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Your: 2 August 2016 no. 4-3-23-166

Our: 29 August 2016 no. 9-2/160981/1603498

Opinion in constitutional review case no. 3-4-1-2-16

Honourable Chief Justice,

The bulk of the Administrative Reform Act remains within the limits of the discretion granted to the *Riigikogu* under the Constitution. Unfortunately, the timetable established in the Administrative Reform Act (ARA) does not allow for the forced merger of local authorities in a manner compliant with the Constitution. The forced merger is to occur so close to the elections of local councils that the possible contestation of the forced merger regulation will result in a situation where candidates and voters will not learn early enough which local authority is the object of the elections. Therefore, the time limits provided for in subsection 2 of § 9 and, as provisions closely related to the former, subsection 1 of § 13 of the ARA as well as the second sentence of subsection 1 of § 9 and clause 2 of § 28 of the ARA are against the constitutional principles of legal certainty and democracy according to which subsection 1 of § 8 of the Territory of the Estonia Administrative Division Act (TEADA) does not apply to alteration of the organisation of the administrative territory initiated by the Government of the Republic.

The first sentence of subsection 1 of § 24 of the ARA is constitutional regarding payment of a merger grant in the event of a merely voluntary merger, but the threshold of covering the merger costs, which arises from the second sentence (100,000 euros) is in conflict with the financial guarantee of the local government, which arises from subsection 2 of § 154 of the Constitution.

Here it should be noted that at the given moment of time, i.e. before the situation of application of the forced merger option becomes evident,[1] the review is essentially more characteristic of abstract constitutional review, i.e. there is no opportunity to assess the aspects concerning the reasonableness of the specific forced merger. Therefore, it cannot be precluded that an assessment of the rules based on the circumstances identified following possible forced mergers may differ from the current one.

I also declare that I do not wish to discuss the matter by way of oral procedure.

First, I will discuss the admissibility of the application (I); thereafter I will identify the interference with the guarantees of local government (2.1) and assess the compliance of the contested provisions with the fundamental principles of the Constitution (2.2) and the guarantee of local government (2.3).

[1] The actual application of the forced merger option depends, among other things, on whether all the local authorities that do not meet the statutory criteria can exercise the option of a voluntary merger beforehand.

I. Admissibility of the application

1. Under § 7 of the Judicial Constitutional Review Procedure Act (JCRPA), the Supreme Court is competent to hear on the merits applications whereby two conditions are met: first, the application must be submitted by the council of a local authority and, second, the application must submit that a legal instrument specified in § 7 of the JCRPA or a provision thereof is in conflict with the constitutional guarantees of local government (judgment of 15 January 2016 of the Constitutional Review Chamber of the Supreme Court in case 3-4-1-30-15, para. 15). Without doubt, the second condition has been met: the application has been submitted with regard to an Act of Parliament and it has been argued that the Act is in conflict with the constitutional guarantees of local government, which arise from §§ 154 and 158 of the Constitution. However, there is the issue of whether the council of the rural municipality of Kõpu has submitted an application.

2. At the meeting held on 21 June 2016, the required majority of the council of the municipality of Kõpu (subsection 5 of § 45 of the Local Government Organisation Act) decided to approve Decision no. 33 "Submission of an application to the Supreme Court," but did not approve the text of the application. This arises, among other things, from the fact that section 2 of the same decision merely authorised the chairman of the council to draft the application. To the knowledge of the Chancellor of Justice, the council of the municipality of Kõpu has not approved the final text of the application afterwards.[2]

3. Usually, another body has drafted an application submitted by the council of a local authority (e.g. the administration of the rural municipality or city), but the council has still voted to approve its text (usually submitted as an exhibit of the application to the Supreme Court), making amendments to the text, where necessary.[3] By the decision, the chairman of the council has merely been authorised to sign and submit the application formulated in the manner approved by the council. Authorisation to draft an application and authorisation to submit a signed final application are substantively different things. In the first case, the text of the application has not obtained the approval of the council (majority of the members). This, in turn, has made it possible for the chairman of the council to submit the application in two different forms (see section 5).

