

The Principles and Legislative Choices Underlying the Administrative Reform

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The administrative reform plans drafted in various periods, and later named after the ministers responsible for them (see Ave Viks, 'The Design of the Process of the Administrative Reform', and Madis Kaldmäe, 'The Plans for the Administrative-Territorial Restructuring of Estonia from 1989 to 2005'), either have emphasised the need to introduce another tier (county administration) to make municipal administration more efficient, or have stressed that local authorities need to cooperate in order to increase their capacity and to ensure the higher quality of the public services they provide, or else have underlined the need to encourage mergers at the initiative of municipal councils or required government-initiated municipal mergers.

In a nutshell, the administrative reform plans have been aiming to increase the capacity of local authorities for providing public services. Therefore, the preparation of the 2017 administrative reform, spearheaded by Arto Aas, the Minister of Public Administration, was driven by the need to support local authorities in increasing their capacity to provide high-quality public services using the prerequisites for regional development, increasing their competitive ability and ensuring more uniform regional development¹. The need to achieve these goals was agreed on in the 2015 coalition agreement and established as the core goal of the administrative reform in the Administrative Reform Act.²

The basic framework for the reform, which had been laid down by the government coalition in 2015, and was to be further elaborated under the guidance of the Ministry of Finance, was rather abstract. As far as the basis for planning the local administration reform (referred to below as 'the administrative reform'), which was part of the state reform, is concerned, the Pro Patria and Res Publica Union, Reform Party and Social Democratic Party had decided in the central government's action programme for 2015–2019 to adopt the legislative amendments necessary for the implementation of the administrative reform by 1 July 2016,³ which, among other things, were to establish the deadline for the reform. At the same time, a decision was made that an evaluation of the conformity of municipalities, on the basis of objective and unequivocal criteria, was to be conducted for the implementation of the administrative reform. It was also agreed that the non-conforming municipalities were to be merged by the deadline stated in the Act.

¹ More detailed information about the needs and motives for the implementation of the 2017 administrative reform can be found in the explanatory memorandum to the draft Administrative Reform Act (200 SE): <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/fec18826-0e43-4435-9ba8-598b6ed4ea40/Haldusreformi%20seadus>. The Act was passed by the Riigikogu (Estonian Parliament) on 7 June 2016 and entered into force on 1 July 2016.

² Article 1(2) of the Administrative Reform Act.

³ <https://www.riigiteataja.ee/aktilisa/3030/6201/5006/231klisa.pdf>.

The original text had stated that, unless the merger was performed within one year after the evaluation, the municipalities in question would be merged by the central government. Guidelines were also given for planning all the steps in such a manner that the process of the voluntary merger of municipalities within the reform could be completed by the 2017 local elections. The last provision was, however, further specified during the process, which is viewed in more detail below.

In order to emphasise the importance of the administrative reform, the political coordination of the reform was overseen by the Prime Minister, while the Ministry of Finance and the Minister of Public Administration remained chief driving powers behind the preparation of the draft Act. The author of this article had the honour of participating in the preparation of the draft Administrative Reform Act as the responsible lawyer within the Ministry of Finance.

This article examines the substantive considerations of the administrative reform, which the author regards as primary, and the corresponding legislative choices for the reform, which the Ministry of Finance, the central government and the *Riigikogu* relied on in the process of preparing the draft Act and establishing its principles.

The principles of the administrative reform were developed on the basis of numerous studies, analyses and expert opinions executed in Estonia, the recommendations of the OECD and the Council of Europe, as well as the experience of the states which are historically and culturally close to Estonia. In these countries, the reform was not limited to local initiative: at some point, the state became involved in directing it at the central government level.

The Administrative Reform Act establishes the legal basis and procedure for changing the administrative-territorial organisation of municipalities in order to achieve the purpose of the administrative reform, including deadlines for making the resolutions and performing the actions necessary for changing the said administrative-territorial organisation, the criterion for the minimum size of a municipality on the basis of its

population size, conditions for making exceptions to the application of this criterion, and the general rights and obligations of local authorities associated with changing the administrative-territorial organisation.

The article discusses the most significant principles, which form the backbone of the reform. In this connection, the following questions were posed before the preparation of the draft Act.

- Was the organisation of local government that was effective in 2015 constitutional?
- What would be the more efficient way of increasing the capacity of local authorities: mandatory cooperation or merging?
- Can objective criteria be applied to the demonstration of a local authority's capacity, and if so, what would the capacity threshold be for an 'average' local authority?
- Should the Act provide only for the merging of municipalities, or also prescribe additional tasks for local authorities, and then what should the title of the Act be in such a case?
- Should the preferred approach to the implementation of the administrative reform be a clear bottom-up process, and under which conditions can the state intervene if local authorities fail to start working to achieve the goals of the reform?
- What timeframe is to be established for the reform, and should the elections for the mergers initiated by local authorities and the mergers initiated by the central government be organised at the same time or at different times?
- How can the opinions of residents be determined in the process of the merging of municipalities and changing the borders of administrative divisions?
- How is it possible to promote the merging of centres with a hinterland (should 'city' be preserved as the type of administrative unit in the case of a merger of a city and a rural municipality)?
- How is it possible to ensure the involvement of residents in the exercising of local power and the right of regions to voice their

opinion (more detailed regulation of rural municipal districts and urban districts)?

- Should an abridged procedure be established for contesting merger regulations in court in the case of mergers initiated by the central government?

Was the local government organisation that was effective at the beginning of the preparations for the administrative reform constitutional?

According to the European Charter of Local Self-Government,⁴ local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population. Therefore, local authorities should have opportunities for managing local affairs as well as the ability and obligation to do so.

The Charter narrows down the capacity of a local authority, stating that the conditions of service of local government employees shall permit the recruitment of high-quality staff on the basis of merit and competence.⁵ The Estonian Constitution also links the local authority's guarantee to its capacity, stating that all local matters are to be determined and managed by local authorities executing their duties autonomously in accordance with the law.⁶

Consequently, it was determined before commencing to prepare the Administrative Reform Act that the local government organisation effective at the time was not constitutional because many local authorities were not able to perform all essential local functions prescribed to them by the law due to their small size, lack of administrative capacity and limited financial capacity.

⁴ Article 3(1), European Charter of Local Self-Government.

⁵ Article 6(2) of the Charter.

⁶ Article 154(1), Constitution of the Republic of Estonia.

Before the local government elections of 2017, there were 213 municipalities in Estonia. The population of 80 per cent of the municipalities was below 5,000 people. A medium-sized municipality had a population below 2,000 people. Such local government organisation would not have been sustainable due to the limited resources and the ageing population.

If a local authority cannot fulfil all the local government functions due to a lack of capacity,⁷ the result will be a failure to guarantee the fundamental rights of its residents in a worst-case scenario. For instance, the Supreme Court en banc found that it is not acceptable under Article 28 of the Constitution for a situation to exist where guarantees of key fundamental social rights, in so far as the local authority's responsibility is concerned, vary greatly across the different regions of the state depending on differences in the financial capacity of the municipalities. The Court noted that the state cannot allow a situation to arise in which the availability of vital public services will largely depend on the financial capacity of the municipality which is the person's place of residence.

Nevertheless, cutting costs at the local level was not the initial reason for launching the administrative reform or the direct expected primary objective; rather the goal of the reform was to merge municipalities resulting in a system of local government that would guarantee the protection of the fundamental rights of local citizens. According to constitutional law, local authorities are under the obligation to guarantee

⁷ In paragraph 53 of Supreme Court en banc judgment No 3-4-1-8-09 of 16 March 2010, local matters are defined as follows: 'On the basis of the substantive criterion, local matters are those matters which arise from the local community and concern it and are not within or constitutionally assigned to the area of competence of a national authority on the basis of a formal criterion. The legislator has the right to make the fulfilment of a certain local function mandatory for the local authority (statutory function of the local authority) if it is an adequate measure for the achievement of the goal promised by the Constitution in the context of self-government. Therefore, local government functions fall within the local government functions arising from the law (also 'mandatory local government functions') and other functions (also 'voluntary local government functions'), the fulfilment of which is not prescribed by law.' <https://www.riigikohus.ee/et/laheidid?asjaNr=3-4-1-8-09>.

the subjective constitutional rights of the individual as the holders of fundamental rights.⁸ In order to do so, the guarantor of the fundamental rights must be professional and sufficiently capable.

In order to ensure that the organisation of local government in Estonia is constitutional, the Administrative Reform Act established the legitimate purpose of the reform: to result in the formation of municipalities with sufficient capacity to be able to perform all the functions prescribed to them by law and guarantee the high quality of the public services being provided; that is, to guarantee the protection of the fundamental rights of individuals anywhere in Estonia.

As the foundations of the administrative reform were being discussed, there was a prevailing consensus that a two-tier local government system was to be ruled out because the size of the Estonian state would make this unreasonable both in substantive terms and in terms of the use of resources. The formation of second-level local authorities would not solve the issue of the lack of constitutionality in small rural municipalities. No regionalisation trends have been observed in Europe either.

A solution that involves centralising the municipal functions that many or most local authorities struggle to cope with is not preferred either, since that would involve a departure from the actual substance of local government, which is to organise the addressing of local matters. Such an approach did not meet the approval of the local authorities either.

