bureaucracy in this field.

Another range of issues that has emerged concerns access to payment services and financial supervision. Combating money laundering is undoubtedly an important activity but it cannot disregard people's fundamental rights. How to ensure that a bank does not rashly close a person's bank account? How could and should potential disputes between a bank and a client be resolved? These questions are also important in combating money laundering because leaving someone without a bank account with the aim of combating money laundering does not resolve problems but rather creates new ones. In dealings without a bank account, more transactions are conducted in cash, the source and use of which is significantly more difficult to control than use of a bank account.

Certainly, the Chancellor has also not overlooked issues concerning taxation and economic activities or the environment, but conclusions on those topics can be drawn in a year's time.

Public space

The role of rural municipalities, towns and cities

Rural municipalities, towns and cities have a substantial role in designing public space and also in using some public resources. Local authorities organise spatial planning, issue design

specifications, building permits and occupancy permits, and carry out construction supervision. They must also ensure that an environment suitable for local people is preserved.

Often different and opposing interests clash in designing public space. A local authority must protect the public interest while also taking into account people's fundamental rights. Finding a compromise that satisfies everyone may be difficult and sometimes even impossible. This makes it all the more important to observe the rules laid down by law and make a well-considered and justified decision.

The Chancellor has had to explain the binding nature of a detailed spatial plan. A detailed spatial plan is binding in its entirety: once its implementation has started, all its conditions must be complied with. A detailed plan may be the result of difficult compromises, and some conditions may have been inserted in a detailed spatial plan to protecting persons' interests. Certainly, not all the conditions in a detailed spatial plan are necessarily to the liking of a developer. However, in all the proceedings within its competence a local authority must ensure compliance with the detailed spatial plan. Sometimes it may take years from the moment of establishing a spatial plan to implementing it. If vital needs or interests have changed over time, the detailed spatial plan also has to be amended or declared partially invalid. As an exception, to the extent specified by law a detailed spatial plan may also be amended by design specifications issued in an open procedure.

Although laws and regulations provide a list of documents that may be required in applying for a building permit or occupancy permit, this does not mean that all those documents should always and absolutely be requested. The Chancellor is of the opinion that those documents should be requested that correspond to the purpose of the proceedings, and reasons for requesting them should also be given if necessary. No relief from the duty of reasoning can be provided even if a rural municipality, town or city establishes administrative rules regulating the work of its officials and listing the documents required in proceedings for a building and occupancy permit. The general principles of administrative procedure must be respected in proceedings for building and occupancy permits, and the proceedings must be organised in line with the purpose, effectively, as simply and swiftly as possible, and by avoiding any unnecessary expense or inconvenience. All procedural steps arranged by a rural municipality, town or city and all the requirements imposed on persons within the proceedings must be lawful, appropriate, necessary and proportionate. It has to be understood that compliance with each requirement generally requires additional time and

often also money. It is incompatible with the principle of good administration if unjustified requirements lead to additional costs.

When issuing a building permit, it should also be considered whether and what requirements need to be imposed to protect the rights of others. Construction may entail various nuisances: for example noise, which cannot be avoided. According to the Chancellor's assessment, a condition may be attached to a building permit to restrict the timeframe of causing noise and/or compel use of measures to reduce noise. Issuing a building permit need not be limited to merely taking account of the regulation on night-time peace laid down in § 56(2) of the Law Enforcement Act. For instance, noisy construction work in the vicinity of an educational institution may be restricted so that it disturbs instruction as little as possible. Such an additional condition in a building permit also means that § 56(1) and (2) of the Law Enforcement Act would not be applied (as set out in § 56(3) clause 2 of the Act).

Real estate developments affect consumption of common water resources, and if no directions are given in real estate development the living environment may deteriorate. Even now there is a shortage of good-quality drinking water in some places in Estonia. Ground water reserves are limited and must be used economically. Therefore, a local authority should not promote use of ground water for irrigation.