4. The issue of whether the general authorisation granted by the council is sufficient to fulfil the requirement established in § 7 of the JCRPA ("the council may submit an application to the Supreme Court"), when a specific application is not approved, must be resolved. The council must approve the text of the legislation that needs to be adopted by the council. However, an application to the Supreme Court does not have the same legal meaning as a legal instrument. In the present case, the intent of the council is quite clearly expressed in the decision and minutes of the meeting of 21 June 2016. Section 1 of the decision contains the following order: *"To submit to the Supreme Court on the basis of § 7 of the Judicial Constitutional Review Procedure Act an application to repeal the proclaimed Administrative Reform Act, which was adopted on 7 June 2016, but has not entered into force yet, or an unconstitutional provision thereof, because the Administrative Reform Act adopted by the Riigikogu*

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[2] According to the register of documents of the municipality of Kõpu available at http://adr.nortal.com/kopuvv/, following the aforementioned meeting on 21 June 2016, the council met on 20 July 2016, but the minutes of the latter meeting do not refer to the submission of the application to the Supreme Court.

[3] See, for example, Decision no. 159 "Submission of an application to the Supreme Court and the authorisation of Kalev Kallo" made by the Tallinn City Council on 29 October 2015, Decision no. 154 "Submission of an application to the Supreme Court and the authorisation of Toomas Vitsut" made on 16 October 2014 (available at https://aktal.tallinnlv.ee/) or Decision no. 188 "Submission of an application to the Supreme Court" made by the Council of the Rural Municipality of Jõelähtme on 14 May 2015, available at http://wd.joelahtme.ee/?page=pub_view_dynobj&pid=1347338&tid=2094&u=20160824165031&desktop=1017&r_url=%2F%3Fpage%3Dpub_list_dynobj%26pid%3D%26tid%3D2094%26u%3D20160824165031.

is in conflict with the constitutional guarantees of local government." Agenda item 3 of the meeting states, among other things, the following: *"The rural municipality mayor gives an overview of the issue once more. S. Avi: Since these are the last years in the life of the rural municipality of Kõpu, it is our last chance to address the Supreme Court regarding some issues. The main motivation is that upon submission of the application we have done everything we can to retain the independence of the rural municipality of Kõpu. We are also motivated by the fact that if we ask the Supreme Court to declare the Administrative Reform Act unconstitutional and although the preparation of the application is a great legal challenge, the non-submission of an application would leave an even worse taste. At least we will be smarter and get answers to our questions. The Act has cut the time limits, which exerts pressure on negotiations between local authorities, as we here in Kõpu currently feel in relations with larger rural municipalities. Should the rural municipality be forcibly merged with another rural municipality, we will get no merger grant. Violation of the principle of equal treatment. If the sections regulating forced merger are repealed, a voluntary merger will be less tense, because there will be no end-of-the-year deadline. However, under the Territory of Estonia Administrative Division Act (adopted in 1995) a forced merger is possible if the financial situation is poor and in such an event it must be initiated one year before the elections."* Thus, the decision of the council and the minutes of the meeting by and large allow for identifying both with regard to what an opinion of the Supreme Court will be asked as well as the main motives behind it.

5. Yet it must be noted that the council authorised the submission of an application to *repeal* the Act that had not entered into force or a provision thereof (section 1 of the decision) at the moment (21 June 2016) when the Administration Reform Act had not entered into force yet (entered into force partially on 1 July 2016). However, in the case of an Act *that has not entered into force yet*, § 7 of the JCRPA entitles the council to (merely) apply for declaring the Act *unconstitutional* (repeal is an option in the case of an Act that has already entered into force). Thus, the compliance of the authorisation with law is questionable. It seems that the chairman of the council has also noticed it, because the application bearing his signature, which was submitted on 30 June 2016, before the entry into force of the Act, applies for declaring the rules unconstitutional (without applying for repeal). As such, the application of 30 June 2016 is in conflict with the wording of the authorisation granted by the council. Later, the chairman of the council submitted a modified and corrected application – in the header of the application the date is still 30 June 2016, but in the amended form it was signed on 26 July 2016. Thus, in reality the application has been submitted in the new form after the entry force of the Act, but the amended application still merely applies for declaring the Act unconstitutional.

6. In the light of the aforementioned one is bound to ask if the council agreed to such application and amendment thereof and (if applications submitted in such a manner can be considered as sufficiently legitimised by the council) the application must be considered as an application submitted for the establishment of the unconstitutionality of the Act that had not entered into force or as an application to repeal the Act that had entered into force in the meantime (in the authorisation, the goal is the repeal of the Act and it would also be more effective upon defending the guarantee of local government[4]). These questions can probably be answered by way of interpreting the application(s). On the other hand, to avoid such confusion in the future, it may be reasonable to demand that a condition for the admissibility of the application of a council be the approval of its text by the council. At the same time, should the Supreme Court find the application of the council of the rural municipality of Kõpu inadmissible, the assessment of the constitutionality of the forced merger in the manner specified in the Administrative Reform Act will be merely postponed, because in such an event the Chancellor of Justice intends to initiate constitutional review proceedings in that regard.