Therefore, should increasing the capacity of local authorities be achieved through mandatory cooperation or merging?

While earlier critics of the administrative reform (including the local authorities in the court dispute concerning the constitutionality of the

⁸ See the comments to Chapter II in the annotated edition of the Constitution of the Republic of Estonia, <http://www.pohiseadus.ee/index.php?sid=1&ptid=12>.

Administrative Reform Act⁹) expressed as one of the arguments against the reform that instead of merging municipalities a milder solution urging local authorities to cooperate in the provision of public services should be preferred, the preparation of the draft Administrative Reform Act was based on merging as a more effective measure for increasing capacity.

In actual practice, local authorities did not demonstrate any noticeable cooperative initiative. Cooperation did not function due to a number of reasons, for example, political rivalry and administrative complexity, which requires both legal and expert competence from the local authorities.

It is also clear that the management of a specific municipality through local government bodies (a municipal government or council) cannot be delegated to the authorities of another municipality.¹⁰ This means that cooperation can be achieved in the provision of only a few public services, which will not result in a substantial increase in overall capacity for local government. Still, the question of whether cooperation in the performance of functions should be mandatory for local authorities was touched upon during the discussions held as part of the preparation of the administrative reform.

Should the Administrative Reform Act only regulate the merging of municipalities or also provide for the complete review of local government functions? Should a special act be drawn up and how should it be titled?

When the draft Administrative Reform Act was circulated for approval, discussion at government meetings and read in the *Riigikogu*, comments were made that because the changes would primarily pertain to the

⁹ See Constitutional Review Chamber of the Supreme Court judgment No 3-4-1-3-16 of 20 December 2016, <https://www.riigikohus.ee/et/laheidid?asjaNr=3-4-1-3-16>.

¹⁰ For example, municipal council A cannot authorise municipal council B to issue A's legislation; legal acts apply only within the administrative territory of the relevant local authority (Article 7(3) of the Local Government Organisation Act).

administrative-territorial organisation of municipalities, it should be titled, for example, the 'Administrative-Territorial Organisation Reform Act', rather than the 'Administrative Reform Act'. The notion of an administrative reform was considered to be broader than the merging of municipalities.

The Ministry of Justice doubted that a new separate act needed to be prepared for the implementation of the reform because it found that adding amendments that would provide for the reform; for example, to the Territory of Estonia Administrative Division Act and the Promotion of Local Government Merger Act, was a possible option.

The Ministry of Finance would not agree with the above opinions because the notion of the 'administrative reform' had become ingrained in the public mind as synonymous with changing the administrative-territorial organisation of municipalities. A separate act was found to be necessary to emphasise the importance of the reform and for the timeframe of the reform to be universally understood. If amendments were added to other acts, the implementation of the reform would be even more complicated.

The initial ambition involved giving some new functions over to local authorities in the process of the administrative reform after the mergers. This plan was, however, rather quickly abandoned due a lack of political agreement.

As became apparent in practice later, the preparation of a separate act was the only right choice for the sake of legal clarity. Introducing a major reform involving amendments to other legal acts would have over-complicated the text and caused confusion in the references between the new act and existing laws, as to what is applicable and what not. A separate act would also be easier to understand for the addressees of the regulation, that is, the local authorities.¹¹

¹¹ <https://eelroud.valitsus.ee/main/mount/docList/7a8fcd91-77ec-4293-8555-09c23c1081a3>.

In addition to the provisions of the Administrative Reform Act (which are of a temporary nature), the Territory of Estonia Administrative Division Act and the Local Government Organisation Act were supplemented with permanent amendments that are also applicable to any future municipal mergers (for instance, the regulation on the formation of rural municipal districts and the amendment of merger agreements).

Searches for an objective indicator of the capacity of the local authority: should an estimation criterion or a specific numerical minimum size criterion be used?

During the preparation of the draft Administrative Reform Act, the number of residents was selected as the indicator of the capacity of local authorities because of its objective nature.¹²

Had only indicators that require broad discretion been selected as the core criteria of the administrative reform; for example, by focusing only on the evaluation of the circumstances and impacts listed in Article 7(5) of the Territory of Estonia Administrative Division Act¹³, it would have been extremely difficult to prove that the merging of these particular municipalities was optimal. A major part of the estimated impact is merely a prediction that would largely depend on the decisions – made by the municipalities to be merged and formed as the result of merging – on how to guarantee the provision of public services and which model of the internal organisation of the local authority to choose (for instance, whether rural municipal districts, administrative centres or regional departments

¹² As considered in detail in the explanatory memorandum to the draft Administrative Reform Act, the reasoning behind selecting this criterion is not repeated here. See <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/fec18826-0e43-4435-9ba8-598b6ed4ea40/Haldusreformi%20seadus>.

¹³ Under this provision, the following must be considered in the process of merging municipalities: (1) historical reasons; (2) effect on residents' living conditions; (3) residents' sense of cohesion; (4) effect on the quality of public services; (5) effect on administrative capacity; (6) effect on the demographic situation; (7) effect on the organisation of transport and communications; (8) effect on the business environment; (9) effect on the educational situation; and (10) effect on the organisational functioning of the municipality as a common service area.

would be created in the merged municipalities). The above implies that such objective criteria only allow the foreseeable impact of the merging of particular municipalities to be predicted based on current trends, but do not allow it to be definitively proven that the merging of municipality A with municipality B will result in the formation of a certain specific municipality, because it is the particular local authority that establishes the internal structures and the organisation of public services.

Both the expert committee on the administrative reform formed by the directive of the Minister of Public Administration and the central government considered other potential criteria in detail, but still arrived at a fairly unanimous conviction that the number of residents is the fairest and the most objective. The other options would have been much more subjective and less precise, not to mention their potential for being endlessly challenged and manipulated.

The Administrative reform Act, for the first time, established the minimum number of residents which indicates the capacity of the local authority and correlates this with the functions prescribed to a local authority by law. Namely, under the Administrative Reform Act,¹⁴ the local authority can guarantee it has the professional capacity necessary for managing its functions as prescribed by law and to provide high-quality public services to all its residents provided that the municipality has at least 5,000 residents (hereinafter the criterion for the minimum size of a municipality).

Still, this merely establishes the minimum size of a municipality, and not the ideal and optimal size prescribed by the state. Expert opinions showed that a clear economy of scale and increased financial capacity was noticed in municipalities with at least 5,000 residents. According to experts, the recommended size of a municipality would be at least 11,000 residents.¹⁵

¹⁴ Article 3 of the Administrative Reform Act.

¹⁵ Article 1(3) of the Administrative Reform Act.

The state decided to allocate another half a million euros in merger grants in order to aid the fulfilment of the recommended criterion or of the formation of county-sized municipalities during the round of mergers initiated by the municipal councils. Unfortunately, there were in fact no mergers initiated by municipal councils that would result in the formation of a county-sized municipality.

Discussions in the central government came to the conclusion that for the mergers initiated by the government to be painless, the Act is to establish that the central government shall initiate a merger when the number of residents in a rural municipality is below 5,000 and shall not use the recommended size of a municipality (at least 11,000 residents) as a basis.

The government was given the obligation to propose an additional merger for those municipalities where the municipal council had initiated a merger forming a municipality with fewer than 5,000 residents except when this council had applied for an exemption on the basis of Article 9(3) of the Administrative Reform Act.

The application of the criteria and exemptions created heated discussion when the draft Administrative Reform Act was circulated for approval and read in the *Riigikogu*. The Pro Patria and Res Publica Union as well as the Estonian Free Party believed that the requirement of 5,000 residents was too small, while others found that the requirement of 5,000 residents was too large (Conservative People's Party of Estonia) or that the reform could only be implemented on the initiative of municipal councils, and the 5,000-resident criterion could not be mandatory (Centre Party). In the end, this criterion was still a political compromise that was indeed an indicator suggested by experts and based on objective calculations. Looking into the future and considering the falling population, the legislator might as well have increased the criterion (for instance, to the recommended size of the municipality) in order to provide an even more efficient boost to the municipal development.

The process of establishing the criterion of the minimum size of a municipality is described in more detail in Veiko Sepp's and Rivo

Noorkõiv's article 'The Central Criteria for the Administrative Reform'.

In the court dispute concerning the constitutionality of the Administrative Reform Act, the Supreme Court found that, as far as the criterion of the minimum size of a municipality is concerned, there is no reason to doubt the legislator's assumption that the formation of larger municipalities could improve the capacity of local authorities to provide public services, and deemed the criterion to be constitutional.¹⁶ The Court agreed that municipalities with more than 5,000 residents can be expected to perform the functions assigned to them better than municipalities with fewer residents and emphasised that the establishment of the basic principles regarding the capacity of local authorities is a matter of national importance on which only the *Riigikogu*, and not the judiciary, is competent to decide.

