

The Protection of the Constitutional Guarantees for Local Government during the Administrative-Territorial Reform

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Introduction

The article analyses the issues related to the protection of constitutional guarantees for municipalities that arose during the 2017 administrative reform.

The judicial disputes over the lawfulness of the reform took place in two stages. First, many local authorities put before the Supreme Court the question of whether the Administrative Reform Act,¹ which introduced the general conditions for the implementation of the reform,

¹ RT I 21.6.2016, 1; 21.12.2016, 32.

including authorising the Government of the Republic to coercively merge specific municipalities, was in accordance with the Constitution of the Republic of Estonia.² Subsequently some of the local authorities contested the government's coercive merger regulations in an administrative court and/or the Supreme Court. This article discusses the main issues faced in these court cases.

In particular, the article looks at the conditions under which local authorities may file an application directly with the Supreme Court for a constitutional review and the conditions under which a government regulation for the coercive merging of municipalities may be considered lawful. Finally, the authors offer suggestions for future reference.

Conditions under which local authorities can have recourse to the courts to protect their constitutional guarantees

The state must implement administrative-territorial reform in full compliance with the constitutional guarantees for local government. These are established in Chapter 14 of the Constitution (Articles 154–155 and 157–160). In conjunction with the guarantees provided in the European Charter of Local Self-Government (ECLSG),³ these constitute the set of guarantees for local government.

There are too main ways for a local authority to protect its constitutional guarantees, depending on the nature of the activity or legislation that it seeks to contest. It can either turn to an administrative court or have its municipal council file an appeal with the Supreme Court.⁴

² RT 1992, 26, 349; RT I 15.5.2015, 1.

³ RT II 1994, 26, 95.

⁴ Indirectly, the protection of constitutional guarantees can also be sought through the President of the Republic (under Article 107 of the Constitution) or the Chancellor of Justice (under Article 142 of the Constitution, and to seek the constitutional review of international agreements, which is particularly relevant in connection with the ECLSG in the context of this article).

Jurisdiction depends on the nature of the activity or legislation that is being contested. A local authority can file an application directly with the Supreme Court if the conditions arising from Article 7 of the Constitutional Review Court Procedure Act⁵ are met. If an application is filed in accordance with these conditions, the Supreme Court is required to review it. The following three conditions must be met:

- the application must be filed against a legal act of the kind specified in Article 7 of the Act (i.e. either to establish the unconstitutionality of a legislative act that has been promulgated but has not yet entered into force or a government or ministerial regulation that has not yet entered into force, or to repeal an act or a government or ministerial regulation, or a provision thereof, that has entered into force);
- the contested legislation, or a provision thereof, is in conflict with the constitutional guarantees for local government;
- the application is filed by a municipal council.

In the following sections, we will discuss these conditions in more detail.

Filing an application to contest a legal act

No one questioned the fact that local authorities were allowed to contest the Administrative Reform Act directly in the Supreme Court. However, the question did arise as to whether local authorities seeking to contest a coercive merger regulation adopted by the government under the Administrative Reform Act should turn to an administrative court or directly to the Supreme Court. In other words, can a legal act of the kind specified in Article 7 of the Constitutional Review Court Procedure Act

⁵ RT I 2002, 29, 174; 26.6.2017, 17.

be contested based on its form⁶ or does it have to be sufficiently general in nature to fall under the definition of a legislative act?⁷ In the latter case, it must to be determined whether a coercive merger regulation is a legislative act of sufficiently general nature. If not, then it is a piece of legislation of specific application and reviewing its lawfulness is within the jurisdiction of the administrative courts.

While the problem of jurisdiction was raised already in the court dispute over the constitutionality of the Administrative Reform Act, the Supreme Court did not rule on jurisdiction and the related procedural rules at that point. Justice of the Supreme Court Jüri Põld criticised this in his dissenting opinion accompanying the Supreme Court judgment, going on to state that the legislature should quickly establish legal clarity regarding the procedural rules.⁸ The legislature did not adopt the appropriate legislation.

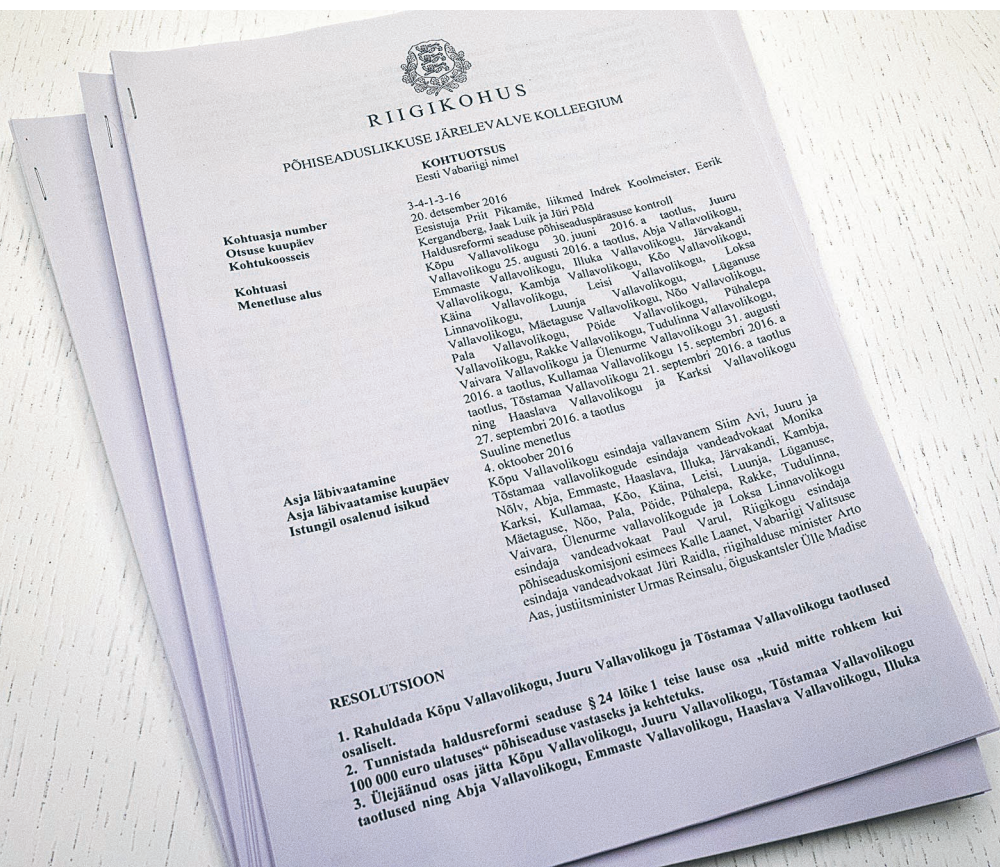
The local authorities then went on to first contest the coercive merger regulations in the administrative court. They relied on the argument that the legal nature of a coercive merger regulation is that of legislation of specific application (in particular, a general order within the meaning of Article 51(2) of the Administrative Procedure Act⁹), the verification of the lawfulness of which falls within the jurisdiction of the administrative courts.

⁶ This approach was supported by the Chancellor of Justice as one of the parties to the proceedings. See Chancellor of Justice opinion of 29 August 2018 in Constitutional Review Case No 3-4-1-3-16, p. 5; http://www.oiguskantsler.ee/sites/default/files/field_document2/arvamus_pohiseaduslik_kuse_jarelevalve_asjas_nr_3-4-1-2-16.pdf [last accessed 18.12.2017]. As an argument in comparative law, it can be pointed out that in Germany, for example, the legislature is recognised as having broad discretion in deciding the form of a legal act and the court does not change the classification of a legal act by the legislature. See U. Ramsauer, 'Abgrenzung von Allgemeinverfügung und Rechtsverordnung' – *Juridica International* 2014, Vol 21, pp. 69, 75; <https://ojs.utlib.ee/index.php/juridica/article/view/JI.2014.21.06> [last accessed 18.12.2017].

⁷ The latter approach seems to be supported by Constitutional Review Chamber of the Supreme Court judgments Nos 3-4-1-2-03, 21.2.2003, paragraph 12, and 3-41-14-08, 15.12.2008, paragraph 28.