[4] The Supreme Court *en banc* recently extended the scope of constitutional review on the basis of the "principle of the effective protection of the legal order" (see Supreme Court *en banc* judgment of 26 April 2016 in case 3-2-1-40-15, para. 38).

7. The contested provisions are also different in the applications submitted at a different time, but that does not pose a substantive problem. In the application dated 30 June 2016, subsection 2 of § 9 and § 24 of the ARA have been contested. In the application dated 26 July 2016, the contestation of the second sentence of subsection 1 of § 9 and clause 2 of § 28 of the ARA has been added. In essence, the latter provisions have been contested to the extent according to which subsection 1 of § 8 of the Territory of Estonia Administrative Division Act (TEADA) is not applied upon amendment of the administrative territorial organisation initiated by the Government of the Republic. Since the time limits of amendment of the administrative territorial organisation initiated by the Government of the Republic given in subsection 2 of § 9 of the ADA differ from the time limit given in subsection 1 of § 8 of the TEADA, the second sentence of subsection 1 of § 9 and clause 1 of § 28 of the ARA can, to the contested extent, be deemed as substantively covered by the application submitted on 30 June 2016, because they should have been deemed as provisions closely related to the contested rules on the basis of the application (see the judgment of 9 April 2008 of the Constitutional Review Chamber of the Supreme Court in case 3-4-1-20-07, para. 16).

II. Constitutionality of the contested provisions that allow for a forced merger

2.1. Interference with the guarantees of local government

8. As a result of any administrative territorial reform the local government as such (and the types thereof, i.e. cities and rural municipalities) must be preserved, i.e. the guarantee of legal subjecthood must be ensured first. Even though the requirement of 5000 residents is considerably higher than the ordinary number of residents in many local authorities in Estonia, given their current boundaries, it nevertheless does not allow for calling into doubt the preservation of the institution of local government as such.

9. However, one must agree with the application in that the contested provisions of the Administrative Reform Act, which allow for a forced merger, interfere with the limited individual guarantee of legal subjecthood and do so regardless of whether a forced merger will be really applied in the future or not (cf. the judgment of 15 January 2016 of the Constitutional Review Chamber of the Supreme Court in case 3-4-1-30-15, para. 21). Additionally, the possibility of a forced merger already has an impact: local authorities, especially those that do not meet the statutory criteria[5] should open voluntary merger negotiations in order to prevent a later forced merger.[6]

10. Before commencing the constitutional review of the interference with the limited legal subjecthood of a local authority as a subject of law, it is reasonable to review the compliance of legislation with the fundamental principles of the Constitution, more specifically in the present case, the principles of democracy and legal certainty.

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[5] According to the Administrative Reform Act in force, the rural municipality of Kõpu cannot escape a forced merger in any way, because as of 1 January 2016 it had 643 residents according to the population register and none of the exceptions specified in subsection 3 of § 9 of the ARA were applicable to the rural municipality of Kõpu. Thus, the rural municipality of Kõpu now needs to merge voluntarily in such a manner that a local authority of at least 5000 residents is formed (§ 3 of the ARA). The rural municipality of Kõpu is already pursuing merger negotiations (as appears from the minutes of the meeting of the council of 21 June 2016).

[6] If no merger negotiations have been commenced, these must be commenced by 1 October 2016 the latest (subsection 1 of § 4 of the ARA). The applications of the councils made as a result of the negotiations must be submitted not later than by 1 January 2017 (subsection 4 of § 7 of the ARA).

2.1. Compliance of the contested forced merger provisions with the principles of democracy and legal certainty

11. Under subsection 2 of § 9 of the ARA, which was contested in the application, the councils of the local authorities with regard to whom the Government of the Republic has initiated the alteration of the administrative territorial division and boundaries of the administrative unit must submit an opinion not later than by 15 May 2017. Accordingly, it has been established in subsection 1 of § 13 of the ARA that a regulation of the Government of the Republic regarding alteration of the administrative territorial organisation of rural municipalities and cities initiated by the Government of the Republic will be adopted not later than by 15 July 2015. Given the time limit specified in subsection 2 of § 9 of the ARA, it is not likely that the final composition of local authorities will become clear well before 15 July 2017.