Building regulations

Under previous laws, local authorities were also allowed to rely on their own regulations in building and planning activities. For example, rural municipalities, towns and cities are allowed by law (§ 19(4) of the Building Act; § 5 of the Planning Act) to lay down their own building regulation. Inter alia, regulation of planning and construction law procedures under a municipality's regulation was allowed, including setting procedural deadlines.

Current laws lay down procedural issues with sufficient detail, so that rural municipalities, towns and cities no longer need to establish their own rules. The Riigikogu has changed the legislative provisions on deadlines as well as procedure, i.e. some previously existing procedures no longer exist (for instance, written consent procedure, simplified proceedings for a spatial plan). Therefore, building regulations can no longer be implemented in compliance with the law: they may be misleading and reduce legal clarity. On that basis, the Riigikogu laid down by the Act on Implementing the Building Code and the Planning Act that by 1 July 2017, at the latest, rural municipalities, towns and cities had to bring their building

regulations into line with the laws. Most rural municipalities, towns and cities have complied with this duty, yet the Chancellor had to issue a separate precept on this to several local authorities (Tõrva rural municipality, Kastre rural municipality, Räpina rural municipality, Otepää rural municipality, Mustvee rural municipality, Rakvere rural municipality, Kehtna rural municipality, Narva-Jõesuu town, Võru rural municipality, Raasiku rural municipality, Keila town, Ruhnu rural municipality, Jõhvi rural municipality, Maardu town). Most rural municipalities and towns have complied with the Chancellor's recommendation and brought their building regulations into line with the law. In many cases, amending the building regulations has been delayed due to the administrative reform.

Local authorities' right of self-organisation still allows them to regulate certain issues of planning and building law. Primarily, this includes the right to regulate the working arrangements and competence of rural municipal, town and city agencies and officials. Legislation established by rural municipalities, towns and cities must be in conformity with the law. Under Tallinn city building regulation, the city may require submission of a draft before a building design (i.e. prior to applying for a building permit) and may process it at its own discretion. The Chancellor made a proposal to the city to amend the building regulation because laws do not prescribe such a procedure preceding the building permit procedure. The Chancellor found that the draft procedure was not transparent, its result was not foreseeable, and it made the process of obtaining a building permit unjustifiably burdensome and time-consuming. The law prescribes a planning procedure so as to exert a significant influence on the spatial development in a city.

Toleration compensation for utility networks and remuneration paid on expropriation

The Chancellor has often been asked about the so-called 'toleration' payment for utility networks located on someone's immovable but belonging to another person. Primarily, people's petitions have been motivated by the legislative amendment entering into force on 1 January 2019, under which toleration compensation depends on the purpose of land use and on the type of utility network located on the land. For example, the law no longer lays down a periodic toleration payment for tolerating an electric power cable line located on commercial land and residential land. The law proceeds from the premise that even though a cable line on such a land unit interferes with the right to property, as a rule this does not preclude using the land for its current designated purpose. This solution is compatible with the Constitution.

To construct some buildings or sites in the public interest, it is inevitably necessary to

expropriate land in private ownership. The Acquisition of Immovables in Public Interest Act has been in force for a short period (as of 1 July 2018) and the practice of implementing and interpreting it is still developing. Although regulatory provisions promote expropriation of land based on agreement and also lay down compensation in the case of agreement, it is inevitable that sometimes no agreement is reached. Primarily, this is prevented by different understanding of the value of land to be expropriated.

The Chancellor has received complaints that the price offered for expropriation does not cover the business income envisaged in the owner's business plan and lost due to expropriation. The income envisaged in the business plan is, first and foremost, a forecast which might never become a reality. The Constitution does not enable the conclusion that the Acquisition of Immovables in Public Interest Act should necessarily contain different regulatory provisions and require mandatory compensation of lost income envisaged in a business plan. The law lays down the procedure for resolving these disputes: if a person disagrees with the price offered for expropriation of land, they should have recourse to the court. This is also stipulated by § 32(1) of the Constitution.