⁸ <https://www.riigikohus.ee/et/laheidid?asjaNr=3-4-1-3-16> [last accessed 12.11.2017].

⁹ RT I 2001, 58, 354. 26.6.2017, 1.



Constitutional Review Chamber of the Supreme Court judgment of 20 December 2016, which declared the Administrative Reform Act to be constitutional in all material aspects. Source: Delfi.

Both the Tallinn Administrative Court and the Tallinn Circuit Court held that the coercive merger regulations were legislative acts and the resolution of applications to contest them was not within the jurisdiction of an administrative court. The Circuit Court based its ruling mainly on the fact that, despite being directed at specific local authorities and adopted as part of a one-off administrative reform, the contested

regulations essentially altered the Estonian administrative-territorial organisation as a whole, with the aim of establishing a new, permanent division of administrative units.¹⁰

The Circuit Court also pointed out that, unlike individuals, municipalities can file an application with the Supreme Court for the annulment of a government regulation concerning them directly under Article 7 of the Constitutional Review Court Procedure Act¹¹. The Supreme Court rejected the local authorities appeals against the Tallinn Circuit Court rulings, thereby agreeing with the Circuit Court that the coercive merger regulation must be contested directly in the Supreme Court.¹²

For example, in Germany and Austria constitutional courts also review coercive municipal mergers through a constitutional review procedure.¹³

Applications to protect the constitutional guarantees for local government

The second precondition for a local authority to be allowed to have direct recourse to the Supreme Court is that it must file an application for

¹⁰ Tallinn Circuit Court rulings Nos 3-17-1427, 3-17-1428, 3-17-1433, 3-17-1435, paragraph 13 (12.7.2017); 3-17-1454 and 3-17-1458, paragraph 8 (7.19.2017); 3-17-1486 and 3-17-1488, paragraph 7 (26.7.2017); 3-17-1682, paragraph 10 (30.8.2017); and 3-17-1590, paragraph 10 (4.9.2017).

¹¹ Tallinn Circuit Court rulings Nos 3-17-1427, 3-17-1428, 3-17-1433 and 3-17-1435, paragraph 13 (12.7.2017).

¹² See Supreme Court press release 'Government regulations regarding coercive merging cannot be contested in an administrative court' from 17 July 2017; <https://www.riigikohus.ee/et/uudiste-arhiiv/sundliitmist-puu-dutavaid-valitsuse-maaruseid-ei-saa-vaidlustada-halduskohtus> (last accessed 18.12.2017). The press release was based on Administrative Law Chamber of the Supreme Court rulings Nos 3-17-1427, 3-17-1428, 3-17-1433 and 3-17-1435 (17.7.2017); 3-17-1421 (14.8.2017); 3-17-1421 (18.8.2017); 3-17-1590 (4.9.2017); and 3-17-1682 (6.9.2017).

¹³ See e.g. judgment of the German Federal Constitutional Court of 19 November 2002, No 2 BvR 329/97, paragraph 32; http://www.bverfg.de/e/rs20021119_2bvr032997.html; judgment of the Constitutional Court of Austria of 23 September 2014, G 44/2014-20, V 46/2014-20, https://www.vfgh.gv.at/downloads/VfGH_G_44-2014__V_46-2014_Gemeindefusionen_Waldbach.pdf.

the protection of the constitutional guarantees of local government. According to the case law of the Supreme Court, it is enough for a local authority to meet this condition if it claims in the application it files that a legal act (or a provision thereof) of the kind specified in Article 7 of the Constitutional Review Court Procedure Act is in conflict with the constitutional guarantees for local government.¹⁴

An application for declaring a legal act or a provision thereof to be unconstitutional can be filed only with respect of those provisions of the Constitution that are included among the constitutional guarantees of local government. An application based on a constitutional rule that does not regulate a constitutional guarantee of local government is inadmissible under Article 7 of the Constitutional Review Court Procedure Act and will be returned without review in accordance with Article 11(2) of the Act.¹⁵ An application is admissible if a municipal council contests a legal act or a provision thereof on the basis of several constitutional rules, some of which can be regarded as a constitutional guarantee of local government while others cannot.

The fact that Article 7 of the Constitutional Review Court Procedure Act requires the applicant to refer to a conflict with the constitutional guarantees for local government, does not in itself restrict the Supreme Court's authority to verify that a regulation is in agreement with the legislation (Article 87(6) of the Constitution), provided that the legislation specifies the constitutional guarantees for local government.

In regulating the relations between local authorities and the state, the legislature must also consider the general principles of law. If a municipal council requests the repeal of a legal act on the grounds that it

¹⁴ When ruling on the admissibility of applications, the Supreme Court used to also assess whether the alleged infringement of constitutional guarantees was possible in the given situation. However, the Court changed this case law as of 16 March 2010 (judgment of the Supreme Court en banc No 3-4-1-8-09, paragraph 48).

¹⁵ Judgment of the Administrative Law Chamber of the Supreme Court of 16 March 2010, No 3-4-1-8-09, paragraph 45.

is in conflict with a general principle of law, the council must explain how the conflict damages a constitutional guarantee for local government.¹⁶

The Supreme Court considered the applications¹⁷ of the municipal councils that contested the constitutionality of the Administrative Reform Act insofar as these claimed that the provisions of the Act infringe on the following constitutional guarantees for local government: individual legal personality, which is guaranteed by Articles 154 and 158 of the Constitution (and in turn ensures the right to administer local matters), and the financial guarantee provided by Article 154 of the Constitution.¹⁸

The Supreme Court also reviewed the formal constitutionality of the Act, verifying compliance with jurisdictional, procedural and formal requirements, as well as the principles of parliamentary reservation, legal certainty and legal clarity.¹⁹

On the other hand, the Supreme Court dismissed the application filed by the municipal council of Kōpu, which claimed that there was a conflict with the principles of democracy and legal certainty because the deadlines for the implementation of the reform were so close to the local elections that, the council thought, the contesting of the relevant government regulations in court might deprive the local population of clarity as to which municipality the elections were being held in and whom to vote for.²⁰

¹⁶ Judgment of the Constitutional Review Chamber of the Supreme Court of 15 December 2008, No 3-4-1-14-08, paragraph 29. See also judgments of the Constitutional Review Chamber of the Supreme Court of 19 March 2009, No 3-4-1-17, paragraph 26, and of 19 January 2010, No 3-4-1-13-09, paragraph 39.

¹⁷ In reviewing the constitutionality of the Administrative Reform Act, the Constitutional Review Chamber of the Supreme Court essentially deliberated on three different applications together. These were filed by a total of 26 municipal councils (for more details, see judgment of the Chamber of 20 December 2016, No 3-4-1-3-16, paragraphs 2–11).

¹⁸ See judgment of the Constitutional Review Chamber of the Supreme Court of 20 December 2016, No 3-4-1-3-16, paragraph 83.

¹⁹ *Ibid.*, paragraphs 106–108, 111–113 and 131–136. Paragraphs 137–147, in which the Supreme Court refers to the deadlines specified in the Administrative Reform Act, are also relevant, as the local authorities contested their constitutionality by appealing to the principle of legal certainty.

²⁰ *Ibid.*, paragraphs 170–172.

The Chancellor of Justice as a party to the proceedings supported the admissibility of the application on the grounds that, according to the case law of the Supreme Court,²¹ the internal organisation of elections is a local matter (as opposed to the external organisation, which is a national matter), and the municipal council of Kõpu was contesting the very possibility of carrying out elections in accordance with the constitution, rather than just the conditions of the elections.²²

However, the Supreme Court found that, in this respect, the application concerned the protection of the active right of voters to vote, rather than the constitutional guarantees for local government.²³

Although the Supreme Court referred to active suffrage, this problem is in fact more about passive suffrage, or the right to stand for election. Potential councillors have to choose the municipality where they set up their candidacy and the area where they run an election campaign – in a situation where it may still be unknown whether the local authority will contest the relevant coercive merger regulation.

For future reference, the Supreme Court's position on this shows that the President and the Chancellor of Justice in particular should, where appropriate, consider filing applications with the Supreme Court to contest the possible unconstitutionality of deadlines for the organisation of elections.