12. It is so close to the date of the elections of local councils (15 October 2017) that the possible contestation of the forced merger regulation will result in a situation where candidates and voters will not learn early enough which local authority is the object of the elections.[7]

13. A dispute may arise from the question of whether a regulation of the Government of the Republic adopted on the basis of subsection can be contested by a local authority in the administrative court (in the light of the case-law of the Supreme Court to date it cannot be fully ruled out that it is deemed as a general order) within the time limits provided for in the Code of Administrative Court Procedure and/or on the basis of § 7 of the JCRPA without a time limit directly in the Supreme Court. Since § 7 of the JCRPA explicitly mentions the opportunity to submit an application regarding a regulation of the Government of the Republic, a regulation of the Government of the Republic adopted on the basis of subsection 1 of § 13 of the ARA should be contestable on the same ground. Here, it is not justified to bind the possibility of the submission of an application to the Supreme Court to the issue of distinguishing between a legislative instrument and an instrument of specific application. Unlike § 142 of the Constitution, which regulates an application submitted by the Chancellor of Justice, the Constitution does not bind an application submitted by the council to the definition of a legislative instrument (in fact, the Constitution does not regulate the council's application at all). Unlike § 6, § 7 of the JCRPA does not mention 'a legislative instrument of the legislature or the executive' and therefore in the case of § 7 of the JCRPA it seems to be justified to focus merely on the form of the legal instrument. If a forced merger needs to be contested in the administrative Court (also, taking into account the time limits provided for in the Code of Administrative Procedure), the initiated court proceedings may not be completed by a reasonable time preceding the elections. If a forced merger needs to be contested on the basis of § 7 of the JCRPA, the local authority can also contest it immediately before election day.[8] Thus, legal uncertainty can surprisingly arise at the last moment before the elections. **Placing the possibility of a forced merger so close to the regular elections of local councils is in conflict with the principles of legal certainty and democracy** (cf. the judgment of 14 October 2005 of the Constitutional Review Chamber of the Supreme Court in case 3-4-1-11-05, para. 22), because in order to plan their campaign or make up their mind about for whom to vote it must be sufficiently clear early on for the candidates and the voters with regard to which local

[7] The Chancellor of Justice drew attention to it in the opinion given on the draft ARA. In the approval table annexed to the explanatory memorandum of the draft Act (available at www.riigikogu.ee), merely the following has been noted in that regard: '***Notice taken.*** *Regrettably, given the tense timetable of the reform, the risk that in the case of some merger groups formed at the initiative of the Government of the Republic the goals of the reform and the merger may not be reached by 15 October 2017 due to possible court disputes.*'

[8] Since § 7 of the JCRPA does not impose a time limit on the council, the council can submit an application until the local authority ceases to exist, i.e. until the day of announcement of the election results of the local council in accordance with subsection 1 of § 9^1 of the TEADA.

authority the elections are being held. Therefore, the time limits provided for in subsection 2 of § 9 and, as provisions closely related to the former, subsection 1 of § 13 of the ARA as well as the second sentence of subsection 1 of § 9 and clause 2 of § 28 of the ARA are in conflict with the constitutional principles of legal certainty and democracy according to which subsection 1 of § 8 of the TEADA does not apply to alteration of the organisation of the administrative territory initiated by the Government of the Republic.

14. The planned administrative territorial reform can be carried out in a constitutional manner if the legislature shifts the final decision of a forced merger to the period following the regular local elections (voluntary mergers and the election of new councils on the basis thereof can be carried out in compliance with the Constitution based on the time limits established in the Administrative Reform Act). In such an event, the elections of the council of the local authority are held in accordance with § 4 of the Local Councils Elections Act (depending on the situation, also at the time between regular elections). If a forced merger is contested on the basis of § 7 of the JCRPA, a special rule regarding the closing date of contestation of the forced merger should be established in such a manner that the aforementioned situation could not arise again.

2.2. Constitutionality of the interference with the limited individual legal subjecthood of a local authority

2.2.1. Formal constitutionality

15. In the present case there is no doubt that the ARA itself is formally constitutional. However, the compliance of enabling a forced merger with additional formal criteria needs to be examined and these criteria are the following:

- hearing the opinion of the respective local authorities (§ 158 of the Constitution);
- form appropriate to the importance.

