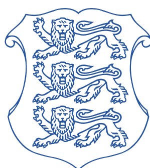

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Your: 01.09.2016 no. 4-3-27-16

Our: 22.09.2016 no. 9-2/161053/1603836

Additional opinion in constitutional review case no. 3-4-1-3-16

Honourable Chief Justice,

I stand by the positions expressed in the previous opinion and will not repeat them. I will merely submit my observations regarding additional aspects of the applications that differ from the applications submitted by the council of the rural municipality of Kõpu. In addition, in sections 6 and 7 of the opinion, I present some of the most important counter-arguments against the arguments of the other parties to the proceedings to date.

The application submitted by the council of the rural municipality of Juuru (Juuru's application) and the applications of the councils of the rural municipalities of Abja, Emmaste, Illuka, Järvakandi, Kambja, Kõo, Käina, Leisi, Loksa, Luunja, Lüganuse, Mäetaguse, Nõo, Pala, Pöide, Pühalepa, Rakke, Tudulinna, Vaivara and Ülenurme, which the council of the rural municipality of Kullamaa joined later (joint application), differ from the scope of the application submitted by the rural municipality of Kõpu mainly in terms of the following:

- it is argued (only in Juuru's application) that the Administrative Reform Act (ARA) is formally in conflict with the Constitution, referring to the requirement for preparation of a drafting intent of the draft Act;
- (only in Juuru's application) the constitutionality of the time limits established for a voluntary merger is contested and, alternatively, it is requested that the entire Administrative Reform Act be repealed;
- it is argued that upon deciding on a forced merger of local authorities the Government of the Republic cannot take into account the circumstances specified in subsection 5 of § 7 of the Territory of Estonia Administrative Division Act (TEADA) and, therefore, the rules concerning a forced merger (incl. the criterion of the minimum size of a local authority in § 3 of the ARA and §§ 9-13 of the ARA) are substantively in conflict with the Constitution.[1]

[1] In comparison with the application of the council of the rural municipality of Kõpu, the list of rules concerning the conditions of a forced merger, which is contested in the later applications, is also slightly longer, but there is no need to submit additional arguments on the basis thereof. The arguments concerning the provisions pointed out by the council of the rural municipality of Kõpu, which were made in the previous opinion of the Chancellor of Justice, also cover the constitutionality of the rules concerning a forced merger indicated in the later applications (because these rules are substantively so connected to one another).

1. Subsection 1 of § 1 of the Rules for Good Legislative Practice and Legislative Drafting (RGLPLD) indeed provides for the preparation of a legislative intent. On the other hand, clause 1 of subsection 2 of the same section states that a legislative intent is not required if the legislative proceedings of the draft need to be urgent with good reason. The urgency of the draft has been convincingly explained in the explanatory memorandum of the ARA based on the time proximity of the local elections. The urgency is inexplicitly confirmed by the arguments made in the application of the council of the rural municipality of Juuru in connection with the argument that the law leaves too little time for carrying out the proceedings (in that view, the arguments of the application are in conflict with one another). The explanatory memorandum of the ARA also refers to the previous legislative intent, which also substantively explains the reasons for the administrative territorial reform (even though the starting points are somewhat different from the solutions of the ARA). Even if there was no reason to consider the draft legislation as urgent or one could not take into account the earlier legislative intent, the ARA would not be formally in conflict with the Constitution. The following of the RGLPLD cannot have decisive importance upon assessment of the formal constitutionality of the legislation adopted by the Riigikogu. The RGLPLD have been established on the basis of subsection 3 of § 27 of the Government of the Republic Act, according to which the Government of the Republic issues regulations, among other things, for conducing and organising the affairs and work of *governmental agencies*. However, an Act does not necessarily have to originate from an intent in the government sector before being passed in the Riigikogu (even though it happens to be the case with the ARA). Thus, the rules concerning the preparation of the draft in the government sector must be taken into account with reservations upon assessing the formal constitutionality of an Act (otherwise the Government could even maliciously make a draft Act fail). Moreover, not every irregularity in the procedure results in the unconstitutionality of a legislative instrument – for that to happen, the procedural irregularity has to be considerable.[2] Even if the legislative proceedings are deemed to conflict with § 1 of the RGLPLD, it is not a serious mistake.