Of course, individuals themselves may also have recourse to the courts to protect their fundamental right of active or passive suffrage, but this is probably difficult to do in the limited time before elections because both candidacy and suffrage are established relatively close to

²¹ The Chancellor of Justice referred to the judgment of the Constitutional Review Chamber of the Supreme Court of 9 June 2009, No 3-4-1-2-09, paragraph 33.

²² Chancellor of Justice supplementary opinion of 22 September 2016 in Constitutional Review Case No 3-4-1-3-16, paragraph 7; http://www.oiguskantsler.ee/sites/default/files/field_document2/riigiko-hus_arvamuse_taiendus_haldusreformi_seaduse_pohiseadusparasusele.pdf (last accessed 18.12.2017).

²³ Judgment of the Constitutional Review Chamber of the Supreme Court of 20 December 2016, No 3-4-1-3-16, paragraphs 171 and 172, with reference to previous similar case law.

the election day²⁴ (nor are the authors of this article aware of any cases where a voter or candidate has filed a court case for this reason before elections). Therefore, the legal dispute would not be resolved in time for the elections, anyway.

The applications for constitutional review submitted to the Supreme Court in regard to coercive merger regulations focused on violations of the guarantees provided in Articles 154(1) and 158 of the Constitution (the right of self-administration and the right to be heard, respectively).²⁵

The applications either contested only the specific provisions concerning coercive merging or, in some cases, the entire merger regulation, claiming that all the provisions of the regulation were interrelated and aimed at merging the municipalities by the government.²⁶

The Supreme Court adopted the strict position that there was no reason to review the constitutionality of the entire merger regulation, as it would also contain provisions that do not infringe the guarantees for local government. Reviewing the constitutionality of the provisions directly related to coercive merging was decided to be sufficient.²⁷

It is worth noting that, in the constitutional review cases concerning the Administrative Reform Act and the merger regulations, neither the local authorities nor the Supreme Court referred to the first paragraph

²⁴ See Articles 27(2)–(4), 35(1) and (2), and 37(1) of the Municipal Council Election Act (RT I 2002, 36, 220; 21.6.2016, 1). However, it is arguable that individuals have a right of recourse to the courts even before registering as a candidate, by claiming that their rights are already being violated by the fact that it is unclear to which municipal electoral committee they should apply for registration.

²⁵ Judgments of the Constitutional Review Chamber of the Supreme Court of 13 October 2017, Nos 5-17-14, paragraphs 47 and 51; 5-17-15, paragraphs 51 and 55; 5-17-16, paragraphs 51 and 55; of 19 October 2017, Nos 5-17-17, paragraphs 68 and 72; 5-17-18, paragraphs 49 and 53; 5-17-19, paragraphs 56–63; 5-17-20, paragraphs 54; 5-17-24, paragraph 56; and of 4 October 2017, Nos 5-17-21, paragraph 53; and 5-17-22, paragraph 51.

²⁶ Judgments of the Constitutional Review Chamber of the Supreme Court of 13 October 2017, Nos 5-17-14, paragraph 51; 5-17-15, paragraph 55; 5-17-16, paragraph 55; and of 19 October 2017, Nos 5-17-17, paragraph 72; 5-17-18, paragraph 53; 5-17-20, paragraph 54; and 5-17-24, paragraph 56.

²⁷ See e.g. judgment of the Constitutional Review Chamber of the Supreme Court of 19 October 2017, No 5-17-24, paragraph 57.

of Article 155 of the Constitution, which states that local government entities are rural municipalities and cities. It must have seemed impossible (or at least difficult) to argue that the post-reform administrative-territorial entities were essentially so different from the ones that existed before that they no longer constituted rural municipalities or cities within the meaning of Article 155.

Applications filed by municipal councils

In order to meet this requirement, a majority of the membership of the municipal council must decide to file an application with the Supreme Court under Article 7 of the Constitutional Review Court Procedure Act, as required by the second sentence of Article 45(5) of the Local Government Organisation Act.²⁸ The Local Government Organisation Act does not specify whether it is only the decision to file the application that must be adopted by majority rule or whether the application itself must be put to vote.

In the court dispute over the constitutionality of the Administrative Reform Act, the Kōpu municipal council did initially decide with the required majority to file an application with the Supreme Court under Article 7 of the Constitutional Review Court Procedure Act, but then authorized the chairman of the council to draw up and sign the application,²⁹ meaning that the council itself did not vote on the text of the application.³⁰

The Supreme Court ruled that the requirement is intended to ensure that the council's decision to turn to the Supreme Court is taken in full knowledge of the content of the decision and the council must therefore vote on the final text of the application to be filed with the

²⁸ RT I 1993, 37, 558; 4.7.2017, 2.

²⁹ Decision of the municipal council of Kōpu of 21 June 2016, No 33 'Filing an application with the Supreme Court', paragraphs 1 and 2.

³⁰ Judgment of the Constitutional Review Chamber of the Supreme Court of 20 December 2016, No 3-4-1-3-16, paragraph 78.

Supreme Court.³¹ According to the Court, this reading will help prevent further disputes over whether the final text of the application is in line with the council's intention in authorising the application.³²

In this case the Supreme Court did not yet consider it justified to rely on the above reading in assessing the admissibility of the application filed by the municipal council of Kōpu, as there was no established case law on this kind of assessment, nor was there reason to believe that the council decision was made on insufficient information or was otherwise biased).³³ In the subsequent court cases to contest the government's coercive merger regulations, on the other hand, the Supreme Court applied this reading strictly. If neither the application nor the supporting documents established, when deciding to file an application, that the council had also voted on its final text, the Supreme Court returned the application without review and gave the applicant(s) a deadline for eliminating the deficiencies.³⁴

Interim legal protection for local authorities being merged

The contestation of the government's coercive merger regulations in the administrative court and later in the constitutional review procedure gave rise to the question of applying interim legal protection or the option of suspending the regulations so that the preparations for elections by municipal councils and the voting would not be carried out within the new municipal boundaries until the court dispute was resolved.

³¹ Ibid., paragraphs 79 and 81.

³² Ibid., paragraph 81.

³³ Ibid., paragraph 82.

³⁴ See judgments of the Constitutional Review Chamber of the Supreme Court of 19 October 2017, Nos 5-17-14, paragraph 44; 5-17-15, paragraph 49; 5-17-16, paragraph 49; and of Nos 5-17-17, paragraph 64; 5-17-18, paragraph 47; 5-17-20, paragraph 48; and 5-17-24, paragraph 49.

The municipalities³⁵ that requested interim legal protection claimed that the suspension of the coercive merger regulations was required because otherwise the municipalities' legal personality might be terminated with the elections before the end of the court dispute. The newly formed municipality would replace the terminated municipality in the court proceedings and it would be in its own interests to withdraw the application filed with the Supreme Court. Consequently, the municipality would be deprived of the opportunity to defend itself against an arbitrary decision taken by the national government, which is in conflict with the guarantee arising from Article 154 of the Constitution. In that case, the contested regulation has irreversible consequences, as it is impossible to restore the status quo ante. Furthermore, it would be necessary to suspend the regulation in order to avoid confusion with the preparations for elections.

The municipalities also pointed out that there was a possible scenario whereby the county governor carries out preparations for elections for the new municipality while the municipal council does the same for the existing municipality. The county governor's preparations do not replace those conducted by the applicant or annul them. It would therefore be possible for two simultaneous municipal elections to be held in the same territory, which would go against the principles of legal clarity and democracy. If the county governor's election preparations replace those of the municipal council, then elections will be held only in the new municipality that is to be formed. If the regulation is not suspended, the county governor's election preparations must not be obstructed and the elections will be based on an unlawful coercive merger.³⁶

³⁵ In particular, the rural municipalities of Emmaste, Illuka, Kambja, Ülenurme, Pala, Tõstamaa, Lasva, Koeru, Mikitamäe, Lügánuse, Rakke, Padise, Vastseliina, Võru ja Sõmerpalu.