16. Subsection 2 of § 9 of the ARA provides for giving the local authority concerned a chance to express an opinion (establishing time limits for expressing it). It is correct that the period of barely[9] three months, which remains between the initiation of the alteration of the administrative territorial organisation of local authorities and the boundaries of the administrative unit by the Government of the Republic and the closing date for the submission of an opinion thereon is quite a short time, also taking into account the duty to identify the opinion of the local residents during this period. On the other hand, the proceedings under the ARA have two stages, guiding local authorities to, for the purpose of seeking possibilities for a voluntary merger, identify and weigh the essential circumstances before the start of the proceedings carried out at the initiative of the Government of the Republic. Even though one cannot expect a local authority to have an opinion on the proposal of the Government of the Republic ready earlier on (because in the case of quite a few local authorities there are multiple merger options), certain preparations for it can nevertheless be made.

17. Even though comparative law arguments do not constitute any binding guidelines upon giving substance to the provisions of the Estonian Constitution, they may still carry some weight (order of 22 December of 2009 of the Constitutional Review Chamber of the Supreme Court in case 3-4-1-16-09, para. 42). The constitutional courts of other countries give broad discretion to the legislature in

[9] The start of the period depends on whether the Government of the Republic is able to initiate the proceedings before 15 February 2017 (which, according to subsection 2 of § 9 of the ARA, it the latest time for that purpose).

shaping the proceedings for hearing the opinion of local authorities[10] and, thereby, have accepted time limits shorter than three months, thereby taking, among other things, into account the time left from the entry into force of the act to the closing date for submission of an opinion[11] (in general, this approach resembles the requirement of a sufficient *vacatio legis*).

18. In view of the above, there is no reason to consider the time limits established in the provisions providing for the possibility of a forced merger as insufficient in the fulfilment of the requirement to hear under § 158 of the Constitution.

19. The Constitution does not regulate which state body has the right to alter the boundaries of local authorities. However, legal writings take the view (in essence, similarly to the principle of importance) that it is subject to the requirement of the form appropriate to the importance extended to it, which means that a forced merger should be based on an act of Parliament.[12] In the present situation, the legislature has established the option of a forced merger and sufficiently specified the terms of a forced merger (mainly by establishing the criterion of the minimum size of a local authority in § 3 of the ARA and possible exceptions in subsection 3 of § 9 of the ARA), in order to preclude arbitrary action by the executive. Germany, too, has taken the view that even though an administrative reform can be carried out, in principle, solely on the basis of an act of Parliament, the reform can on the ground be implemented on the basis of regulations, provided that the act of Parliament is sufficiently specific.[13]

20. Since in the Administrative Reform Act the forced merger criteria have been established by the legislature and the Government of the Republic has been given the task of implementing the criteria within the narrow framework of the act of Parliament, the requirement of the form appropriate to the importance has not been violated in the current situation.

2.2.2. Substantive constitutionality

21. In the Constitution, only § 158 touches upon the guarantee of the limited individual legal subjecthood and, according to this section, the boundaries of local authorities cannot be changed without hearing the opinion of the respective authorities. This provision explicitly only contains a procedural guarantee, which has been discussed under the formal constitutionality above (sec. 16 *et seq.*). The Constitution does not establish substantive requirements for an administrative territorial reform with equal clarity. Thus, one must ask if the option of a forced merger can substantively infringe upon the guarantee of the limited individual legal subjecthood of a specific local authority and how to assess it. According to one possible interpretation, the Constitution did indeed establish only the requirement to hear. However, the interpretation according to which the boundaries of local authorities must not be altered arbitrarily (i.e. without relevant considerations) seems to be in greater harmony with the inherent purpose of §§ 154 and 158 of the Constitution.

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[10] See, for example, judgment 2 BvR 329/97 of the German Federal Constitutional Court of 19 November 2002 (available at http://www.bverfg.de/e/rs20021119_2bvr032997.html), side note 84.

[11] A certain period preceding the entry into force of the act has even been taken into account – see judgment no. 2 BvR 329/97 of the German Federal Constitutional Court of 19 November 2002, side note 84 *et seq.* (available at http://www.bverfg.de/e/rs20021119_2bvr032997.html).

[12] Ü. Anton, Kohaliku omavalitsuse garantii Eesti Vabariigi 1992. aasta põhiseaduses (in Eng. The Guarantee of Local Government in the 1992 Constitution of the Republic of Estonia). Juridica VI/1998, pp. 305-313 (available in Estonian).