The owner's home may be located on land to be expropriated in the public interest, so the law provides for a possibility of additional compensation if agreement is reached. The wording of the law does not specify the conditions for paying that compensation. For example, it is not clear whether the owner themselves should live in the dwelling subject to expropriation or whether the owner's family members could also be entitled to additional compensation regardless of whether they form a common household with the owner or are a separate family. The fact that the law does not specify the conditions for paying additional compensation does not render the law unconstitutional.

Rural entrepreneurship

Life in rural areas remains and develops only thanks to people who are willing to live in the countryside, and engage in farming or other entrepreneurship there. Communication with the authorities, including applying for support and verification procedures should not become unnecessarily burdensome.

Work in the fields generally begins in spring and ends in autumn. During that time, farmers have to be mostly active in the fields, sheds and pastures, not sitting at a computer and filling out forms sent by government agencies. Therefore the Agricultural Registers and Information

Bureau (PRIA) should not force a farmer to check their parcels and maps literally in springtime. In the same way, an official from the Veterinary and Food Board should not come to a livestock shed to count sheep at the busiest time when animals are giving birth. This kind of ill-considered organisation of work most of all affects small producers who cannot hire a separate person to manage paperwork and work at the computer. Agencies must better take into consideration farmers' day-to-day work, so that the state's inability to plan work would not impede legitimate entrepreneurship.

Review of support applications must proceed from the purpose of support. The executive cannot arbitrarily and without a legal basis impose additional conditions on applicants for obtaining support. The conditions for support must be fit for purpose and must be capable of fulfilment.

For example, § 7(7) of the Minister of Agriculture Regulation contains the requirement that the keeper of an animal must submit data to the register of farm animals within seven days.

So if one farmer sells to another a herd of several hundred animals, the new owner must enter several hundred animals in the register of farm animals within seven days. According to farmers, it is not possible to fulfil this requirement within seven days unless the seller of the herd previously carries out the necessary steps for this in the register. At the same time, the new owner of the herd may lose agricultural support if the entry in the register is late. When setting the conditions for support, the Ministry of Rural Affairs should take better account of cases occurring in reality and real-life circumstances.

In the course of an inspection by PRIA, a checklist for fields is filled out manually on the spot about the circumstances that a PRIA specialist found in the field, and photographs are taken. Only after the on-the-spot check would PRIA ascertain shortcomings found in the fields, draw up a checklist on this and send it to the applicant farmer for examination. PRIA checklists are drawn up as a table which is difficult to read, and so a farmer often does not understand what problem exactly PRIA is raising.

Farmers are paid support through a decision made on the basis of the checklist. Therefore, a farmer must clearly understand what exactly PRIA is reproaching them for. The checklist should also describe the consequences that the shortcomings ascertained may bring about. The farmer must also receive clear information as to how and during what period they can submit their objections prior to the making of a decision.

The Chancellor has also received information that PRIA is not always ready to hear farmers during extra-judicial challenge proceedings. The Administrative Procedure Act and the principle of good administration stipulate that a person must always be given this opportunity and a reasonable hearing must be substantive and not a mere formality. For a farmer looking for an explanation from PRIA a meeting with PRIA lawyer is not sufficient. A PRIA official with substantive knowledge of land cultivation, growing arable crops, etc., should also be present at the meeting. Probably, the discussion and dispute are substantive and highly practical, so that the reasoning and objections should also relate to the particular case and be substantive.

PRIA's practice of amending administrative acts is also not compatible with the principle of good administration. An administrative act that has already been contested and is partially amended cannot be annulled in its entirety so as to newly adopt it in a partially unamended form. If a contested administrative act is annulled and readopted in a partially amended form the person would in fact have to contest the readopted administrative act for the second time. The administrative act which actually annuls the previous administrative act cannot be entitled as an amendment of the administrative act either, as this would be misleading. In particular, if an administrative act issued in respect of many persons is substantively amended only, for example, in respect of person A. If persons B and C have completed the mandatory extra-judicial challenge proceedings and filed a complaint with the court, they should again contest the same administrative act and complete the administrative challenge proceedings before having recourse to the court.