³⁶ Rulings of the Constitutional Review Chamber of the Supreme Court of 7 August 2017, Nos 5-17-14, paragraphs 3-5; 5-17-15, paragraphs 3-5; 5-17-16, paragraphs 3-5; 5-17-17, paragraphs 3-5; 5-17-18, paragraphs 3-5; 5-17-20, paragraphs 3-5; and 5-17-24, paragraphs 3-5.

Some local authorities also claimed that if the merger regulation entered into force before the Supreme Court decision, this would have other legal consequences the reversal of which would be impossible or involve considerable difficulty. For example, the legal acts adopted by the council of the newly formed municipality would have to be repealed, new budgets would have to be drawn up for the unconstitutionally merged municipalities, and questions relating to the formation of new local government bodies and recruiting their staff would have to be addressed. It was further argued that the situation whereby, just a month before the elections, the candidates and voters did not know in which district or for which municipal council they were going to run or vote was not in the public interest.³⁷

The local authorities first contested the government's merger regulations in the administrative court and at the same time filed applications for interim legal protection. In some cases, the administrative court initially suspended the merger regulation for up to 30 days,³⁸ but later revoked this ruling before the expiry of the suspension period, taking the view that the resolution of the dispute was not within the jurisdiction of an administrative court, which also precluded the application of interim legal protection.³⁹ Higher courts agreed with this.

In the following constitutional review procedure based on the applications filed by local authorities, the Supreme Court dismissed all the local authorities' applications for interim legal protection. According to Article 12 of the Constitutional Review Court Procedure Act, the Supreme Court may, on the basis of a reasoned request of a participant in Supreme Court proceedings or on its own initiative, suspend with

³⁷ Rulings of the Constitutional Review Chamber of the Supreme Court of 7 August 2017, Nos 5-17-21, paragraphs 4–6; 5-17-22, paragraphs 4–6; 5-17-23, paragraphs 4–6; and of 21 August 2017, 5-17-19, paragraphs 9 and 10.

³⁸ See e.g. ruling of the Tartu Administrative Court of 7 July 2017, No 3-17-1421.

³⁹ See e.g. ruling of the Tartu Administrative Court of 14 July 2017, No 3-17-1421 (on 24 July 2017, the Tartu Circuit Court dismissed the appeal against the Administrative Court ruling of 14 July 2017).

good reason, the enforcement of a contested legislative act, or a provision thereof, until the entry into force of a Supreme Court judgment. The Supreme Court agreed with the applicants' view that this required that the legal act, or the relevant provision, had not yet entered into force.

The applicants claimed that the provisions of the coercive merger regulations entailing the termination of the legal personalities of existing municipalities, while not yet formally in force, had a material effect already before the elections, as based on these provisions, the relevant county governors would commence election preparations regarding the municipalities being merged. In other words, they would start implementing the regulations.

The Supreme Court still ruled that the provisions entailing the termination of the municipalities as legal personalities had not yet entered into force. (In doing so, the Court conceded that the formal prerequisites for the application of Article 12 of the Constitutional Review Court Procedure Act in order to suspend the entry into force of the provisions resulting in the formation of a new administrative division were met. However, this alone was not sufficient to grant interim legal protection, which also has substantive prerequisites.) The Supreme Court supported its disagreement with the applicants by reasoning that, under the applicable legislation, the provisions of the regulation entailing the formation of a new municipality would enter into force on the day of the announcement of the results of the local elections for the new municipality.

The Supreme Court also found that neither the contested regulation as a whole nor any specific provisions thereof affected whether the local elections would be held in the existing or new municipalities, as the responsibilities to be fulfilled by the local authorities and county governors in connection with the 2017 local elections derived from the Administrative Reform Act, the Territory of Estonia Administrative Division Act⁴⁰

⁴⁰ RT I 1995, 29, 356; 4.7.2017, 28.

and the Municipal Council Election Act,⁴¹ and the preparations of the county governors were already warranted by the initiation of the alteration of the administrative-territorial organisation by the government. (It follows that, according to the Supreme Court's reading, Article 12(9) of the Administrative Reform Act does not require the county governor to await the government's final decision on the coercive merger.) As a result, the suspension of the validity or execution of the contested regulation would not have had the outcome intended by the applicant.⁴²

In other words, the Supreme Court found that the entry into force of the coercive merger regulation did not affect the obligation to abide by the preparatory activities of the county governor. However, we believe that the adequacy of this conclusion can be called into question with another conclusion reached by the Supreme Court, that the elections would be held within the existing municipal boundaries if the government had decided to terminate the previously initiated alteration of administrative-territorial organisation (i.e. to not adopt a coercive merger regulation) in respect of the municipalities in question.⁴³ That is to say, these two views of the Supreme Court seem to logically contradict one another. If the government's decision to terminate an alteration procedure has decisive bearing on the obligation to abide by the county governor's activities (in terms of eliminating that obligation), then the opposite decision (to complete the procedure) by the government should also be decisive.

In other respects, the Supreme Court held that, at the time of ruling on the request for interim legal protection, the need to suspend the provisions that had not yet entered into force had not yet arisen, and that the

⁴¹ RT I 2002, 36, 220; 17.11.2017, 7.

⁴² Rulings of the Constitutional Review Chamber of the Supreme Court of 7 August 2017, Nos 5-17-14, paragraphs 7-13; 5-17-15, paragraphs 7-13; 5-17-16, paragraphs 7-13; 5-17-17, paragraphs 7-13; 5-17-18, paragraphs 7-13; 5-17-20, paragraphs 7-13; 5-17-21, paragraphs 8-13; 5-17-22, paragraphs 8-13; 5-17-23, paragraphs 8-13; 5-17-24, paragraphs 7-13; and of 21 August 2017, No 5-17-19, paragraphs 13-15.

⁴³ Ruling of the Constitutional Review Chamber of the Supreme Court of 7 August 2017, No 5-17-19, paragraph 13.

need for such a procedural decision could only arise if it becomes likely that the court case might not end before the election results are announced.

The Supreme Court noted that, if it did not reach a decision before the announcement of the election results, it could, if necessary, suspend the entry into force of the provisions of the contested regulation on its own initiative. As an advantage of postponing the resolution of this issue, the Supreme Court stated that it would allow for the prospects of granting the main application (a prerequisite for granting the application for interim legal protection) not to be assessed before a thorough examination of the positions of the parties to the proceedings.⁴⁴

However, the Supreme Court did not reach a decision in a number of cases concerning the constitutionality of coercive merger regulations before the local elections.⁴⁵ Nor did the Supreme Court apply interim legal protection on its own initiative before election day, despite the fact that it must have become evident at some point before the elections that the relevant judgments could not be handed down before the announcement of the election results. This was probably due to the fact that the deliberations held in the meantime had established that there were no prospects for the main applications to be granted.

On the one hand, we might as well agree with the reading that it was the county governor's activities and legal acts that were binding in cases where conflicting election-related activities and legal acts had been adopted by the municipal council and the county governor in respect of the same municipality. However, the reading is not quite unproblematic because, among other things, a county governor does not have the authority to adopt a regulation, which is a legislative act

⁴⁴ Rulings of the Constitutional Review Chamber of the Supreme Court of 7 August 2017, Nos 5-17-14, paragraph 11; 5-17-15, paragraph 11; 5-17-16, paragraph 11; 5-17-17, paragraph 11; 5-17-18, paragraph 11; 5-17-20, paragraph 11; 5-17-21, paragraph 11; 5-17-22, paragraph 11; 5-17-23, paragraph 11; and 5-17-24, paragraph 11; and of 21 August 2017, No 5-17-19, paragraph 11.

⁴⁵ Judgment of the Constitutional Review Chamber of the Supreme Court of 19 October 2017, Nos 5-17-17, 5-17-18, 5-17-20 and 5-17-24.

(or legislation of general application), and Article 22(2) of the Municipal Council Election Act specifically requires that matters related to elections be established by regulation.

Moreover, the clarity provided by the case law came as hindsight for the candidates. From a candidate's point of view, it makes quite a lot of difference whether final clarity as to the municipal boundaries in which elections will be held already exists by the time of registering candidates, or the typical beginning of election campaigns, or whether it is only established directly before the start of the vote. In the latter case, candidates are forced to try to predict the outcome of the court dispute throughout much of their election campaigns as they are deciding what campaign messages to direct at which constituency (the residents of either the previous or future municipality). If their predictions fail, the candidates are not compensated for the time and money spent on campaign advertising.