[13] Th. Maunz, G. Dürig. Kommentar zum Grundgesetz. 76. Auflage, 2015, GG Art. 28 Abs. 2, Komm. no. 153. See also judgment no. 2 BvR 329/97 of the German Federal Constitutional Court of 19 November 2002 (available at: http://www.bverfg.de/e/rs20021119_2bvr032997.html).

22. The Supreme Court has started reviewing the interference with the local government's right to self-organisation following the identification of a legitimate purpose and on the basis the principle of proportionality in three steps (suitability, necessity, moderation). In terms of an argument from comparative law it should be pointed out that the German Federal Constitutional Court has avoided the application of proportionality upon reviewing interferences with the guarantees of local government.[14] The principle of proportionality arises from § 10 of the Constitution, which is located in Chapter II of the Constitution, titled 'Fundamental Rights, Freedoms and Duties.' Chapter II of the Constitution regulates, above all, relationships between persons and authorities exercising public authority, but local authorities, being authorities who also exercise public authority, cannot rely on the provisions of the chapter in that capacity (cf. the judgment of the Constitutional Review Chamber of the Supreme Court of 19 March 2009 in case 3-4-1-17-08, para. 25). Additionally, a local authority cannot demand the application thereof in the event of interference with its guarantees on the basis of the principle of the rule of law either (compare with para. 26 in the same judgment), because according to the principle, the application of the principle of proportionality is inevitably required solely upon restriction of fundamental rights. Even if we consider a three-step review of proportionality justified in the event of interference with the right of self-organisation of local government, we need to answer the question of whether that should also be following upon reviewing the interference with the restricted guarantee of the individual legal subjecthood, which is, in essence, already 'restricted,' as the description suggests.

23. At the same time, a review of proportionality can be considered as a purely technical means that allows for a thorough weighing of the matter under dispute in a manner that can be easily followed by the public, thereby increasing the legitimacy of the judicial decision. A review of proportionality is also not precluded under the Constitution upon reviewing interference with the guarantee of the restricted individual legal subjecthood. In other words, in the present case the Supreme Court in principle has to decide whether the application of the principle of proportionality and the selection of its manner of application (steps and review criteria) is practical.

24. It would be wise to act on the assumption that the principle of proportionality is more intensively applicable in the field of fundamental rights than outside it. Thus, for instance, the constitutional courts of Austria and Germany allow for broad discretion on the part of the legislature in the case of an administrative reform and review the choices of the legislature only to a very limited extent.[15] A review of the guarantee of restricted individual legal subjecthood should probably resemble

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[14] See a discussion and critique of the decisions of the German Federal Constitutional Court in A. L. Göhring. Doctoral thesis. Experimentierklauseln im Kommunalrecht -Rechtsprobleme im Spannungsfeld zwischen Regelungswut und "laisser faire"-. 2003. Pp. 78-79. In Estonian context, the application of the principle of proportionality has been critically analysed in H. Kalmo. Põhiseadus ja proportsionaalsus – kas pilvitu kooselu? (The Constitution and Proportionality – a match made in heaven?), Juridica, 2013 II, pp. 79-97 (available in Estonian).

[15] For instance, judgments G 44/2014-20 and V 46/2014-20 of the Austrian Constitutional Court of 23 September 2014 (available at https://www.vfgh.gv.at/cms/vfgh-site/attachments/3/2/9/CH0006/CMS1413269914499/gemeindefusionen_waldbach.pdf), side notes 44, 50-51 and 55: the legislature's extensive discretion and the limited scope of judicial review – the court does not weigh any alternatives or practicability, but carries out merely a review of the relevance of a forced merger; side note 51: in the case of a local authority with fewer than 1000 residents the reasonableness of a forced merge can be assumed and only very special exceptional cases allow for calling that into doubt (along with references to previous case-law of the same substance). See, for example, judgment 2 BvR 329/97 of the German Federal Constitutional Court of 19 November 2002 (available at http://www.bverfg.de/e/rs20021119_2bvr032997.html), side notes 50 and 70: the legislature's extensive discretion – no need to take each local authority into account; can be, so to say, divided into types and the requirement of 5000 residents can be established an assumption of

a review of typical discretionary errors in the administrative court where a review concerns mainly the question of whether relevant considerations have been relied on.