Several problems have arisen in connection with granting use of state land. Under the Land Reform Act, usufruct of state-owned arable land could be transferred to a family member only if the family member operated as a sole proprietor. This was so even if the family member was engaged in agricultural production in the form of a private limited company or public limited company. Due to this statutory requirement, in that case the generation taking over agricultural production had to begin operating as a sole proprietor. This kind of

arrangement brought about the obligation to keep accounts for two different types of entrepreneurship. The Chancellor made a proposal to the Riigikogu Rural Affairs Committee to consider amending the law. The Riigikogu has already amended the Land Reform Act and the problem should now be resolved.

Another problem that arose is also related to usufruct contracts. For years, many tenants of arable land have been able to apply for agricultural support from PRIA. However, during the past year PRIA has changed its administrative practice and now refuses to pay support to producers who for years have cultivated state-owned arable land on which usufruct has been established and which usufructuaries have leased to them. PRIA is also reclaiming previously paid support from producers.

PRIA explained the change of administrative practice by the fact that a check of area payments and payment applications revealed problems with land use rights. However, it is incomprehensible why PRIA had not noticed those problems before as the arable lands in question have belonged to the state since as long ago as the land reform. Farmers who have been cultivating these lands for years cannot understand how the state, having paid them support for cultivating state-owned arable land, has now suddenly found that paying the support is no longer possible and is reclaiming the support previously paid.

With regard to all area payments, the requirement applies that to be eligible for support a legal basis for land use must exist. PRIA interprets this so that if the applicant is not a usufructuary of state land but is only on the basis of a lease contract cultivating arable land subject to usufruct, then no support can be applied for that land. At the same time, legislation does not specify what a legal basis for land use means in terms of applying for support. Nor is it specified that state-owned arable land on which a usufruct has been established and which has then been leased is not deemed eligible for support. Previous administrative practice has created a legitimate expectation in the applicants that the state agrees with cultivation of its arable land subject to usufruct even if this takes place on the basis of a contract of lease entered into with the usufructuary.

Such an abrupt change of administrative practice without amending legislation is not compatible with the principles of good administration, legal certainty or legitimate expectations. In its decisions PRIA must take into account the fact that the agency as the representative of the state had to have at its disposal information on state-owned arable land on which usufruct had been established. The administrative court must now assess whether

PRIA decisions based on which support paid in previous years is reclaimed from farmers are lawful.

Problems still exist with cadastral records of lands, which has resulted in violation of people's right to property. For years, the state has carried out land reform in a manner that has allowed lack of clarity concerning boundaries of immovables, and so the state must now deal with the consequences in a way that does not violate persons' right to property. If activities are carried out without precisely knowing the boundaries of an immovable, it may happen that, for instance, a cycle and pedestrian track is built on someone else's land or trees are cut down from someone else's plot.

Land surveyors cannot be held responsible for shortcomings in an administrative authority's earlier technical capability or work arrangements either. If previously inspection procedures could not be carried out with sufficient thoroughness, now a possibility should be reckoned with that the state will have to organise control measurements at its own expense.

The state must also respect people's fundamental right to property when planning roads, registering forest notifications or carrying out supervision over hunting.

Banking

Access to payment services

Several people and companies have complained to the Chancellor that banks had restricted their use of basic payment services (internet bank, card payments and ATM) or closed their bank account and refused to open a new account.

Undoubtedly, this puts these people and companies in a difficult situation as without a bank account it is impossible, for example, to pay for utilities or make other necessary payments. Economic activities of companies have essentially stopped after closure of their bank accounts, or they even have to close down completely.

Closing a bank account also restricts a person's right of recourse to the court to protect their rights. State fees must be paid by bank transfer, or a person may also need paid legal assistance and a payment channel to make that payment. Moreover, hasty closure of bank accounts neither promotes the state's economic development nor increases social well-being.