The specific requirements for the formal constitutionality of a coercive municipal merger regulation

Delegating coercive merging to the national government

The main problem here can be put as follows: Can the legislature delegate a specific coercive municipal merger to the executive and, if so, under what conditions?

The Constitution does not specify which state institution has the authority to change municipal boundaries. However, it has been argued in legal literature that this comes under the requirement of form appropriate to importance (essentially similar to the principle of parliamentary reservation), according to which coercive merging should be carried out by law.⁴⁶ The Constitution does not rule out the possibility of delegating matters that are within the competence of the legislature to the

⁴⁶ Ü. Anton, 'Kohaliku omavalitsuse garantii Eesti Vabariigi 1992. a põhiseaduses' – *Juridica* No 6, 1998, pp. 305–313.

executive, provided that the law defines a sufficient basis and conditions for the non-arbitrary exercise of executive power.⁴⁷

According to the second paragraph of Article 2 of the Constitution, Estonia is a unitary state in terms of the organisation of its government, and the administrative division of its territory is provided by law. The administrative-territorial division is not relevant for state administration alone; the constitutional provision is designed to ensure that matters of administrative division are regulated by law, which is also important for the autonomy of municipalities. For the purposes of Article 2 of the Constitution, the administrative division of territory also includes the territorial organisation of local government.⁴⁸ The Territory of Estonia Administrative Division Act does not contain a list of administrative divisions, but it has been argued in legal literature that, in order for the administrative division of territory to be provided by law, the specific administrative divisions must be listed in the law.⁴⁹ While the general conditions for coercive municipal merging were provided by law with the adoption of the Administrative Reform Act (in particular the minimum population size criterion in Article 3 and the possible exceptions in Article 9(3) of the Act), the power to decide on specific coercive mergers was delegated to the government. The question arose whether this was compatible with the Constitution.

The Supreme Court held that the Administrative Reform Act was not in conflict with the principle of importance. With the Act, the legislature provided the purpose, basis and procedure for the reform. The Supreme Court found that the basis and procedure for the government-initiated alteration of the administrative-territorial organisation of local

⁴⁷ Judgment of the Constitutional Review Chamber of the Supreme Court of 20 December 2016, No 3-4-1-3-16, paragraph 111.

⁴⁸ Constitution of the Republic of Estonia. Commented edition, Article 2, comment 6, p. 50; judgment of the Constitutional Review Chamber of the Supreme Court of 20 December 2016, No 3-4-1-3-16, paragraph 112.

⁴⁹ Constitution of the Republic of Estonia. Commented edition, Article 2, comment 7, p. 51.



4 October 2016: The Supreme Court discussing the applications filed against municipal mergers. Source: Õhtuleht.

government were sufficiently regulated by law. The law provided the procedure and deadlines for the commencement and conduct of the process, as well as the general framework for exercising discretionary power.⁵⁰

For example, in Germany, the established view is also that, while strictly speaking administrative reform can only be implemented by law,

⁵⁰ Judgment of the Constitutional Review Chamber of the Supreme Court of 20 December 2016, No 3-4-1-3-16, paragraph 112.

it can also be done by a regulation, provided that the law is specific enough on this.⁵¹

The procedural requirements for the government-initiated alteration of the administrative-territorial organisation of municipalities

The Administrative Reform Act distinguishes between the municipal council-initiated and government-initiated alteration of the administrative-territorial organisation of municipalities, which are provided for in Chapters 2 and 3, respectively. It is the government-initiated alteration that is relevant when discussing the protection of the constitutional guarantees for local government.

It fell to the government to initiate the administrative-territorial alterations in accordance with the procedure provided in Article 8 of the Territory of Estonia Administrative Division Act, with some exceptions (some provisions did not apply).⁵² By 15 February 2017, the government was required to initiate administrative-territorial alterations with respect to the municipalities that did not meet the minimum population criterion (5,000 residents) according to the population register as of 1 January 2017 and for which the government had not adopted a regulation regarding a municipal council-initiated administrative-territorial alteration or applied for an exemption based on Article 9(3) of the Administrative Reform Act.

For this purpose, the government was to submit a draft regulation, or proposal, for a coercive merger to the relevant municipal councils and request their opinion. A proposal could also be made to the municipalities – both those that met the minimum population size criterion and

⁵¹ Th. Maunz, G. Dürig, *Kommentar zum Grundgesetz*. 76. Auflage, 2015, GG Art. 28 Abs. 2, Komm. 153. See also e.g. judgment of the German Federal Constitutional Court from 19 November 2002, No 2 BvR 329/97; http://www.bverfg.de/e/rs20021119_2bvr032997.html (last accessed 24.12.2017).

⁵² Article 9(1) of the Administrative Reform Act.

those that did not but in respect of which the government had already adopted a voluntary merger regulation – if the coercive merger would have a positive impact in terms of the criteria set out in Article 7(5) of the Territory of Estonia Administrative Division Act⁵³ and was both necessary and reasonable for ensuring the administrative capacity of a municipality that did not meet the minimum size criterion.

The government submitted its proposal on 14 and 15 February 2017.⁵⁴ The local authorities were to respond with their opinions by 15 May 2017 or else the proposal would be considered accepted (Article 9(8) of the Administrative Reform Act). The opinions were submitted on time, although some local authorities did not respond at all.

Where the municipality responded with a negative reasoned opinion, the Administrative Reform Act allowed the government to either (a) refrain from merging the municipality based on the reasons given and the circumstances referred to in Article 9(2) and (3) of the Act, or (b) to decide to coercively merge the municipality by issuing a regulation if it did not consider the reasons sufficient.

In the latter case, the Ministry of Finance was required under Article 9(10) of the Act to promptly notify local the authorities concerned before the regulation was adopted. According to the explanatory memorandum to the Act,⁵⁵ the government was required to rebut the objections of the local authorities in an explanatory memorandum accompanying the draft government regulation, and notify the local authorities of these

⁵³ Article 7(5) of the Act requires that the following be considered when altering the administrative-territorial organisation: (1) historical reasons; (1) effect on residents' living conditions; (2) residents' sense of cohesion; (3) effect on the quality of public services; (4) effect on administrative capacity; (5) effect on the demographic situation; (6) effect on the organisation of transport and communications; (7) effect on the business environment; (8) effect on the educational situation; and (9) effect on the organisational functioning of the municipality as a common service area.

⁵⁴ See <http://dokumendiregister.rahandusministeerium.ee/?a=ram&pealkiri=vabariigi+valitus+ettepaneku+esitamine&op=otsi&pg=2>.

⁵⁵ Explanatory memorandum to the draft Administrative Reform Act, p. 38; <https://www.riigikogu.ee/tege-vus/eelnoud/eelnou/fec18826-0e43-4435-9ba8-598b6ed4ea40/Haldus-reformi%20seadus> (last accessed 10.12.2017).

rebuttals before adopting the regulation in question. This notification requirement arising from Article 9(10) of the Administrative Reform Act is unprecedented. The notification could have served a purpose only if the local authorities had had an accompanying right for a further hearing. No such right, however, was provided by the Act. Nor did the Ministry of Finance send draft coercive merger regulations out to the local authorities as required by the explanatory memorandum to the draft Administrative Reform Act. The government sent out only the minutes for agenda item No 10 of the government session of 15 June 2017 and an accompanying explanatory statement specifying the reasons why the government had decided to proceed with the merger.⁵⁶ As the explanatory memoranda of draft acts are not legally binding, the above should be considered sufficient in terms of meeting the notification requirement, the government was not bound by the requirement to notify the local authorities by submitting the draft regulation and its explanatory memorandum in advance, which was included in the explanatory memorandum to the Administrative Reform Act.

The reasoning behind coercive mergers is available to the public in the explanatory memoranda to the draft coercive merger regulations. Unfortunately, the same does not apply to the reasons behind the decisions to cancel a coercive merger,⁵⁷ as no draft regulation or explanatory memorandum was drawn up in such cases. No reasons are specified in the minutes of the 15 June 2017 government session. We can only assume that the government acted on the reasons provided for the proposals submitted to the government in the explanatory statement

⁵⁶ https://haldusreform.fin.ee/static/sites/3/2017/06/15juuni2017_istungi-protokollnr-27_pkp10-2.pdf (last accessed 10.12.2017).