The critics of the administrative reform also challenged the criterion of the minimum size of a municipality by claiming that minimum standards for the public services provided by local authorities should be developed in order to demonstrate their factual capacity. Given the fact that, in accordance with the principle of the right to self-government, municipalities have the right to make decisions on the specific method and procedure for, as well as frequency of, providing public services in the process of performing local government functions, the establishment of a mandatory standard by the state would be an unreasonable violation of the municipalities' right to self-government.¹⁷

¹⁶ Paragraphs 119 and 120 of Constitutional Review Chamber of the Supreme Court judgment No 3-4-1-3-16 of 20 December 2016, <https://www.riigikohus.ee/et/laheidid?asjaNr=3-4-1-3-16>. <https://www.riigikohus.ee/et/laheidid?asjaNr=3-4-1-3-16>. The Court also noted: 'The fact that the legislator attempted to promote the formation of larger municipalities in other ways before establishing the minimum number of residents should be taken into account, having for that purpose passed the Promotion of Local Government Merger Act as early as 2004. However, this measure proved to be ineffective, because there were 213 municipalities in Estonia as of 1 January 2016 according to Statistics Estonia data. Neither did opportunities for local authorities to cooperate significantly improve their capacity.'

¹⁷ Still, the law must establish the necessary basic standards for the protection of the fundamental rights of residents. Local authorities must not impose restrictions on fundamental rights.

How is it possible to maximise the results achieved in the course of the administrative reform while municipalities' right to self-government remains safeguarded? The implementation of the administrative reform in two stages

Before the administrative reform of 2017, local authorities were rather seen as community self-governments or a symbiosis of the community and state self-government theory.¹⁸

According to the theory of community self-government, the state is not to interfere with the municipalities' right to self-management at all or is to do so in highly exceptional and limited cases. Advocates of the community self-government model regarded municipalities as something of a state within a state and rather denied the central government's jurisdiction over changing their administrative-territorial organisation, which is, essentially, the transformation of the local government system by the state on the basis of development needs, the socio-economic situation or other considerations. The supporters of this approach have for decades also only favoured voluntary mergers of municipalities in Estonia; these have not, however, resulted in numerous mergers in any country despite state financial stimuli.

At the same time, legal theory has not been able to define 'community'; that is, to determine the characteristics and territorial scope of a community. There is no common understanding of whether a community is linked to the identity of place, or whether the entire population of a municipality, or some distinct subset of the population, can be regarded as a community.

Still, arguments for the need to protect a local government system based on abstract communities were often voiced in the form of

¹⁸ The theory of community self-governments is based on the ideas of natural law, which recognise local authorities as the source of power and justify the state's obligation to respect the freedom of community administration and the inalienability of community rights, which is what guarantees local authorities considerable autonomy (right to self-management). See the annotated online edition of the Constitution of the Republic of Estonia, 2017, <http://www.pohiseadus.ee/index.php?sid=1&ptid=170>.

dogmatic political statements. For example, in their rhetoric, those opposing the administrative reform would often protest that the merging of municipalities would result in the disappearance of unified communities, and decision-making would be removed from the population, so that local matters could no longer be organised in accordance with the European principle of subsidiarity. What they did not take into account was the fact that the principle of subsidiarity does not only imply that public services are provided as close as possible to home; it also means that the authority providing the function is to be adequate and the performance of the function is to be as effective and sustainable as possible.

Another argument against the reform was that since local authorities had the right to have legal personality (i.e. the right to exist), the state could only intervene in changes to the organisation of the administrative-territory of municipalities when there was a legitimate objective for implementing the change and the intervention was necessary, appropriate and moderate¹⁹ (i.e. a large-scale proportionality review must be performed).

According to legal scholars, the Constitution does not guarantee the status quo to a specific rural municipality or city as far as the size of their administrative territory or even the preservation of their legal personality is concerned. At the same time, it has been found that the termination of the legal personality of local authorities implies that the state government will meet various formal prerequisites (a hearing) and material prerequisites (identification and consideration of the interests of various parties, the principle of proportionality, constitutional principles: rule of law, democracy, social justice).²⁰

It has also been found that changes in administrative-territorial organisation should be accompanied by changes in the functions

¹⁹ Also see the opinions of the local authorities in court case no. 3-4-13-16 concerning the constitutional review; <https://www.riigikohus.ee/et/laheidid?asjaNr=3-4-1-3-16>.

²⁰ Constitution of the Republic of Estonia, annotated edition, 2008, p. 866.

performed by local authorities. In other words, administrative reform for the sole purpose of changing administrative-territorial organisation is criticised in legal literature.²¹ However, this view is not supported with substantive arguments.

Similarly, the dominant dogma in political rhetoric for years was that changes to the administrative-territorial organisation of municipalities could only be made on a strictly voluntary basis, since changing the administrative-territorial organisation is a local matter and not a state matter although international practice did not support such a position.

Taking into account the cautiousness and reservation towards the implementation of the administrative reform on the initiative of the state expressed in legal literature and political statement, the Administrative Reform Act worded the execution of the mergers in two stages: first those initiated by municipal councils and then, if municipalities did not merge at all or did not meet the minimum size criterion despite merging during the stage of mergers initiated by the municipal councils, mergers initiated by the central government.

The first stage, the so-called voluntary merger stage, implied merger negotiations and the submission of merger applications and documentation to the county governor by 1 January 2017 at the latest. The administration reform clearly targeted the merging of municipalities on the initiative of municipal councils, so a decision was made to create an incentive for mergers initiated by the municipal councils in the form of doubling the merger grant (compared to the regulation effective until 1 January 2018) and additional aid to those municipalities that would have more than 11,000 residents or form a county-sized municipality as the result of the merger. Another attempt involved securing increased termination-of-service compensation for the heads of rural municipalities, mayors and chairpersons of municipal councils.

²¹ See, for example, https://haldusreform.fin.ee/static/sites/3/2012/09/ekspertarvamus_olle_ps-riive.pdf

The above grants and compensations were meant to serve as social guarantees for the heads of local authorities because their statutory social guarantees are more limited than those of local government officials and employees, and at the same time, as incentives to promote mergers. Earlier mergers had clearly shown that the process would be successful where the head of the local authority led the merger. The Act ruled out the payment of compensations, as in Article 54¹(3)–(4) of the Local Government Organisation Act, only to those heads of local authorities who would continue working in the same position in the local authority formed after the merger (the former head of a rural municipality, the head of a rural municipality or mayor in the new local authority, the former chairman of the municipal council as the chairman of the municipal council in the new local authority).

In practice, the regulations were often approached in a casuistic manner. For example, a motion of no confidence in the heads of municipalities and municipal council chairmen who had effectively spearheaded mergers in good faith would be expressed just before the day of the municipal council elections to avoid paying compensations, and a new head of the rural municipality or a municipal council chairman would be promptly chosen, who would receive the compensation prescribed by the law in exchange for a very short term in office. There were also numerous cases of manipulation with leading positions in the new municipalities formed as a result of mergers; for instance, the former head of the municipality would be appointed chairman of the municipal council, not head of the municipality, only for the person in question to receive compensation in the amount of an annual salary although they would actually continue working in the new local authority. The author believes that such a reprehensible practice and manifestations of political culture could have been prevented if the Administrative Reform Act established that compensation would not be paid also in cases where the head of the municipality was elected chairman of the municipal council or vice versa.



During the planning of the administrative reform process, there was the hope that most local authorities would reach mutual agreements during the first stage of mergers initiated by municipal councils. This is what actually happened in many places. The photograph shows a fragment of the joint meeting of the municipal councils merged to form Valga rural municipality after the approval of the decision. Source: Arvo Meeks / Valgamaalane.

Another additional incentive in an attempt to motivate municipalities to merge on their own initiative was the fact that the provisions of the Promotion of Local Government Merger Act providing for merger grants to be allocated to the municipalities merging on the initiative of the municipal councils per standard procedure (that is, outside the administrative reform), were deemed ineffective as of 1 January 2018. Therefore, the amendments clearly signalled that further mergers would take place without government grants, so it would be worthwhile for local authorities to use the last opportunity to receive financial support for the merger from the state.

A decision was made to give the central government in chapter 3 of the Administrative Reform Act the right to intervene in changing the administrative-territorial organisation only when the first stage of merging was not the goal of the administrative reform and was not sufficiently effective from the perspective of the criterion of the minimum size of a municipality; that is, when a merger initiated by the municipal council still resulted in forming a municipality with fewer than 5,000 residents or if a municipality with fewer than 5,000 residents never took part in any merger negotiation group and did not submit a merger application to the county governor by 1 January 2017.

Nevertheless, the minimum size of a municipality was not an absolute criterion because it was found in the course of preparing the draft Act that it would be reasonable for the Act to comprehensively provide for exceptional cases in which local authorities could apply with the central government for an exemption from the requirement to merge.²² In addition to these exceptions, one more opportunity to opt out of merging was left for local authorities. Namely, after receiving a proposal for a merger from the central government, local authorities had the option of proving, under the Administrative Reform Act and the Territory of Administrative Division of Estonia Act,²³ that they are able to ensure administrative capacity and quality of public services without merging,

²² Article 9(3) of the Administrative Reform Act allows the central government to refrain from initiating the alteration of the administrative-territorial organisation of a municipality that does not meet the minimum population size criterion where: at least two municipalities with a total area of 900 square kilometres or more and a combined population of at least 3,500 have merged voluntarily; the relevant municipalities are maritime island municipalities; the new municipality resulting from a voluntary merger borders with a temporary control line of the Republic of Estonia within the meaning of Article 22(1) of the State Border Act on land, has a total population of at least 3,500 and is formed of at least four historically, culturally and geographically connected municipalities or parts thereof; or the population of the merging municipalities has dropped below 5,000 within the past year (by 1 January 2017).