The desire of banks to mitigate possible risks can be understood. The fight against money laundering must be systematic. However, it is not legitimate if under cover of this people are deprived of access to basic payment services and legal remedies, thereby creating a new basis for their social and economic exclusion.

In a memorandum to the Minister of Finance, the Chancellor noted that the requirements of combating money laundering may not be used as a pretext to ignore financially less attractive persons (including, for instance, tax debtors or people owing money in enforcement proceedings). Banks may find it less attractive to open an account for a politically exposed person since this involves elevated due diligence for the bank, and to comply with it the bank needs to incur more expenses than usual.

Although under the Credit Institutions Act banks are allowed to choose their clients, the right of choice of the banks in the case of natural persons is restricted by the Law of Obligations Act . This law obliges a bank to enter into a basic payment service contract with a consumer lawfully residing in the European Union in the event of justified interest of a consumer.

Within the meaning of the Emergency Act, payment services are vital services whose continuity is ensured by the Bank of Estonia. Thus, restriction of basic payment services (including closure of bank accounts) amounts to restricting people's access to vital services which is particularly important in a crisis situation (e.g. in the event of a disease outbreak) where a person might not have any other possibility to pay for purchases.

On that basis, a bank must enter into a payment service contract and open an account for a person in respect of whom no money laundering and terrorist financing suspicion exists. Also, opening a bank account cannot be refused when a person and the contract conditions sought by them conform to the statutory requirements, the bank's general terms and conditions for services or the standard conditions for provision of payment services.

The bank must ensure that a person can use basic payment services to the extent of the unseized amount. Provision of basic payment services may not be restricted in any manner (including the number of transactions), and the range of services offered under a payment service contract must remain the same (§ 710^1(9) and (10) Law of Obligations Act). On that basis, it is not lawful to restrict the right of an enforcement proceedings debtor to make payments with a debit card, transactions in an internet bank, and withdraw cash from an ATM.

The Consumer Protection and Technical Regulatory Authority in its proceedings ascertained that only one bank offering the vital payment service (AS SEB Bank) ensured a natural person all the basic payment services to the extent of the unseized amount. Luminor Bank, Swedbank as well as LHV Bank have all restricted payment services. Supervision of the banks by the Consumer Protection and Technical Regulatory Authority is still pending.

Under § 115(5) of the Code of Enforcement Procedure, if a bailiff has sent an instrument of seizure of a debtor's account to a bank for enforcement, the instrument of seizure is also deemed to be valid in respect of accounts opened by the debtor in the future. Subsection (5^1) of the same section specifies that a bank may also refuse to open an account for a debtor if an instrument of seizure received from a bailiff is subject to enforcement in the same bank regarding an account of the debtor. However, § 115(5^1) of the Code of Enforcement Procedure does not prohibit a bank from opening an account if the person does not have an existing account in that bank. Contrary to the Code of Enforcement Procedure, the Taxation Act stipulates (§ 131(5) of the Act) that a bank is prohibited from opening a bank account for a taxable person if an order of a tax authority concerning seizure of the bank account of the taxable person has been received.

Thus, current legislative provisions are contradictory. Section 115(5^1) of the Code of Enforcement Procedure, in principle, allows opening an account for a debtor, whereas § 131(5) of the Taxation Act precludes this for certain persons. Moreover, the Law of Obligations Act does not provide for a possibility to refuse to open an account for an enforcement proceedings debtor or a tax debtor. Under the Law of Obligations Act, nor can an account of debtors be closed or their access to basic payment services restricted,

Restrictions related to a bank account even further increase a debtor's financial exclusion and complicate the payment of debt. Based on the Payment Accounts Directive and

recommendations by the European Commission, such restrictions should be avoided. Due to these restrictions, people may find themselves in a particularly difficult situation first of all in the event of a larger crisis.