⁵⁷ Agenda item No 10(1) of the minutes of the government of 15 June 2017 terminated the procedures for the alteration of the administrative-territorial organisation for the merging of Loksa city with Kuusalu rural municipality; Häädemeeste and Tahkuranna rural municipalities with Saarde and Surju rural municipalities; and Kanepi, Kõlleste and Valgjärve rural municipalities with those of Ahja, Laheda, Mooste, Põlva and Vastse-Kuuste. https://haldusreform.fin.ee/static/sites/3/2017/06/15juuni2017_istungi-protokollnr-27_pkp10-2.pdf (10.12.2017).

accompanying the draft decision.⁵⁸ In future, it would be appropriate if the government added its reasoning to decisions of such importance and finality for the local authorities. This is particularly necessary in view of equal treatment, an issue that arose with particular urgency in connection with the decision to refrain from merging Loksa city and Kuusalu rural municipality as opposed to many other similar municipalities that were merged by the government.⁵⁹ The reasons for coercively merging one municipality and not others with similar characteristics should be transparent to the public.

The lawfulness of a partial termination of coercive merger procedures is an issue in its own right. On 15 June and 6 July 2017,⁶⁰ the government reduced the number of municipalities subject to coercive merging. It did so by terminating, under Article 9(9)1) of the Administrative Reform Act, the procedures for an administrative-territorial alteration with respect to some of the municipalities specified in its proposals, while continuing the procedures with respect to several others, under Article 9(9)2) of the Act. (The Act does not explicitly provide for the option of changing the number of municipalities subject to coercive merging while the procedure is ongoing). This raised the question of the significance of the fact that local authorities were at first asked for an opinion on being merged with a certain set municipalities but were subsequently not asked about being merged with only a subset of those municipalities.

For example, in its constitutional review application, the municipal council of Illuka claimed that merging only the rural municipalities of

⁵⁸ Explanatory statement accompanying the decision 'Alterations of administrative-territorial organisation initiated by the Government of the Republic as part of the administrative reform'; https://haldusreform.fin.ee/static/sites/3/2017/06/vv_protokolliline_otsus_vv_uhendamis_d_kinnitamiseks_sk.pdf (10.12.2017). See e.g. the proposal for Loksa city and Kuusalu rural municipality, p. 4.

⁵⁹ See also the judgment of the Constitutional Review Chamber of the Supreme Court of 4 October 2017, No 5-17-23, paragraph 91.

⁶⁰ 'Alterations of administrative-territorial organisation initiated by the Government of the Republic as part of administrative reform', paragraph 2; <https://dhs.riigikantselei.ee/avalikteave.nsf/documents/NT00302D1A?open> (last accessed 10.12.2017).

Illuka, Alajõe, Iisaku, Mäetaguse and Tudulinna, without those of Toila, Kohtla and Kohtla-Nõmme (which were in the original proposal), should have called for a new public opinion poll and an additional hearing of the local authority.⁶¹ The Supreme Court did not agree with the applicant's view and held that, while the inclusion of new municipalities in the course of a merger procedure was not allowed without issuing a new proposal, the exclusion of municipalities was allowed, and the law did not provide for a new hearing or further inquiry into the residents' opinions in such cases. The Supreme Court also noted that in this case a new poll or hearing would probably not have changed the outcome of the procedure.⁶² Although this may have been true in the case in question, the authors of this article believe that it would have been more appropriate if the possibility of changing the set of municipalities subject to coercive merging, and the related right for a hearing, had been clearly established by law.

According to Article 12(2) of the Administrative Reform Act, a municipal council that had received a proposal from the government was required to do the following: (1) determine its residents' opinion regarding the alteration of the administrative-territorial organisation in accordance with the procedure specified in a government regulation;⁶³ (2) submit to the county governor a reasoned opinion, prepared in the form of a decision, regarding the government proposal by 15 May 2017; (3) agree, by 15 June 2017, with the other municipal councils concerned, on the name, type and insignia of the new municipality, the settlement of any organisational, budgetary or other issues related to proprietary rights and obligations as well as issues concerning the preparation of

⁶¹ Judgment of the Constitutional Review Chamber of the Supreme Court of 13 October 2017, No 5-17-15, paragraph 29.

⁶² *Ibid.*, paragraph 69.

⁶³ Government Regulation No 87 of 28 July 2016 establishing the scope and procedure for determining the residents' opinion on the alteration of the administrative-territorial organisation and boundaries of an administrative division (RT I 29.7.2016,12; 21.3.2017,12).

the statutes of the new municipality and making any other necessary amendments to legal acts (merger agreement).

The opinion polls were duly conducted by the local authorities. However, regardless of what they showed, the Supreme Court agreed with the government that the results of the opinion polls were not binding when deciding on the alteration of the administrative-territorial organisation and that Article 158 of the Constitution did not make them binding either.⁶⁴

As mentioned above, no second polls were conducted if the scope of the original merger proposal had been reduced by terminating the merger procedure for municipalities, and the Supreme Court did not consider this legally problematic. It can be said without exaggeration that the poll results did not carry significant argumentative weight with the Supreme Court.

As the government adopted most of the coercive merger regulations on 22 June, 10 July and 13 July 2017, the municipal councils had no time to sign merger agreements after the coercive mergers had been decided because, according to Article 12(2)3 Administrative Reform Act, the agreements were to be signed by 15 June 2017. In an opinion submitted to the Supreme Court, the Chancellor of Justice stated that the fact that the municipalities were not given enough time to decide matters related to elections and those specified in Article 12(7), (8) and (10) of the Administrative Reform Act amounted to an infringement of the municipalities' constitutional right to self-administration. The legislature should have considered this right when establishing the deadlines set out in the Act. The Chancellor of Justice further stated that since the municipal councils could not reasonably have been expected to take the relevant decisions before the government decided on the coercive

⁶⁴ Judgments of the Constitutional Review Chamber of the Supreme Court of 20 December 2016, No 3-4-1-3-16, paragraph 136; of 13 October 2017, No 5-17-15, paragraph 69; and of 19 October 2017, Nos 5-17-17, paragraph 88; 5-17-18, paragraph 66; 5-17-20, paragraph 77; and 5-17-24, paragraph 74.

mergers, it would have been appropriate for the government to decide the mergers well before 15 June 2017 in order to leave the municipalities a realistic amount of time to reach an agreement among themselves. However, the Chancellor of Justice also held that the above does not warrant the conclusion that the coercive mergers were unconstitutional, as it should not be assumed that the small municipalities could have achieved more favourable conditions in the negotiations that would have followed the decision on coercive merging.⁶⁵ Regrettably, the Supreme Court did not express a view on this.

The standard of providing reasons and the division of the burden of proof

During the court disputes, the question was raised about whether a coercive merger must have a positive effect simultaneously in terms of all the circumstances listed in Article 7(5) of the Territory of Estonia Administrative Division Act, for all the municipalities being merged with each other. The Supreme Court took the view that the above provision does not require that. In making proposals for administrative-territorial alterations, the government was only required to consider the impact in terms of all the circumstances specified in Article 7(5) of the Act and assess which municipalities should be merged to help achieve the purpose of the administrative reform – to increase the capacity of local authorities to provide public services, use regional potential for development, increase competitiveness and ensure a more balanced regional development – while not neglecting cost savings as one of the purposes of the state governance reform (Article 1(2) of the Administrative Reform

⁶⁵ Judgments of the Constitutional Review Chamber of the Supreme Court of 4 October 2017, Nos 5-17-21, paragraph 37; 5-17-22, paragraph 36; and 5-17-23, paragraph 37; of 13 October 2017, Nos 5-17-15, paragraph 36; 5-17-16, paragraph 36; and 5-17-19, paragraph 43; and of 19 October 2017, Nos 5-17-17, paragraph 49; 5-17-18, paragraph 36; 5-17-20, paragraph 34; and 5-17-24, paragraph 35.