²³ Article 9(9)1) of the Administrative Reform Act combined with Article 7(5) of the Territory of Estonia Administrative Division Act.

despite the considerations presented by the central government.

Therefore, the central government was given the discretionary power in the mergers initiated by the state or in deciding not to implement them while exercising this power was still limited by the law because local authorities had to thoroughly assess arguments against merging. The legislator deliberately left rather little room to manoeuvre in which the core criterion of the administrative reform could be disregarded, given that otherwise growth in the capacity of local authorities could not be achieved, and the goal of the administrative reform would not be fulfilled.

Numerous local authorities had started merger negotiations before the draft Administrative Reform Act was submitted to the *Riigikogu*. Still, it can be concluded with the benefit of hindsight that there would have been more mergers initiated by municipal councils in the end if not for the Estonian presidential elections, which took place at the same time as the merger negotiations – due to the fact that some candidates made election campaign promises not to pass the Administrative Reform Act should they be elected President, so that some of the local authorities, which were already deep in negotiations, suddenly renounced the idea of merging. What also played a part was, undoubtedly, the fears of local authority leaders for their future.

At the same time, the change of government and the dispute in the Supreme Court over the constitutionality of the Administrative Reform Act at the end of 2016 resulted in the conviction of local authorities that mergers would not be carried out, which was further strengthened by some former opposition politicians, because of the steps that the central government would take next and the expected court judgment (there were high hopes that the Supreme Court judgment would be in favour of the local authorities) (see Argo Ideon, 'The Main Political Attitudes and Arguments Prior to the Administrative Reform: Why was it successful this time?'). What was nevertheless surprising was the strong opposition

to the administrative reform in some municipalities, which was amplified by numerous politicians and top lawyers, in a manner that was rather unstatesman-like.²⁴

The implementation of the reform purely at the initiative of municipal councils would not have been possible even if more substantial financial aid from the state had been offered. For years before the administrative reform, the legislator had provided for paying merger grants to the local authorities merging at their own initiative,²⁵ and the amount had been increased on several occasions.

Practice showed though that using merger grants alone as an incentive did not result in systemic mergers of municipalities to such an extent that would restructure the entire local government system and replace the administrative reform.

Judging by the conservative opinions about reforming the local government organisations system expressed by experts and published in legal literature, an alternative solution implying that the state could have implemented the administrative reform only on the central government's initiative was never seriously considered. In such cases, the local authorities would not have had the discretionary power to choose their merger partners since the state would have 'mapped it out' or given local authorities a list of merging areas and required them to merge with another municipality within their area.²⁶

This is why the decision selected in the course of preparing the Administration Reform Act implied that local authorities would still have

²⁴ It is understandable that law firms act in the interests of their clients, but in this case they had been actively lobbying for local authorities to challenge the Administrative Reform Act and the regulations prescribing mergers. Which ultimately resulting in an irresponsible wasting of public funds.

²⁵ Promotion of Local Government Merger Act, in force from 25 July 2004. Amended to increase merger grants by the Act that amends the Territory of Estonia Administrative Division Act and other related acts, publication citation RT I, 19.3.2013, 1.

²⁶ In the dispute over the constitutionality of the Administrative Reform Act, the Supreme Court did not rule out the possibility that the legislator itself might establish the appropriate local government system.

broad discretionary power in selecting their merger partners (during the first stage of merging) even in cases where, as a result of the merger, the rural municipality or city had to change the county it belonged to (i.e. the merger crossed a county border). In order to guarantee the right to self-government for municipalities, the central government was deliberately not allowed to refuse to issue regulations approving the mergers initiated by municipal councils even if, during the first stage, the local authorities applied for a merger that would result in the formation of a municipality with fewer than 5,000 residents or if a merger did not guarantee the consideration of the impact and circumstances listed in Article 7(5) of the Territory of Estonia Administrative Division Act in the best possible way; for example, if the newly formed municipality had several centres and was weakly connected. This is certainly one of the valuable lessons of the 2017 administrative reform.

If any further possible changes to the local government system were to be implemented in two stages (provided, of course, that there is sufficient time for such a reform), local authorities could be allowed to choose merger partners, but the state should take the lead in directing mergers if they do not comply with the positive impacts listed in Article 7(5) of the Territory of Estonia Administrative Division Act and should not approve such 'illogical' mergers.

During the preparation of the draft Administrative Reform Act it was decided that the state would only be allowed to offer guidance about the mergers initiated by municipal councils through regional committees formed by the state,²⁷ whose role was to advise local authorities, the Ministry of Finance and the central government. The most important and

²⁷ On the basis of Article 5(4) of the Administrative Reform Act, regional committees were formed by the central government. Initially the draft Administrative Reform Act established that regional committees would be formed by the responsible minister, but the proceedings in the Riigikogu (including the Constitutional Committee meetings) resulted in deciding that there would be better political balance if regional committees were formed by the government and could not be undeservingly accused of being suspiciously similar to one minister in their views.

challenging task of the regional committees was to advise the central government on where it should make proposals for state-initiated mergers of municipalities with fewer than 5,000 residents. County governors were also involved in the reform process (as members of regional committees), and they supported and advised the local authorities within their counties. The Committees were to assess compliance with the effects and circumstances specified in Article 7(5) of the Territory of Estonia Administrative Division Act and had to consider alternative mergers for municipalities with a population of fewer than 5,000 residents.

As far as the mergers initiated by the central government are concerned, another solution under consideration was that of the state simply not approving mergers initiated by municipal councils that would result in fewer than 5,000 residents. However, such a solution would have been too problematic for the local authorities that had applied to merge because the central government adding a merger partner, and only then approving the merger, could have resulted in unpredictable situations, including political strategising, which would have allowed the merger to slip away. In a worst-case scenario, it could have made some local authorities abandon the idea of merging and initiate litigation against the state.

It was found that by 1 February 2017, the central government could pass merger regulations concerning the local authorities that had applied to merge at the initiative of the municipal councils, and only then use the suggestions of the regional committees to decide which municipalities to merge with, or concerning municipalities with fewer than 5,000 residents it would make a proposal about changing their administrative-territorial organisation even if the stage of the implementation of the government's proposal would require that the merger regulation passed during the voluntary merger stage be modified or annulled.

The only exception was added during the proceedings in the *Riigikogu* when, according to a proposal by coalition representatives,

a provision was included in the Administrative Reform Act²⁸ making it possible for local authorities that do not share a border to initiate changes to the administrative-territorial organisation if a municipality with fewer than 5,000 residents is located between them, and the central government merges that municipality with the municipalities that are applying for a merger initiated by their municipal councils. During the proceedings concerning the draft Act, there was a specific example involving the rural municipalities of Kaiu, Raikküla and Rapla, with Juuru rural municipality, which was within the functional area of Rapla rural municipality, had fewer than 5,000 residents and was located between the territories of the three municipalities, refusing to enter into negotiations with the rural municipalities that would merge to form Rapla rural municipality.²⁹

One of the matters most disputed during the stage of mergers initiated by the central government was which requirements the local authorities should follow in choosing a merger partner for a municipality that had not already merged to form a municipality with more than 5,000 residents. The dilemma was whether the Act should establish that a municipality failing to meet the minimum size requirement should be merged with what is logically a local commuting centre (for instance, a surrounding rural municipality would be merged with a central municipality) or an arithmetic operation should rather be used as the basis, and the municipality should be merged with the neighbour which has the number of residents necessary for the two to formally meet the minimum size criterion. In other words, if the options are merging a municipality that fails to meet the population size criterion with an adjoining one which also fails to meet the criterion, or merging it with a capable municipality that meets the criterion and has stronger ties with

²⁸ Article 7(3) of the Administrative Reform Act.

²⁹ https://haldusreform.fin.ee/static/sites/3/2017/06/20170618_rapla_kaiu_raikkula_juuru_sk.pdf.

the former while merging with it will have a more positive effect on the circumstances listed in Article 7(5) of the Territory of Estonia Administrative Division Act, which merger should be chosen?

Because both the goal of the administrative reform (forming municipalities with at least 5,000 residents) had to be achieved and the circumstances and impacts listed in Article 7(5) of the Territory of Estonia Administrative Division Act had to be taken into consideration, it was found that merging a municipality that does not meet the criteria with what is logically the centre would be justified. This point of view was also covered in the explanatory memorandum to the draft Administrative Reform Act. Otherwise, if the municipalities to be merged had not cooperated or acted in the same functional area before, the internal organisation of the local authority and the provision of services would become more complicated. Therefore, the central government was allowed to initiate a merger of a municipality also with such a municipality that already met the minimum size criterion or even the recommended size criterion.³⁰

The administrative reform has been criticised because the state regrettably abandoned the local commuting centre model in the implementation of the reform. In fact, what was required by the Administrative Reform Act and in the case of mergers initiated by municipal councils or the central government was due consideration of the circumstances and impacts listed in Article 7(5) of the Territory of Estonia Administrative Division Act, which as a whole aimed to facilitate merging municipalities with local commuting centres because this type of merger ensures that the above circumstances are taken into account in the best way possible.

Nevertheless, the Administrative Reform Act did not stipulate that a government-initiated merger should have a predominantly positive effect in terms of each of the individual circumstances and impacts listed in Article 7(5); instead, it required that the overall positive effect of a

³⁰ Article 9(2) of the Administrative Reform Act.

merger outweigh its possible negative effects.³¹ As many local authorities had not experienced active or large-scale cooperation in providing services before merging, there could not have existed any major cooperation networks that would have unambiguously shown the local authorities to be a common cooperation area and would have thus had a positive impact on all sectors.