2. The time limits established in the ARA for the voluntary merger of local authorities are not in conflict with the constitution, because a period totalling at least six months can be deemed as sufficient. These time limits also serve the purpose of identifying the local authorities to be formed well before the local elections. Thus, declaring the time limits for voluntary mergers unconstitutional and repealing the time limits would not be justified (it could bring voluntary mergers even closer to the elections). The application to repeal the ARA on the whole is also groundless because the provisions regulating voluntary mergers are, in part, encouraging (incl. the merger grant) and, in part, arranging (a large portion of the provisions of Chapter 4), and the local authorities that voluntarily mere in the meantime have relied thereon.

3. I cannot agree with the conclusions drawn in the applications in that the Government of the Republic cannot, upon deciding the forced merger of local authorities, take into account the circumstances listed in subsection 5 of § 7 of the TEADA.[3] Firstly, the ARA does not preclude the application of the provision. In accordance with subsection 4 of § 1 of the ARA, the question should be regulated differently for the purpose of non-application of the provision. Subsection 9 of § 9 of the ARA provides for the criteria for making a forced merger decision and thereby refers to subsection 2 of § 9 of the ARA on the whole (in addition to referring to the exceptions specified in subsection 3). The third sentence of subsection 2 of § 9 of the ARA clearly refers to taking into account the circumstances specified in subsection 5 of § 7 of the TEADA. It has been done with a reference to

[2] M. Ernits. Comment 2.1.1 to § 11 of the Constitution. Available at: http://www.pohiseadus.ee/ptk-2/pg-11/ - Ü. Madise, *et al*. (ed.). Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne 2012 (Commentary to the Estonian Constitution. Available in Estonian).

[3] In that regard, the joint application is inherently controversial, because in some places it argues so for a fact, while in other places it calls into doubt the legal clarity of the very same rules.

local authorities that meet certain conditions (those who meet the minimum size criterion and those who do not and with regard to whom the exception has already been applied). This does not mean that upon deciding a merger, the circumstances listed in subsection 5 of § 7 of the TEADAS could not be taken into account on the basis of the considerations concerning the local authorities that do not meet the conditions specified in the third sentence (i.e. do not fulfil the minimum size criterion). Otherwise the merger of the latter with local authorities that meet the minimum size criterion or exception would be virtually impossible. According to the third sentence of subsection 2 of § 9 of the ARA, the initiation of a forced merger of such a local authority is permitted only if the alteration is also necessary and practical for the purpose of ensuring the capacity of the local authority that does not meet the minimum size criterion. In other words, the circumstances specified in subsection 5 of § 7 of the TEADA are conducive to a forced merger based on the circumstances concerning a local authority that does not meet the minimum size criterion.[4]

4. According to the first sentence of subsection 2 of § 9 of the ARA, the Government of the Republic must initiate a forced merger of a local authority that does not meet the minimum size criterion or the exceptions. But this does not mean that in such an even the forced merger must certainly be decided. The criteria for a forced merger are provided for in subsection 9 of § 9 of the ARA, which has been discussed above. It has also been clearly emphasised in the explanatory memorandum of the draft ARA (p. 15) that if the arguments that are based on subsection 5 of § 7 of the TEADA and set out in the proposal of the Government of the Republic are not founded, the Government of the Republic will terminate the merger proceedings and immediately inform the local authority thereof. The interpretation of the ARA according to which the Government of the Republic must take into account the circumstances specified in subsection 5 of § 7 of the TEADA upon making a forced merger decision, is more in line with the general purpose of the right of discretion (the right of discretion is granted only if the legislature also admits the admissibility of different choices) as well as the requirement for giving preference to an interpretation that takes the constitutional values more into account (cf. the judgment of the Supreme Court en banc of 22 February 2005 in case 3-2-1-73-04, para. 36). The interpretation according to which the Government of the Republic can, upon making a forced merger decision, take the circumstances specified in subsection 5 of § 7 of the TEADA into account, ensures the restricted legal subjecthood guarantees of the local authority (in comparison with the interpretation that would not allow to take these circumstances into account). In addition, under § 7 of the ARA, in the event of a voluntary merger, clarifications regarding taking into account the effects and circumstances specified in subsection 5 of § 7 of the TEADA must be submitted as well. If the minimum size criterion (§ 3 of the ARA) and the exceptions (subsection 2 of § 9 of the ARA) were the only criteria that must be taken into account in an administrative reform, such a requirement would not have any point. Additionally, clauses 2 and 3 of subsection 2 of § 5 of the ARA provide that the regional committees formed by the Government of the Republic will give an opinion on the consideration of the effects and circumstances specified in subsection 5 of § 7 of the TEADA as well as on the consideration of the characteristics, the compliance of the inhabitation system and the territorial integrity of the region to the local authorities and to the Ministry of Finance. Overall, the legislation is not legally unclear in that regard.