Act).⁶⁶ In other words, the Supreme Court allowed that a coercive merger may also have a negative impact in terms of some of the circumstances or for some of the municipalities being merged. This can hardly be disputed because as the Chancellor of Justice noted, being merged with a municipality of limited administrative capacity may, at least for some time, inevitably affect the performance of a municipality with better administrative capacity.⁶⁷

Whether the government was required to prove that the municipalities being coercively merged had insufficient capacity to perform the functions of local government was also disputed. In their constitutional review applications, some local authorities stated that the burden of proof rested with the government rather than the local authorities in respect to all the relevant circumstances. The Supreme Court held that, in the explanatory statement accompanying the proposal, the government did have to indicate why it had chosen the particular option for a coercive merger, what in its opinion the impact of the merger would be in terms of the circumstances specified in Article 7(5) of the Territory of Estonia Administrative Division Act and that the particular coercive merger was necessary for the alteration of the administrative-territorial organisation of a municipality that did not meet the minimum population size criterion. However, according to the Supreme Court, all this did not make it obligatory to demonstrate the insufficient capacity of the municipality that failed to meet the minimum size criterion – the assumption of insufficient capacity is derived from the law.

⁶⁶ Judgment of the Constitutional Review Chamber of the Supreme Court of 4 October 2017, No 5-17-23, paragraph 72.

⁶⁷ Opinion of the Chancellor of Justice of 8 September 2017 in case No 5-17-19, *Lasva, Sõmerpalu, Vastseliina, Võru*, paragraph 22; http://www.oiguskantsler.ee/sites/default/files/field_document2/Arvamus%20Riigikohtule%20Lasva%2C%20S%C3%B5merpalu%2C%20Vastseliina%20ja%20V%C3%B5ru%20valdade%20sund%C3%BChendamise%20p%C3%B5hiseadusp%C3%A4rasuse%20kohta.pdf (18.12.2017).

The Supreme Court found that the aspects that the government needed to consider for a coercive merger required it to make a prediction, which it could not prove but only support with arguments. Furthermore, the law required the local authorities themselves to give reasons if they submitted a negative opinion and the government to weigh those reasons to determine the presence of exceptional circumstances that might strongly support the idea that a municipality had sufficient capacity despite its small population.⁶⁸ The Supreme Court, then, held that the government had an obligation to state reasons, rather than a burden of proof, and even that obligation was divided between the government and the local authorities.

In fact, the government did not analyse the impact in terms of all the circumstances listed in Article 7(5) of the Territory of Estonia Administrative Division Act with equal thoroughness in the explanatory statements accompanying the coercive merger regulations; its statements were sometimes general and conjectural. This did not, however, constitute a violation of statutory requirements, which the Court also confirmed.⁶⁹

The applications by the local authorities for legal protection and the government's coercive merger regulations exhibited conflicting assessments of the impact in terms of the circumstances specified in Article 7(5) of the Territory of Estonia Administrative Division Act. While the government usually considered that the impact of a coercive merger for the municipality in question was positive in terms of all or most of the criteria, the municipality itself felt that the impact across all the criteria was negative. This black-and-white approach to some extent compromised the credibility of the arguments of both sides.

⁶⁸ Judgment of the Constitutional Review Chamber of the Supreme Court of 4 October 2017, No 5-17-23, paragraphs 72, 73 and 87.

⁶⁹ *Ibid.*, paragraph 86.

The criteria for reviewing the material constitutionality of a coercive municipal merger regulation

Until the judgment of the Supreme Court of 20 December 2016, No 3-4-1-3-16, regarding the constitutionality of the Administrative Reform Act, it could be argued, on the basis of the Supreme Court's earlier judgment of 16 March 2010, No 3-4-18-09, that the lawfulness of an infringement of the constitutional guarantees for local government should be reviewed using criteria derived from the doctrine of fundamental rights, including a three-step proportionality test.⁷⁰

The Supreme Court judgment of 20 December 2016 introduced a fundamental change. In particular, the Court held that, as the Constitution grants the *Riigikogu* (Estonian Parliament) a wide margin of discretion to establish the administrative division of the country's territory and as the principle of the unitary state (Article 2 of the Constitution) should also be considered, the requirements of a proportionality test cannot be followed rigorously in reviewing the constitutionality of the Administrative Reform Act. The Court stressed that the case was significantly different from the earlier case in which a proportionality test was applied to review compliance with the financial guarantee for local government.⁷¹

For future reference, this gives reason to expect that the Supreme Court will review infringements of the different guarantees for local government with varying degrees of rigour (depending on the discretionary margin that the Court believes the Constitution to grant the legislature in respect of the guarantee in question). On the other hand, we should not rule out the possibility that the Court will discard the proportionality test with respect to all local government guarantees, as the judgment also makes the general statement that, in view of Article 14 of the Constitution,

⁷⁰ For an explanation of the three-step proportionality test, see M. Ernits, 'Kommentaar §-le 11' – Ü. Madise et al. (eds.), *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne 2017*, paragraphs 10–21.

⁷¹ Judgment of the Constitutional Review Chamber of the Supreme Court of 20 December 2017, No 3-4-1-3-16, paragraphs 89–91.

a local authority cannot be the bearer but only the addressee of fundamental rights.⁷² It is worth noting by comparison that the German Federal Constitutional Court, for example, has avoided applying proportionality to the reviewing of infringements of any local government guarantees, not only those related to administrative-territorial reform.⁷³

Instead of applying a proportionality test in the Administrative Reform Act constitutionality case, the Supreme Court only verified that the legislature had complied with the prohibition of arbitrariness. The Court derived this prohibition from Articles 154(1) and 158 of the Constitution, holding that these provisions in combination give rise to a prohibition against arbitrary action by the state when altering the administrative-territorial organisation of local government. The prohibition requires compliance with formal constitutional requirements when making such alterations.⁷⁴

Later, when contesting the constitutionality of the government's coercive merger regulations, some local authorities still requested a proportionality test, arguing that the constitutional guarantees for local government were not adequately protected without it. The Supreme Court dismissed this argument, maintaining the position it had already held in Case No 3-4-1-3-16.⁷⁵

⁷² Ibid. A similar point has been made by the Chief Justice of the Supreme Court Priit Pikamäe: '[A]dministrative reorganisation cannot be subjected to the same standards as the protection of the fundamental rights of individuals. It is arbitrary to lump together the principle of democracy and suffrage on the one hand, and the organisation of local government on the other.' (Priit Pikamäe, 'Priit Pikamäe: kui kohtuotsus ei meeldi, ei sobi mistahes selgitus' – Postimees, 17.11.2017; <https://arvamus.postimees.ee/4312991/priit-pikamae-kui-kohtuotsus-ei-meeldi-ei-sobi-mistahes-selgitus>.)

⁷³ For a discussion of the judgments of the German Federal Constitutional Court and the criticisms that these have attracted, see: A. L. Göhring. 'Experimentierklauseln im Kommunalrecht – Rechtsprobleme im Spannungsfeld zwischen Regelungswut und "laissez faire"', doctoral thesis, 2003, pp. 78–79.

⁷⁴ Judgment of the Constitutional Review Chamber of the Supreme Court of 20 December 2017, No 3-4-1-3-16, paragraphs 88, 106–113.

⁷⁵ Judgments of the Constitutional Review Chamber of the Supreme Court of 4 October 2017, Nos 5-17-21, paragraphs 65–66; 5-17-22, paragraphs 63–64; and 5-17-23, paragraphs 64–65; and of 13 October 2017, No 5-17-19, paragraph 67.



4 October 2016: The Supreme Court discussing the applications filed in respect to the Administrative Reform Act. In the foreground, Chancellor of Justice Ülle Madise. Source: *Õhtuleht*.

The representatives of the state defending the Administrative Reform Act before the Supreme Court were sworn advocate Jüri Raidla, Minister of Public Administration Arto Aas, Chairman of the Constitutional Committee of the Riigikogu Kalle Laanet and Minister of Justice Urmas Reinsalu. Source: *Õhtuleht*.

The Court held that the judicial control over the government's decisions regarding administrative-territorial alterations of local government in order to achieve the objectives of the administrative reform was limited. The legislature has given the government a wide margin of discretion when deciding on alterations of administrative-territorial organisation.