The authors of the draft Administrative Reform Act relied on the assumption that the formation of larger municipalities would not compromise compliance with the principle of subsidiarity *per se*,³² would not split established communities or reduce the accessibility of public services,³³ since requirements for the quality and accessibility of the services provided for in the Promotion of Local Government Merger Act were to be taken into account when redesigning the internal organisation of the work of the local authorities. Under the above Act,³⁴ a municipality formed as a result of a merger must guarantee accessibility and quality of public services to the residents of the rural municipality or city at least at the same level as before the merger of the municipalities. The provision of public services must be organised in all the settlements where a rural municipal government or city government was situated before the merger.³⁵

³¹ The Supreme Court also supported this opinion in disputes concerning the merger regulations issued by the central government.

³² The principle of subsidiarity does not mean that it is necessarily the public authority closest to the person that will be performing the public functions; the appropriateness and efficiency of the performer of the public functions is also important.

³³ The mergers of municipalities performed before the administrative reform largely had a positive effect on the provision of public services; financial capacity and investment capacity improved, which allowed local authorities to implement some important projects. See e.g. https://haldusreform.fin.ee/static/sites/3/2012/09/ekspertarvamus_sootla_omavalitsustehine_miste-mojudest_09-09-2013.pdf

³⁴ Article 4 of the Promotion of Local Government Merger Act.

³⁵ During the first reading of the draft Administrative Reform Act in the *Riigikogu*, Arto Aas, the Minister of Public Administration, explained: 'It is not possible to agree about everything down to the smallest detail in advance; not everything can be solved at the legislative level. It is important to understand that the administrative reform as such will not open or close down a single school, kindergarten or library. These are issues for local people to consider and decide as council members, mayors or heads of the local authority.' See <http://steno-grammid.riigikogu.ee/et/201604061400#PKP-18642>.

Through the judgment concerning the constitutional review of the Administrative Reform Act,³⁶ the Supreme Court clarified the scope of municipal autonomy and the legislator's powers in restricting the municipalities' right to self-government, which had previously rather been a 'no go zone', and in designing the system of local government (the positions of the Supreme Court are described in more detail in Vallo Olle and Liina Lust-Vedder's article 'The Protection of the Constitutional Guarantees for Local Government during the Administrative-Territorial Reform'). Although the constitution provides a simple derogation of the municipalities' right to self-government,³⁷ the opinion that had prevailed so far was that changing the administrative-territorial organisation of municipalities on the initiative of the central government was a rather excessive infringement of their right to self-government. Legal scholars have also found that the justification of the foundation of the administrative reform should also include a proportionality test to verify that the solution planned in accordance with the Act is suitable, necessary and reasonable.³⁸ The same principle was used as the basis for the explanatory memorandum to the draft Administrative Reform Act, and the justifications of the infringements of the constitutional guarantees for local authorities as well as the thorough explanation of the impact of the implementation of the Act. At that moment, there was no certainty

³⁶ Constitutional Review Chamber of the Supreme Court judgment No 3-4-1-3-16 of 20 December 2016: <https://www.riigikohus.ee/et/lahendid?asjaNr=3-4-1-3-16>.

³⁷ Under Article 154 of the Constitution, local authorities must discharge their duties autonomously in accordance with the law. Obligations may be imposed on a local authority only pursuant to the law or by agreement with the local authority. Therefore, the Constitution makes it possible to limit the autonomy of a local authority on the basis of any law even if no agreement with the local authorities is reached concerning the issue.

³⁸ In accordance with the principle of proportionality, an infringement of a right must be appropriate (the measure must contribute to the achievement of the objective), necessary (the objective cannot be achieved by any other measure that would be less of a burden for the person but at least as effective as the former) and reasonable for the intended purpose (the means used are proportional to the objective). The restriction must not damage protected rights more than is justifiable with the legitimate objective of the regulation. See https://haldusreform.fin.ee/static/sites/3/2012/09/eksperiarvamus_olle_ps-riive.pdf.

that checking the planned measures to ensure they were not arbitrary, as well as emphasising the legitimate goal of the reform would be sufficient for the implementation of the administrative reform.

The Supreme Court found that the legislature has broad discretion over establishing and changing the administrative-territorial organisation of municipalities. Although municipalities do exist in the interests of limiting and balancing the power of the state as well as decentralising the public power, the Constitution does not provide for them to function as states within a state. According to the Court, changing the administrative-territorial organisation of municipalities is also a matter of national importance, and decisions about it are to be within the legislature's competence. Since the Constitution provides for the *Riigikogu's* broad discretion over establishing the administrative division of the territory of the state, the state does not have to meet the proportionality requirements in forming the local government system, but it must fulfil the conditions of the prohibition of arbitrariness.³⁹ The Court found that the reform had a legitimate objective and that the Administrative Reform Act met the conditions of the prohibition of arbitrariness.

In the end, the measure that infringed the municipalities' right to self-government the least was chosen as the administrative reform model, since local authorities were given an opportunity to select merger partners themselves.

³⁹ See paragraphs 89 and 91 of Constitutional Review Chamber of the Supreme Court judgment No 3-4-1-3-16 of 20 December 2016. In accordance with the judgment in question, the court is of the position that the prohibition of arbitrariness means that formal constitutional requirements must be followed in the process of changing the administrative-territorial organisation of the municipality (provision for restrictions in the law). In addition to meeting formal requirements, the changing the administrative-territorial organisation of the municipality must be constitutional in the material aspect; that is, to serve a constitutional purpose and contribute to achieving it (be appropriate for achieving it). At the same time, provisions of Article 158 of the Constitution must be taken into account, according to which borders of municipalities cannot be changed without 1) considering the opinion of the relevant local authorities (see paragraph 88 of the judgment). All of the above requirements were met in the course of preparing the draft Administrative Reform Act.

Should new functions be assigned to local authorities within the scope of the administrative reform?

Although the second stage of the reform planned during the preparation of the draft Act implied reassigning new functions from the county governments, which would cease operation, and from other state authorities to the local authorities of newly formed municipalities, it was emphasised both within the Ministry of Finance and by the Minister of Public Administration during all the proceedings of the Administrative Reform Act in the *Riigikogu* that there was no intention to revolutionise the functions fulfilled by local authorities.⁴⁰ The goal was to assign essentially local government functions, which are performed all over the country, along with funds from the national budget to the local authorities.

As far as the above is concerned, the draft Administrative Reform Act attempted to reconsider the prerequisites for the administrative reform as expressed earlier by scholars of law, according to which the administrative-territorial organisation reform initiated by the state could not be implemented without reforming local government functions. For instance, it was found that such a solution which implies that the territorial change aspect would be implemented in the proposed form separately from changes in the local government functions and financing, could not be regarded as legally correct. It was found that a solution involving the implementation of the package including all changes would meet local

⁴⁰ During the first reading of the draft Administrative Reform Act, Arto Aas, the Minister of Public Administration, said the following about assigning additional functions to local authorities: 'We are looking for ways to make local authorities stronger, to increase the significance of their role and financial support. At the same time, not a single discussion or proposal we received has implied that some kind of revolution (in the functions of local authorities) was occurring in Estonia. For over 20 years, we have actually known that the functions of local authorities and the functions of the central government have more or less been sorted out. Local authorities handle education, social welfare, local roads and infrastructure. No proposals for dramatic changes have been heard in this area. This is merely a pretext to criticise the reform. The mergers are necessary in any case. This will make local authorities more capable, and when they have become more capable, we will be able to have a systemic look at the state level to see what to do next.' <http://stenogrammid.riigikogu.ee/et/201604061400#PKP-18642>.

authorities' legitimate expectations and contribute to legal clarity. In the process, the timeframes for re-assigning various functions could vary, but clarity as to what the reform essentially means from the functional point of view should prevail as of the approval of the framework act.⁴¹

Similar arguments were used by the national associations of local authorities when the draft Administrative Reform Act was circulated for approval. For example, the Association of Municipalities of Estonia found that a major administrative reorganisation requires clarity as far as functions and financing principles are concerned, which the draft was mostly unclear about. The single financial aid package planned in the draft Act was important, but it did not replace a comprehensive, task-oriented and forward-looking system of financing local authorities.⁴²

The proposal made by the Association of Estonian Cities when the draft Act was circulated for approval was that provisions linked to the revenue base of local authorities (the principles for strengthening the revenue base and the appropriate financing model) should form a part of the Administrative Reform Act. The Association found that the financing model for the purpose of strengthening local authorities should be approved along with the Administrative Reform Act; therefore, it sought specific proposals for strengthening the revenue base of local authorities as part of the draft Administrative Reform Act.⁴³

Since the minimum size criterion for municipalities established in the Administrative Reform Act is based on the functions assigned to local authorities by existing laws, the local authorities could not claim that they were unaware of the scope of their future functions and therefore unable to estimate the size they should aim for in the merger.

To avoid possible legal disputes over the 'content' of the administrative reform, Article 38 of the Administrative Reform Act established

⁴¹ https://haldusreform.fin.ee/static/sites/3/2012/09/ekspertarvamus_olle_ps-riive.pdf, p. 9.