5. The arguments contained in the applications, according to which the implementing act should, in terms of the time, have been adopted close to the legislation allowing for administrative territorial alterations and the standards of provision of public services allow for better assessment of the administrative capacity of local authorities, are essentially correct. However, this does not bring about a conflict of legislation allowing for administrative territorial alterations with the Constitution, because attainment of the purposes established by the legislation (incl. the economies of scale) may also be

[4] However, a forced merger may just as well fail to take place due to a circumstance concerning, in particular, a local authority that meets the minimum size criterion.

necessary with regard to the implementation of the legislation in force.[5] It should also be noted that the legislature has established the standards of various services in area-based special Acts (e.g. social services are laid down in the Social Welfare Act). On the other hand, the establishment of standards is limited by the autonomy of local government, more specifically, by the need to adjust the performance of the function to the local circumstances (Article 4(5) of the European Charter of Local Self-Government).

6. In connection with the arguments of different parties to the proceedings, according to which, due to the time proximity of deciding a forced merger close to the time of local elections, the ARA does not result in any substantive changes in comparison with the TEADA in force to date (formation of constituencies 90 days before the elections, etc.), I would like to note the following. The fact that there has always been something in the Act in force does not mean that this Act is not in conflict with the Constitution. Additionally, the TEADA does not allow for a forced merger separate from the ARA, because the TEADA lacks provisions allowing for the substitution of the actions and expressions of intent of a council that disagrees with the forced merger, which are found in the ARA. Therefore, there is no great likelihood upon implementation of the TEADA that a local authority would dispute the regulation of the Government of the Republic, because the council itself has granted the consent thereto.[6] Problems can arise, above all, from the contestation of deciding the forced merger, not directly from the contestation of regulations related to the organisation of elections. The forced merger can result in a situation where the local elections are met with two different election procedures that are simultaneously in force, but in conflict. The council of the local authority subject to the forced merger may rely on the fact that the election steps and regulations made by itself with regard to its former territory are lawful, because it has contested (or is about to contest) the forced merger in the Supreme Court. On the other hand, the county governor has, based on subsection 9 of § 12 of the ARA, implemented the decisions and established the legislation with regard to the merged local authority.

7. In the opinion submitted on behalf of the Government of the Republic (section 2.4) it is argued that the arguments of the application of the council of the rural municipality of Kõpu regarding the organisation of elections should be disregarded to the extent that these concern the protection of the subjective rights of voters and candidates. In this regard, it must be pointed out that, according to the case law of the Supreme Court, the internal organisation of the elections is a local matter (merely the external organisation is a matter of state).[7] The legal clarity regarding the territory of the local authority where the local elections will be carried out is, therefore, directly related to the guarantees of local government – it concerns autonomy upon the internal organisation of the elections as well as, ultimately, the autonomy of local government and the guarantee of the subjective legal status. It must be pointed out separately that the time limit for making a decision on a forced merger (subsection 1 of § 13 of the ARA) and the time limit for making election steps of the council of the local authority and substitution of decisions by the county governor (subsection 9 of § 12 of the ARA) are so close that the council of the local authority may not have enough time after learning of a decision of a forced merger to take the respective steps and decisions on its own. If the local authority as a subject of law

[5] The explanatory memorandum of the ARA (p. 12) also says that the surveys that serve as the basis for the minimum criterion relied on the volume of the functions of local government, which was prescribed by the laws in force at the time.

[6] At the same time, this option is probably not completely precluded upon implementation of the TEADA (albeit unlikely in practice): for instance, it is possible that the political situation in the local authority changes following the granting of the council's consent and the opponents of the merger take power (it is, of course, a different matter as to what and how the council can contest if the earlier composition of the council had granted consent to the merger).

[7] Judgment of 9 June 2009 of the Constitutional Review Chamber of the Supreme Court in case 3-4-1-2-09, para. 33.

terminates before the results of contestation of the forced merger become clear and the elections are carried out in the territory of the merged local authority, the requirement for self-organisation is not fulfilled in reality. According to the requirement, the persons residing in the territory of the respective unit must be able to exercise the independent deciding of matters of local life via local elections (periodical legitimisation). The council of the rural municipality of Kõpu has not contested the conditions of elections, but the chance to organise elections in a constitutional manner in the first place. Therefore, the respective arguments of the application of the rural municipality of Kõpu should nevertheless be read as submitted in defence of the guarantee of local government.

Respectfully submitted,

/digitally signed/

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