25. Subsection 2 of § 1 of the ARA reveals the purposes of the administrative territorial reform as follows: *'The purpose of the administrative reform is to support the increase of the capacity of local authorities in providing high quality public services, exploiting regional prerequisites for development, increasing competitiveness, and ensuring a more balanced regional development. To attain this purpose, this Act provides for the alteration of administrative-territorial organisation of rural municipalities and cities, as a result of which local authorities must be able to independently organise and manage local life and perform functions arising from law. The administrative reform is also implemented in line with the purposes of the state governance reform in reorganising public administration, which include ensuring the good quality and availability of public services and cost savings.'* There is no reason to find that these purposes are irrelevant. The applicant does not call them into doubt either, but submits that the state has not fully considered all options for attaining the purposes and a forced merger is, therefore, not a proportional measure for the attainment of these purposes.

26. The alternatives have been described and the principles of non-application of the alternatives have been explained in the explanatory memorandum of the ARA.[16] In summary, the explanatory memorandum concludes: *'There are no other alternatives for making the organisation of local government more effective, which would be as effective, but less intense and more moderate.'*[17] The weighing of the solutions is also demonstrated by the long period of preparation of the administrative-territorial reform (alternatives have also been weighed in previous reform plans) and the surveys compiled in the framework thereof.[18] Without doubt, there are alternatives that would be less interfering with the guarantee of the restricted individual legal subjecthood of a local authority, but one cannot argue with equal certainty that these would at least equally contribute to the attainment of the purposes sought by the legislature. Furthermore, quite a few of these alternatives simultaneously interfere with other guarantees of local government more intensively. For instance, mandatory cooperation and the delegation of functions to cooperation bodies (incl. joint agencies) would, on the other hand, interfere with the guarantee of the institution of local government by the fact that the right of a specific local authority to make decisions independently in performing the delegated function would be reduced (incl. regarding the free use of funds). Inexplicitly, this results in an adverse effect on the legitimacy of the decision-making body (the decision-making body of the mandatory cooperation body would not be elected in direct elections) as well as on the principle of subsidiarity. The application of alternatives may result in other problems as well (e.g. competence disputes and the resulting additional workload on the supervision system). In view of the above, there is no reason to consider the legislature's choice in the form of creation of the possibility of a forced merger of local authorities as arbitrary or irrelevant.

III. Constitutionality of non-payment of the merger grant in the event of a forced merger

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administrative capacity; side note 78 – the executive can take the number of residents established by the legislature and use it as the basis for assessment of the administrative capacity of the local authority; side note 89 – in order to deviate from the requirement of 5000 residents, there should be come very special reasons.

[16] Available at www.riigikogu.ee. For instance, at the bottom of p. 17 the reasons of leaving aside the possibility of reducing the functions of local government and the possibility of differentiating based on the capacity of the local authority have been explained; on p. 18, the same has been done regarding the possibilities of cooperation between local authorities.

[17] *Ibid*., p. 18.

[18] See http://haldusreform.fin.ee/haldusreformi-seadus/uuringud/ (available in Estonian).

27. The application contests § 24 of the ARA (based on the arguments, only subsection 1 thereof is of relevance) whose subsection 1 reads as follows: *'A local authority formed as a result of alteration of the administrative-territorial organisation of local authorities initiated by the Government of the Republic shall not be paid merger grants, excluding for the local authorities regarding the alteration of the administrative-territorial organisation of whom the Government of the Republic has established a regulation specified in § 8 of this Act or who have applied for a merger on the conditions specified in subsection 3 of § 7 of this Act and regarding the alteration of the administrative-territorial organisation of whom the Government of the Republic has established a regulation specified in subsection 1 of § 13 of this Act. A local authority formed as a result of the alteration of the administrative-territorial organisation initiated by the Government of the Republic shall be compensated from the state budget for the actual costs specified in clauses 1 to 4[1] of subsection 2 of § 6 of the Promotion of Merger of Local Authorities Act or clause 4 of subsection 2 of § 12 of this Act on the basis of expense receipts, but not more than for up to 100,000 euros.'* On the basis thereof, the application submits that local authorities are being treated differently upon payment of merger grants and calls into doubt the 100,000-euro threshold upon covering costs.