⁴² <https://eelnoud.valitsus.ee/main/mount/docList/7a8fcd91-77ec-4293-8555-09c23c1081a3>.

⁴³ *Ibid.*

that it is the task of the ministries responsible for the area to analyse the laws of the area of responsibility in cooperation with the Minister of Public Administration in order to determine the functions that are performed by the stated but are essentially local government functions and could be reassigned to the municipalities to be formed during the administrative reform.

It also sets forth that proposals for amending the laws of the area related to administrative reform be submitted to the central government for approval after the Administrative Reform Act enters into force because, contrary to the initial objective, no agreement with the ministries could be reached about these issues during the proceedings concerning the Administrative Reform Act. Political agreements concerning the re-assignment of the functions had not been made during the draft Administrative Reform Act proceedings either. An agreement on additional functions was only reached in 2017, when the *Riigikogu* passed an act amending the Local Government Organisation Act and other acts related to the implementation of the administrative reform,⁴⁴ and an act amending the Government of the Republic Act and other acts following the termination of the operation of county governments⁴⁵ on 14 June (the new local government functions are described in more detail in Ave Viks' article 'The Design of the Process of the Administrative Reform').

The county government reform was to be implemented at a later stage to avoid creating more confusion for the municipalities newly formed as a result of mergers by assigning them and implementing additional statutory functions.

⁴⁴ <https://www.riigiteataja.ee/akt/104072017002>

⁴⁵ <https://www.riigiteataja.ee/akt/104072017001>

The Supreme Court also took a milder stance in the judgment concerning the constitutionality of the Administrative Reform Act and did not find that the administrative reform could only be implemented while reforming the functions to be fulfilled by the local authorities.⁴⁶

What should the timeframe of the administrative reform be to ensure optimal results?

Initially, the central government's action programme involved the merging of municipalities in two stages so that the mergers initiated by municipal councils would come into force in 2017 along with the regular municipal council elections, and the mergers initiated by the central government would take place one year after the mergers initiated by the local authorities.⁴⁷

As far as the timeframe of the administrative reform is concerned, an agreement was reached in the central government before the Act was drafted that it would be optimal and most reasonable if mergers initiated by municipal councils and the central government alike entered into force simultaneously to keep the development of municipalities 'along the same lines' regardless of whether the merger was initiated by the state or the municipal council and to avoid creating confusion via a long transition period.

⁴⁶ See paragraphs 125 and 130 of Constitutional Review Chamber of Supreme Court judgment No 3-4-1-3-16 of 20 December 2016. In simple terms, the Court noted that although it had not been clear which state functions would in the future be assigned to local authorities at the time of reaching the court judgment, this could not result in the Administrative Reform Act being unconstitutional. The Constitution does not establish that a local authority must be informed in advance of any state functions that are going to be assigned to it in the future. The law also allows the central government to impose such functions on local authorities. Therefore, future amendments to the act and potential problems in financing local authorities were not legal obstacles to the implementation of the administrative-territorial reform initiated by the central government. Therefore, the central government should base its proposals and decisions concerning mergers on the capacity of the local authorities to perform the functions established by existing laws.

⁴⁷ <https://www.riigiteataja.ee/aktilisa/3030/6201/5006/231klisa.pdf>

The national associations of local authorities, the Chancellor of Justice, the local authorities which participated in court disputes as well as numerous members of the *Riigikogu* found that the administrative reform schedule was unreasonably dense and did not essentially allow local authorities to hold merger negotiations.

According to the authors of the draft Act, the schedule established by the Administrative Reform Act was indeed tight but still sufficient for local authorities to finalise the mergers initiated by themselves or the central government so that regular municipal council elections would take place on 15 October 2017.

Deliberate attempts were made to avoid a situation in which, in the case of mergers initiated by the central government, elections would be postponed until the period between regular elections or until the year 2021, when the next regular municipal council elections were to take place. The argument behind the decision was that local authorities had had 21 years to conduct voluntary mergers,⁴⁸ of which the state had also supported mergers with grants for the past 12 years.⁴⁹ The Administrative Reform Act also provides for merger grants, and local authorities will receive compensation for direct and proven merger-related expenses in the case of mergers initiated by the central government.

Local authorities had been generally aware of the criteria to be included in the administrative reform since December 2015, when the Ministry of Finance uploaded the draft Administrative Reform Act⁵⁰ in the Information System of Draft Acts for circulation and approval. By 1 July 2016 at the latest, when the Administrative Reform Act entered into force, all local authorities had been made aware of the reform schedule and criteria.

The practice of voluntary mergers (i.e. those initiated by municipal councils) had also shown that, given good will, it was possible to hold

⁴⁸ The Territory of Estonia Administrative Division Act came into force on 27 March 1995.

⁴⁹ The Promotion of Local Government Merger Act came into force on 25 July 2004.

⁵⁰ <https://eelnoud.valitsus.ee/main/mount/docList/7a8fcd91-77ec-4293-8555-09c23c1081a3>

successful merger negotiations and perform the operations required by the law to apply for a merger within six months. As all municipalities that did not meet the minimum size criterion were obligated by the law to select a merger partner after 1 July 2016, and the law provided for repercussions if the merger application was not submitted to the county governor by 1 January 2017, the overall timeframe of the reform was considered sufficient for local authorities to complete mergers.

One very important argument in the process of preparing the reform schedule was political clarity and legal certainty. Naturally, alternatives were considered here as well.

Still, the completion of mergers initiated by the central government later than October 2017, which would imply off-year elections, would have meant that the development of local authorities and political leadership would have been postponed until an undecided time in the future. Relying on the four-year working cycle of municipal councils is important for legality and allows local authorities to focus on their work. Stretching the timeframe of mergers and organising off-year elections would have created a political vacuum for at least two years, which would have been a financially burdensome process and exhausting for the population.

The schedule in the draft was prepared with due consideration of the fact that the schedule did not rule out or restrict the opportunity for local authorities to turn to the courts for the protection of their rights. On the contrary, the fact that the central government was to approve mergers by issuing a regulation,⁵¹ which is a legislative act, gave local authorities the most effective right to challenge the merger regulations: under Article 7 of the Constitutional Review Court Procedure Act, a municipal council may directly submit a request to the Supreme Court to declare a regulation of the central government which has not yet entered into force to be in conflict with the Constitution or to repeal a regulation of

⁵¹ Articles 8 and 13 of the Administrative Reform Act.

the central government or a provision thereof if it is in conflict with the constitutional guarantees of the local government. Consequently, local authorities did not have to go through the three-stage administrative court proceedings to protect their rights.

At the same time, there was no intention to set forth a separate court procedure in the Administrative Reform Act, since there was no necessity to emphasise that a local authority may turn directly to the Supreme Court in order to challenge a legislative act. The explanatory memorandum to the draft Administrative Reform Act (p. 32) states: 'The regulation format is more appropriate for the central government's proposal since a change in administrative-territorial organisation infringes the municipalities' right to self-government, and, in accordance with the theory of law, such an infringement is to be provided for by a legislative act.'

Similarly, establishing shortened proceedings was not deemed necessary at the time of preparing the draft since setting any additional restriction would have required extremely powerful arguments. In practice, local authorities and their representatives used inaccurate arguments in court disputes concerning the central government's merger regulations, claiming that the government's regulation was essentially an administrative act, which can be appealed against in an administrative court. By doing so, they ignored the point of view expressed in the explanatory memorandum to the draft Administrative Reform Act stating that a regulation as a legislative act can only be challenged in the Supreme Court by way of the constitutional review procedure and not in administrative court proceedings.

It can be said, with the benefit of hindsight, that the unnecessary appeals against the central government's regulations filed with the administrative courts, which were not accepted for proceedings by the administrative courts, could have been prevented by a provision in the Administrative Reform Act that would allow the central government's regulations to be challenged under the Constitutional Review Court Procedure Act, and a specific deadline being set for filing the appeals with

the Supreme court and a shortening of the standard four-month period of the proceedings for resolving such disputes. In such a case, instead of disputing the regulations in the administrative courts, local authorities could have focused on building new municipalities in accordance with the prerequisites.⁵²

Given that local authorities can hypothetically challenge the validity of the central government's regulation directly within a constitutional review court procedure, for which there are no statutory provisions as to the period of time during which provisions can be challenged, it would not have been reasonable to postpone the deadlines of the reform due to unpredictable potential disputes. Regardless of how far the completion date for the reform was shifted, there would always be someone who would like to challenge it at the last moment.⁵³

⁵² Another puzzling fact was the conviction shared by local authorities and their representatives that the courts were able to essentially review and evaluate (in the sense of Article 7(5) of the Territory of Estonia Administrative Division Act) the arguments and considerations in the explanatory memorandum to merger regulations in the case of mergers initiated by the central government. In the court disputes concerning merger regulations, the Supreme Court found that judicial control over the central government's decisions to change the administrative-territorial organisation of municipalities for the purpose of achieving the objectives of the administrative reform was limited. The central government has broad discretion in making decisions about changing the administrative-territorial organisation of a municipality. Moreover, most of the circumstances listed in Article 7(5) of the Territory of Estonia Administrative Division Act are of such a nature that the actual impact of changing the administrative-territorial organisation of a municipality on them can only be evaluated after the municipalities formed as the result of a merger have existed for some time. In addition, the actual impact of the merger on the circumstances listed in Article 7(5) of the Territory of Estonia Administrative Division Act largely depends on the actions and decisions of the local authority being created. The court can only review whether the central government has, in changing the administrative-territorial organisation of the municipality, taken into account relevant and important circumstances and ensured it has not relied on incorrect facts. Among other things, the court can check whether the central government has assessed the justification in the negative opinion presented by the local authority and has presented the relevant reasons as to why it does not consider the local authority's justifications sufficient in the explanatory memorandum to its regulation. See, for example, the paragraph 75 of the judgment concerning Koeru rural municipality: <https://www.riigikohus.ee/et/ lahendid?asjaNr=5-17-21/10>.