The Chancellor found that the Minister of Finance should review the rules in the Code of Enforcement Procedure and the Taxation Act and ensure that enforcement proceedings debtors as well as tax debtors have access to an account and that they can also use basic payment services in reality.

Risk assessment and organisation of financial supervision

To combat money laundering, clear principles and control mechanisms need to be put in place which would rule out use of illegal and opaque financial schemes.

Based on § 89(9) of the Credit Institutions Act, in restricting access to the basic payment service banks rely on the provisions of § 20 and § 42(1) of the Money Laundering and Terrorist Financing Prevention Act. Under these provisions, the basis for termination of a payment service contract is change in a bank's risk appetite, i.e. change of the so-called business model. Based on the risk appetite documents drawn up by banks, a bank determines what risks it is prepared to take.

Under international standards, guidelines on combating money laundering should primarily regulate risk management. However, it is not ruled out that instead of management of risks, in fear of financial supervision the banks in Estonia have gone down the road of risk avoidance.

FATF (*Financial Action Task Force* – an international intergovernmental cooperation organisation which coordinates the fight against money laundering and terrorist financing) recommends applying an integrated risk-based approach by banks because money laundering risks are not the same in all cases. Even though a client may have a high risk level, they do not necessarily engage in money laundering or terrorist financing. In order to verify the possible risks of money laundering related to high-risk clients, enhanced due diligence measures need to be applied.

FATF and the Moneyval Report recommend banks using risk management instead of risk avoidance. Termination of a client relationship should be assessed on a case-by-case basis and can be justified only where risks of money laundering and terrorist financing cannot be

mitigated (point 7).

Based on the foregoing, the Chancellor contacted the Financial Supervision Authority in order to draw attention to closing accounts of legal persons (because of change in the risk appetite of banks), which neither promotes development of the national economy nor increases social well-being. Suspicions related to justification of closing the accounts should be verified in the course of financial supervision and, where necessary, possibilities to resolve the problems should be sought.

Effective and reliable functioning of banks is essential for economic development, as well as to ensure the well-being of people and economic stability. Effectiveness and reliability of banks should mean simultaneously combating money laundering as well as smooth and swift bank transactions in lawful economic activity. In this respect, a balance should be found between a bank's need for information and a person's duty to submit any materials a bank requests.

The Financial Supervision Authority carries out financial supervision over banks in order to enhance the stability, reliability, transparency and efficiency of the financial sector, to reduce systemic risks and to promote prevention of abuse of the financial sector for criminal purposes, with a view to protecting the interests of clients and investors by safeguarding their financial resources, and thereby supporting the stability of the Estonian monetary system (Financial Supervision Authority Act § 3(1)). Under § 3(3) of the Financial Supervision Authority Act, financial supervision is conducted only in the public interest. The Supreme Court has held that the purpose of financial supervision is to ensure that a credit institution operates in compliance with the current law and does not harm the public interest.

The reliability of the financial sector is guaranteed by the state through appropriate laws as well as state financial supervision. Supervision must ensure that the financial sector and its participants conform to requirements, and the supervisory authorities intervene decisively if the aims of financial supervision so require. The function of the Financial Supervision Authority is, inter alia, to ensure that the financial sector functions transparently and effectively and, in addition to fulfilling other aims, also protects the interests of clients. The Financial Supervision Authority also guards over compliance with the requirements of legislation in combating money laundering. Review of legality should not be control of lawfulness in an individual case, which is ruled out by § 3(3) of the Financial Supervision Authority Act. However, this does not mean that it is not in the public interest to group similar

individual cases and ascertain the circumstances and reasons for problems related to them, and draw generalised conclusions on that basis.

The state must ensure systematic protection of fundamental rights, and financial supervision plays an important role in this. Certainly, where necessary, the relevant area needs to be regulated but any changes must fit in with the rest of the legal order. Many questions have been raised in connection with imposing administrative fines but resolving them is complicated and requires a detailed debate.