Moreover, most of the circumstances listed in Article 7(5) of the Territory of Estonia Administrative Division Act are such that the actual impact of administrative-territorial alterations in terms of these circumstances can only be evaluated after the municipalities formed as the result of a coercive merger have existed for some time. The actual impact of a coercive merger in terms of these circumstances also largely depends on the future actions and decisions of the newly formed municipality. In light of the above, the court can only verify that the government has, in changing the administrative-territorial organisation of a municipality, taken into account the relevant material circumstances and not relied on incorrect facts. Among other things, the court can verify that the government has assessed the reasons stated by a local authority in support of its negative opinion and has provided, in the explanatory memorandum to its regulation, the relevant reasons as to why it does not consider the local authority's reasoning sufficient.⁷⁶ The Supreme Court identified no cases of unconstitutional coercive merging.

An important point emphasised by the Supreme Court was that the Court cannot not take the place of the government in order to assess whether another possible alteration of the administrative-territorial organisation of a municipality would have a more positive impact in terms of the circumstances specified in Article 7(5) of the Territory of

⁷⁶ Judgments of the Constitutional Review Chamber of the Supreme Court of 4 October 2017, Nos 5-17-21, paragraphs 75; 5-17-22, paragraph 73; and 5-17-23, paragraph 74; and of 19 October 2017, No 5-17-24, paragraph 55.

Estonia Administrative Division Act or would be useful for achieving the objectives of the administrative-territorial reform.⁷⁷

By way of comparison, the German and Austrian constitutional courts, for example, also use a very limited approach to reviewing the decisions to apply coercive municipal merging.⁷⁸

This, of course, raises the question of whether local authorities have any chance at all of winning a constitutional review case regarding a coercive merger. It is our belief that, while not impossible, this requires very serious errors in the implementation of the reform (for example, violations of procedural requirements established by law).

Conclusion

If we divide administrative reform into the three main components of local government functions, the financial resources for the performance of those functions and administrative-territorial organisation, then the changes made in 2017 were limited to the simplest of these – the administrative territorial organisation of local government. Even this was an achievement, considering the two decades of ruminations and failed reform attempts that went before it. However, territorial changes alone do not make for a systematic reform of local government. It is to be hoped that this, too, will be carried off in the coming years.

⁷⁷ Judgments of the Constitutional Review Chamber of the Supreme Court of 4 October 2017, Nos 5-17-21, paragraphs 41–42, 44, 71, 75, 89, 91–92; 5-17-22, paragraphs 40–43, 73, 86, 88–89; and 5-17-23, paragraphs 41–44, 70, 74, 86; of 13 October 2017, Nos 5-17-15, paragraphs 41, 64; 5-17-16, paragraphs 41, 43, 64; 5-17-19, paragraphs 47–48, 50, 80; and of 19 October 2017, Nos 5-17-17, paragraphs 54–56, 84; 5-17-18, paragraphs 40–41, 62; 5-17-20, paragraphs 39, 41, 73–74; and 5-17-24, paragraphs 40, 42, 70–71.

⁷⁸ See judgment of the German Federal Constitutional Court of 19 November 2002, No 2 BvR 329/97, marginals 78 and 89 (http://www.bverfg.de/e/rs20021119_2bvr032997.html) and judgment of the Constitutional Court of Austria of 23 September 2014, G 44/2014-20, V 46/2014-20, paragraphs 44, 50–51 and 55, including references to previous relevant case law (https://www.vfgh.gv.at/downloads/VfGH_G_44-2014__V_46-2014_Gemeindefusionen_Waldbach.pdf).

In what follows, we will outline some of the most important conclusions to be drawn and then offer suggestions to be considered for a future administrative-territorial reform. As an administrative-territorial reform of this scope is unlikely to be repeated in Estonia in the near future, the suggestions may be more useful for other countries where a similar reform is being planned.

What is commendable is the fact that the reform was organised in two stages, during the first of which voluntary merging was encouraged, and the use of expert committees in implementing the reform and the highly committed work of many officials at the Ministry of Finance to solve problems as they emerged.

The Supreme Court judgments show that the Constitution gives the legislature a wide margin of discretion to design the objectives, criteria and procedure for administrative reform. The legislature may in turn give the government extensive discretion regarding coercive municipal mergers. Judicial control over the government's coercive merger regulations is therefore limited and, among other things, does not include the assessment of possible alternative mergers. The (coercive) alteration of the administrative-territorial organisation of local government is not subject to a proportionality test. This is replaced by verifying that the legislature or executive set legitimate objectives and comply with the prohibition of arbitrariness.

When filing constitutional review applications with the Supreme Court, municipal councils should keep in mind the following. The municipal council must vote on the text of the application, which must be supported by a majority of the votes of the membership of the council.⁷⁹ Where a municipal council requests the repeal of a legal act on the grounds that it is in conflict with a general principle of law, which is not

⁷⁹ The council should also file the application as soon as possible, as the Supreme Court may suspend the entry into force of the contested legislative act, or a provision thereof, only if it has not yet entered into force.

in itself a constitutional guarantee for local government, the council must explain how the conflict damages some such guarantee. If this condition is met, the application should further contain arguments contesting the formal constitutionality of the legal act (in particular, compliance with the jurisdictional, procedural and formal requirements, as well as the principles of parliamentary reservation, legal certainty and legal clarity of the adoption of the act). While a coercive municipal merger can be contested directly in the Supreme Court, the prospects for success are not promising, unless the government has made very serious errors in the implementation of the reform (for example, violated essential procedural requirements established by law).

The President and the Chancellor of Justice should focus particular attention on legal provisions that negatively affect individuals' right to stand for election to a municipal council, as this is not covered by the constitutional guarantees for local government even if the very possibility of constitutionally held council elections is being disputed.

The legislature should seek to formulate the conditions for carrying out even a complex reform in terms that are as simple and clear as possible. In Estonia, case law ultimately resolved the legal question of whether it was possible for a coercive merger regulation adopted by the government under the Administrative Reform Act to be contested by a local authority directly in the Supreme Court. However, the legislature would be well advised (as per the dissenting opinion of Justice of the Supreme Court Jüri Põld cited above) to establish jurisdiction and procedure at the same time as it passes the legislation regulating the implementation of the administrative-territorial reform.

It is important to set a deadline for contestation, so as to prevent local authorities from postponing contestation until just before the local elections in bad faith; although no local authority acted this way during this reform, the possibility should be ruled out. At the same time, it would provide clarity to the public earlier (including candidates in municipal elections). At least in the municipalities that have not gone

to court by the deadline it would be clear that the council elections will be held within the boundaries decided by the government.

The procedural deadlines should be laid down by law in such a way as to allow time for the local authorities to negotiate merger conditions among themselves after a coercive merger has been decided.

Overall, more time should be planned for carrying out an administrative-territorial reform, so that court disputes could be settled before the start of the campaign period for local elections. As there is no way to fully ensure this, even by reserving more time, the law should clearly specify the municipal boundaries in which local elections will be held if a court dispute over the constitutionality of the coercive merging of the municipalities in question has not been settled by a certain deadline before election day (for example, by the start of the registration of candidates). A situation whereby, just a few months before elections, candidates and voters do not know in which district or for which municipal council they are going to run or vote should be prevented. At the same time, the law should specify the body whose election preparations and legal acts take precedence in the event of a conflict between the preparations or legal acts of different bodies. The legislature should also provide for the reversal of consequences (including organising new elections) where elections have already been held in municipal boundaries that a court ultimately determines to be incorrect.

The law should be clearer on the possibility of changing the set of municipalities involved in a coercive merger while the procedure is ongoing. In such cases, it would also be appropriate for the law to ensure the right for an additional hearing of the local authorities.

The government should be required by law to also state its reasons for terminating a procedure for the alteration of the administrative-territorial organisation (i.e. where it decides not to coercively merge a municipality). This would make the reasons for coercively merging one municipality and not others with similar characteristics transparent to the public.

The legislation should be more specific about the legal nature of merger agreements and about the scope in which they extend to coercively merged municipalities that are not party to these agreements.