⁵³ The initiation of a court dispute does not suspend the validity of a regulation. The regulation remains in force until the Supreme Court has deemed it to be contrary to the Constitution and invalid.

Similarly, it was not considered necessary to establish variations for cases where mergers had already taken place, but potential court disputes would only be resolved after the date when the results of municipal council elections were announced. As the Administrative Reform Act provides for the obligation to grant a hearing to local authorities for presenting reasoned objections to the merger before the central government's final decision in cases of mergers initiated by the central government and for the central government's obligation to assess the validity of the objections, it was found that any possible abuse of this discretion carried out by the central government could be ameliorated in such a manner, and the use of the right to a hearing could prevent court disputes or at least reduce their number.

Since neither the Supreme Court in the constitutional review court procedure nor the administrative court in the administrative court procedure have jurisdiction over assessing the validity of arguments and considerations instead of an administrative authority, – such obligation to justify and power of discretion rests with the central government (which, in turn, relied on the expert assessments approved by the regional committees for the administrative reform), – numerous court disputes were not predicted nor were the prospects of successful claims or appeals considered very likely during the preparation of the draft Administrative Reform Act.

How can the residents' opinion be ascertained in the case of mergers and changes to the borders of administrative units planned in the course of the administrative reform?

One issue that drew a number of negative opinions during the implementation of the reform was the obligation to carry out public opinion surveys in the case of mergers initiated by municipal councils or the central government, established in the Administrative Reform Act.⁵⁴

⁵⁴ Articles 6 and 12(2)1) of the Administrative Reform Act.

The obligation to consult with the local communities when changing municipal borders arises from Article 5 of the European Charter of Local Self-Government. The Charter does not specify for the contracting states how the local communities should be consulted or stipulate that the residents' opinion is binding. The explanatory memorandum to the Charter rather explains that asking for public opinion serves the purpose of engaging the public and providing information. If a contracting state wishes to, it can also hold a referendum to ascertain the residents' opinions. The Administration Reform Act relies on the principle that the involvement of residents through surveys must be guaranteed to local authorities; still, the result of the survey is not binding for decision-makers but should merely be regarded as one of the arguments in making the decision. By contrast, the public perception was rather that surveys of residents were to be binding.

The Supreme Court found though that the provision of the residents' opinions could also come under the jurisdiction of the local authorities,⁵⁵ so the residents of the relevant municipality did not necessarily need to be asked for their opinion about the merger.

Should there be an option of preserving 'city' as the administrative unit in the case of a merger of a city and rural municipality?

Earlier discussions of the administrative reform would often encounter a problem presented by local authorities: since, according to the laws, it was not possible to preserve a city's historical name in the meaning of an independent municipality in the case of a merger, the idea of the

⁵⁵ Paragraph 136 of the judgment concerning the constitutionality of the Administrative Reform Act: the chamber believes that the European Charter of Local Self-Government does not require that the opinion of the local residents be heard. Article 5 of the Charter states: 'Changes in local authority boundaries shall not be made without prior consultation with the local communities concerned, possibly by means of a referendum where this is permitted by statute.' Therefore, the Charter leaves it for the contracting state to decide whether to hold a referendum, which is binding in accordance with the legal order of Estonia, or a public survey, which does not have legally binding force in accordance with the legal order of Estonia, or collect the residents' opinions under the jurisdiction of the local authority.

merger would rather be abandoned entirely. It is in order to encourage municipalities to merge with the city that is logically their commuting centre that the Administrative Reform Act establishes an exception in the form of the option of preserving 'city' as the type of municipality to be formed when merging a city and a rural municipality.⁵⁶ As the result, rural settlements (villages) also belong to the newly created administrative territory of the city.

Similarly, in accordance with the equal treatment principle, an opportunity to restore 'city' as the type of administrative unit in the case of a merger was provided for cities that had lost their status as independent cities as a result of a previous merger and had become settlements or cities without municipal status.

The option of restoring 'city' as the type of municipality was not used in the course of the administrative reform, but had this provision not been included in the Act, the city of Pärnu, for instance, would not have been formed within its new borders (Audru and Paikuse rural municipality merged with the city of Pärnu, and Tõstamaa rural municipality was merged with it by the central government).⁵⁷

Initially, the draft Act established that 'city' as a municipal type would be preserved if the number of residents was at least 5,000 people as of 1 January 2017 according to the population register, and if the population of the city constituted at least 1/2 of the total number of the residents in the merged municipalities. However, conditions for preserving 'city' as a municipal type were withdrawn during the proceedings in the *Riigikogu*, as they would have aborted mergers that had been initiated in municipalities unable to provide the required city-hinterland ratio before the discussions of the draft Act started.

⁵⁶ Article 14 of the Administrative Reform Act.

⁵⁷ Haapsalu, Narva-Jõesuu, Paide, Pärnu and Tartu remained cities with municipal status as a result of the reform.

Municipalities formed as a result of merging and named 'cities'

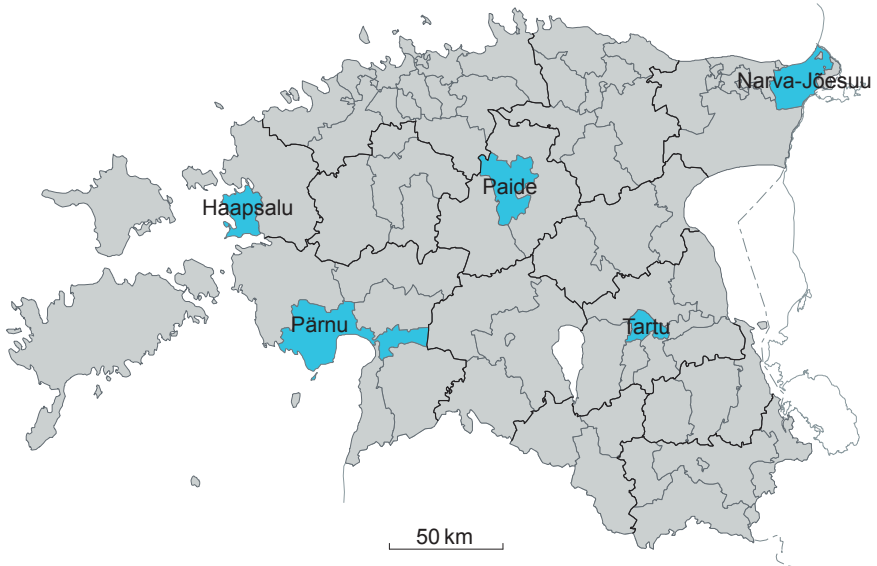


Figure 1.

Therefore, another question that immediately arose was how to refer to the territory of a merged city because the term 'city without municipal status' could not be used for a city formed as the result of a merger. The question was discussed by the Place Names Board, the administrative reform expert committee, the central government and the Constitutional Committee of the *Riigikogu*.

The initial suggestion of the Place Name Board members was 'urban core' (tuumlinn), which was not approved when the Act was circulated for approval. Neither was the term 'urban centre' (keskuslinn) considered suitable.

It was only during the proceedings in the *Riigikogu* that a proposal was made in the course of the Constitutional Committee's discussion not

to use the separate terms 'city without municipal status within a rural municipality' and 'city without municipal status within a city' to refer to such settlement units, but to adopt the common term 'city as settlement unit'. In practice, the identical name of the 'city' as an administrative unit and 'city' as a settlement unit has still created confusion; for example, in writing addresses (an address in the city of Pärnu after merging should consist of the following parts: Pärnu County, city of Pärnu, city of Pärnu, 1 Rüütli Street; however, an address in Paikuse rural municipality, which merged to form the city of Pärnu, should look like Pärnu County, city of Pärnu, Silla village). This issue could benefit from a better legislative solution in the future because the current arrangement can be misleading.

Could a regulation about forming rural municipal districts or city districts be used to involve residents in local matters, and should a mandatory model be established?

While earlier administrative reform plans also discussed the option of making it mandatory for local authorities to form rural municipal districts or city districts (hereinafter together referred to as the municipal district) in the territory of merged rural municipalities and cities to ensure the accessibility of public services and involvement of local residents, it was found during the development of the draft Administrative reform Act that the formation of municipal districts could only be provided for in a voluntary form.

It was also found that the performance of municipal functions through municipal districts had to be essentially organised by local authorities themselves since the organisation of local matters through municipal districts is just one option for decentralising local government,⁵⁸ that the practices of local authorities might vary, and that

⁵⁸ See also indicative guidelines by the Ministry of Finance for the development of decentralised governance and administrative models in local government: https://haldusreform.fin.ee/static/sites/3/2016/07/detsentraliseeritud_juhtimismudelid_loplik_21.07.2016.pdf.

restrictions could not be applied to the municipalities' right to internal self-government.