28. It is very difficult to assess the constitutionality of the 100,000-euro threshold in compensating for costs by way of an abstract review. Only based on specific circumstances it is possible to assess the connection of the incurred costs with the merger (i.e. the compliance with the rules specified in the second sentence of subsection 1 of § 24 of the ARA). It is appropriate for a local authority whose costs incurred in connection with the merger really exceed the amount to contest the threshold. If the Supreme Court nevertheless decides to carry out an abstract review of the constitutionality of the threshold on the basis of the application (i.e. assumes that the exceeding of the threshold in connection with a merger in accordance with the rules specified in the second sentence of subsection 1 of § 24 of the ARA is possible), the threshold of 100,000 euros must be deemed as being in conflict with the requirement arising from subsection 2 of § 154 of the Constitution to cover the costs of the public duties imposed on local government by law from the state budget (a portion of the financial guarantee of local government). According to the explanatory memorandum of the draft ARA,[19] the purpose of establishment of the threshold is to prevent unreasonable expenses from being incurred upon a merger. This purpose can be attained by replacing the threshold with a review of the reasonableness of costs (under the Act in force, the compliance of costs with the criteria of the Act must be reviewed).

29. Secondly, the constitutionality of non-payment of the merger grant to the local authority formed as a result of proceedings initiated by the Government of the Republic is under dispute.[20] First, it must be decided if payment of merger grants only to the local authorities that have been merged at the initiative of the councils of the local authorities at all interferes with the guarantee of local government. The non-payment of merger grants in proceedings initiated by the Government of the Republic does not interfere with the financial guarantee of local government, because completely independently from the merger grant the local authority must be granted sufficient funds for the performance of its functions. The guarantee given to local authorities under subsection 6 of § 6 of the Promotion of Merger of Local Authorities Act, which was amended by clause 4 of § 33 of the ARA, must be taken into account as well. This provides that if the grant allocated to the local authority formed as a result of the merger from the state budget in the next year is smaller than the total of the grants that the merged local authorities would have received independently on the same conditions, the

[19] Available at www.riigikogu.ee.

[20] As regards the applicant's reference to costs incurred by such a rural municipality to whom at the initiative of the Government of the Republic a rural municipality that does not wish an administrative-territorial alteration is added, it should be noted that the costs of such a rural municipality will be covered as the costs of the local authority formed in accordance with the second sentence of subsection 1 of § 24 of the ARA.

decrease of the grant calculated on a one-off basis in the year following the merger will be compensated from the state budget in the next eight years following the year of the merger. In other words, the financial situation of the local authorities should not worsen in comparison with the previous situation. The financial guarantee of local government does not cover the so-called bonus given on the considerations chosen by the legislature. A local authority could reply on the combined effect between the financial guarantee and the requirement for equal treatment only if the financial guarantee was interfered with as well. Thus, the question is whether a local authority can rely on the principle of equal treatment, and if it can, how it can be reviewed.

30. In the case of the principle of equal treatment arising from § 12 of the Constitution, the considerations specified in section 22 *et seq*. largely apply. A local authority should not be able to rely on the principle of equal treatment, at least not to the extent comparable to holders of fundamental rights. However, a local authority can rely on a more general prohibition on arbitrary treatment. The wish of the legislature is to, by way of paying a merger grant as well as a bonus, guide local authorities towards a voluntary merger is a relevant consideration. In the event of a merger taking place at the initiative of the councils of local authorities, the attainment of the purposes established by the legislature is presumably possible in the most effective manner. In such a situation the councils are free to look for the best merger solution for themselves and, presumably, such a solution is also better in attaining the economy of scale expected by the legislature (unfortunately, a mere promise of a merger grant may not be sufficient to attain a merger in the case of local authorities that do not meet all the criteria). The conditions of payment of a merger grant are the same for all local authorities,[21] even though the fulfilment of the conditions is not always dependent solely on the local authority that is deprived of the merger grant. In general, on the basis thereof one has to ask if motivating a voluntary merger by paying a bonus is constitutionally permissible. If it is, the different treatment of local authorities as a result of application thereof is an inevitable permissible consequence. The granting of such a bonus as the motivation for a voluntary merger is widespread according to international practice and accepted as part of the broad discretion of the legislature. Thus, upon payment of merger grants, local authorities are not treated arbitrarily upon payment of merger grants in the event of a merger taking place at the initiative of the local authorities.

Respectfully submitted,

/digitally signed/

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[21] In the case law of the German Federal Constitutional Court, emphasis is also placed on so-called procedural law. The most important one is a transparent distribution procedure: if certain procedural requirements are followed, no equal end result needs to be ensured upon distribution of limited funds. See, for example, judgment 2 BvR 1641/11 of 7 October 2014 (available at http://www.bverfg.de/e/rs20141007_2bvr164111.html) side note 106 *et seq*.