Discussions resulted in the decision, unlike in the previously effective Local Government Organisation Act, to make the formation of the representative bodies of a municipal district mandatory as an instrument for public engagement in case the municipal district model were used so that regional interests would be represented in accordance with the Local Government Organisation Act in the fulfilment or the functions of the rural municipality or city. Another decision meant establishing an obligation in the Act to forward a local authority development plan or budgeting strategy to the municipal district representative body for the latter to form a position and make suggestions before such a plan or strategy is approved.

Previously, the formation of a municipal district government or city district government as an administrative agency alongside the positions of the public officials necessary for a particular service was mandatory if municipal districts were formed. The Administrative Reform Act left the formation of the municipal district government and the appointment of the governor for the local authorities to decide.

The Act also guaranteed the formation of a municipal district for merging rural municipalities and cities by establishing that if the councils of the merging rural municipality and city wanted a municipal district to be formed within its territory, it would be the merged municipality's obligation to create one.⁵⁹

At the same time, the liquidation of a municipal district or alteration of its functions within four years after the merger, was made more complicated. Namely, the Administrative Reform Act established that a municipality formed as a result of a merger may not liquidate a rural municipal district or city district formed on the territory of a merged

⁵⁹ Article 15, Administrative Reform Act.

municipality during the first election period following the merger, excluding cases of an application by the rural municipal district representative body or city district representative body. Another principle added to the Act was that amending the rights and functions to be performed by the rural municipal district or city district under the merger contract or merger agreement during the first election period following the merger shall require at least a two-thirds majority of the membership of the council.

The specified regulation concerning municipal districts very clearly aimed to rule out situations where a two-level local government organisation would be created in a local authority formed as a result of a merger if there was a municipal district; that is, so that the status quo of the pre-merger municipalities would essentially be preserved.

How much did the draft Administrative Reform Act change in the course of the proceedings?

The draft entered into the Information System of Draft Acts did not differ very much from the draft text presented to the Government of the Republic. Most corrections involved the nature of the legislative drafting and most suggestions were further explained in the explanatory memorandum to the Administrative Reform Act.

As mentioned above, the key complaints from the national associations of local authorities about the draft Act related to the unresolved nature of the issue of which additional functions would be assigned to local authorities as a result of the administrative reform, and how the principles for the distribution of the revenue base would change, by the time the draft was circulated for approval.

In their opinion, the associations supported the implementation of the reform via mergers initiated by municipal councils. As far as government-initiated mergers were concerned, the Association of the Municipalities of Estonia took a much more negative stance, which was also logical because the reform mostly affected the members of this

association. The principal comments were mostly of an emotional and worldview nature. The draft Act was not changed much following the comments.

For example, the associations criticised the fact that the first stage of the administrative reform; that is, the mergers initiated by municipal councils, only seemed to be voluntary because an obligation to find merger partners would still apply to all municipalities with fewer than 5,000 residents. The stringent timeframe of the reform was also criticised.

Without substantiating its arguments, the Association of the Municipalities of Estonia even found that it was a given that there was no connection between the size of a municipality and the local authority's capacity; that is, there were weak and capable local authorities among large and small ones. It found that large municipalities that merged would generally not be receiving much additional financing, which would certainly not reach the remote regions of a rural municipality, especially for entrepreneurship and creating jobs. However, according to the analyses of merger experiences known to the Ministry of Finance so far, such fears never materialised in the merged municipalities.⁶⁰

It became apparent during the proceedings in the *Riigikogu* that political parties hold opposing views on the implementation of the reform.⁶¹ The Centre Party essentially wanted the reform to be implemented on a voluntary basis only (while requesting increased merger grants and compensations for heads of local authorities) without any minimum size criterion for a municipality or provisions on mergers initiated by the central government. The Estonian Free Party wanted to

⁶⁰ The comments of local authorities concerning the draft Administrative Reform Act and the responses given by the Ministry of Finance can be found in the draft coordination table: <https://eelroud.valitsus.ee/main/mount/docList/7a8fcd91-77ec-4293-8555-09c23c1081a3>. Experience of earlier mergers: <https://haldusreform.fin.ee/static/sites/3/2014/04/oppetun-nid-pool-aastat-parast-uhine-misi.pdf>.

⁶¹ For the motions to amend the Act, see: <https://www.riigikogu.ee/tegevus/eelroud/eelrou/muudatusettepanekud/fec18826-0e43-4435-9ba8-598b6ed4ea40/Haldusreformi%20seadus>.

increase the criterion for the minimum size of a municipality, but at the same time also increase the number of exemptions in the administrative reform, change governance organisation and election procedures in Tallinn, and give broad decision-making rights to municipal districts, which would have contradicted previously effective principles of local government organisation (by 'hijacking' a major part of the decision-making on issues which were under the sole jurisdiction of municipal councils) and would have created a second level of local government.

By contrast, the Pro Patria and Res Publica Union found that the reform was not ambitious enough and that its goal should be the formation of county-sized municipalities or those with at least 11,000 residents; the same opinion was expressed by numerous members of the Social Democratic Party, while the Conservative People's Party of Estonia wanted the minimum size criterion to be reduced to 3,500 residents and the deadlines of the reform to be postponed.

A major part of the disputes in the parliament concerned exemptions from the administrative reform.⁶² One of the key changes made in the parliament was the unambiguous addition of the exemption for the formation of Setomaa rural municipality, which allowed the merger to be approved even though the merging municipalities did not share a border (the traditional Setomaa group of villages known as 'nulk', which was a part of the former Misso rural municipality, is now a separate area of land belonging to Setomaa rural municipality).

The proceedings in the *Riigikogu* also further specified the provision giving the central government the right to initiate the transfer of a part of the territory of one municipality to another in the course of a merger if necessary for the minimum size criterion to be met. In this case, it also needed to be ensured that the transfer of part of the territory guaranteed the territorial integrity of the municipality.

⁶² Three draft acts to amend the Administrative Reform Act also focused on changes to exemptions from the administrative reform; see 273 SE, 274 SE and 376 SE: <https://www.riigikogu.ee/?withoutTitle=haldusreform&checked=eelnoud&s=>.



Due to the opposition's delaying tactics, the Riigikogu even held a night session for the discussion of the Administrative Reform Act on 11 May 2016. List of proposed changes to the draft Administrative Reform Act. Source: Erik Prozes / *Postimees*.

What were the administrative reform lessons learned in as far as process management was concerned?

The implementation of the administrative reform was a genuine survival course for those who prepared and implemented it (the state and local authorities alike). On the other hand, the implementation of the reform was a developmental experience of the management of such a broad-based process, which had an important impact on society. In this regard, it is rather not about the questions of the substance of the reform or its legal options but about the procedural lessons listed below as worth special attention in the opinion of the author of the article.

A reform needs to have a clear goal based on expert opinion(s), but which political forces have agreed on from the start. It is good if the Prime Minister is politically responsible for the reform, which emphasises the importance of the issue. If only the minister of the certain area were responsible for the reform, it would be easier to put the issue on the shelf in the case of a political stand-off. The goal of the reform and its framework could be included in the coalition agreement to prevent disputes of principle in the process of draft preparation. The office has to support the political directions agreed upon, and politicians have to be responsible for leading the reform.

The implementation of the reform needs to start immediately after the appointment of the new government is confirmed so that political disputes and potential court disputes can be resolved without unnecessary time pressure. For the sake of clarity, the provisions of the reform should be established by a separate act.

- The wording of the act needs to be as simple as possible; parenthetical clauses which can later create interpretation problems should be avoided.
- Political volatility, when a change of power takes place mid-process, and the implementation of the reform is threatened, should also be avoided.
- The team for the preparation and implementation of the reform needs to be sufficiently large.
- Clear roles need be assigned to all team members, a detailed schedule needs to be prepared, and the fulfilment of the tasks agreed upon needs to be monitored regularly. The minister responsible for the reform must also be informed about all the details. To achieve that, regular meetings with the officials need to be held so that everyone is on the same page. The distribution of information through someone's mediation is not sufficiently effective.
- A leading ministry needs to be appointed, but a situation in which other ministries remain passive should be avoided although a

major change that influences the whole country will not leave other ministries' areas of government unaffected.

- Great attention needs to be paid to meetings and discussions with the representatives of local authorities, associations of local authorities, other ministries, politicians, other stakeholders and the media. This contributes to trust, partnership and the feeling of working toward a common cause. Keeping other ministries in the loop about the progress of the reform is also necessary. Explain, explain and explain!
- Although the goal is to reduce the amount of legislation, the experience of implementing the administrative reform shows that local authorities expect even more precise and detailed wording of legal regulations. Unfortunately, most local authorities do not have a habit of reading the explanatory memoranda of draft acts.
- Time and resources need to be allocated specifically for guiding and training local authorities.
- Private sector organisations need to be informed about the consequences of the changes and how they will affect their operation well in advance (e.g. one needs to know the principles of post-merger right of representation of the local government to perform notarial deeds).
- The local authorities also need to agree on specific people responsible for the process as well as specific dates, and need to turn to the state to resolve disagreements or disputes (the support of merger consultants was really necessary).