Constitutional judgment 3-4-1-17-08

JUDGMENT
OF THE CONSTITUTIONAL REVIEW CHAMBER
OF THE SUPREME COURT

No. of the case	3-4-1-17-08
Date of judgment	19 March 2009
Composition of court	Märt Rask and members Henn Jõks Hannes Kiris, Indrek Koolmeister and Harri Salmann.
Court Case	Petition of the Tallinn City Council for the declaration of invalidity of § 7(1)3), § 7(2) and § 7(2^1) of the National Audit Office Act.
Bases of proceeding	Petition of the Tallinn City Council of 17 November 2008.
Date of hearing	13 January 2009
Persons participating at hearing	Representatives of the Tallinn City sworn advocate Toomas Vaher; representatives of the National Audit Office – Auditor General Mihkel Oviir, chief auditor of the local government audit department Airi Mikli and legal adviser Tiina Ojasalu; the Chancellor of Justice Indrek Teder and the Deputy Chancellor of Justice-Adviser Madis Ernits.
DECISION	**To dismiss the petition of the Tallinn City Council.**

FACTS AND COURSE OF PROCEEDING

1. On 11 May 2005 the Riigikogu passed the Act Amending the National Audit Office Act and the Local Government Organisation Act (RT I 2005, 32, 235), by which – among other things § 7(1) and (2) of the National Audit Office Act (hereinafter “the NAOA”) were amended and subsection (2^1) was added to the section.

2. On 13 November 2008, by its resolution no. 222, the Tallinn City Council decided to submit a petition to the Supreme Court for the declaration of invalidity of § 7(1)3), § 7(2) and § 7(2^1) of the National Audit Office Act due to the conflict thereof with the constitutional guarantees of local governments and with the principle of legal clarity. The Supreme Court received the petition on 19 November 2008.

JUSTIFICATIONS OF THE PARTICIPANTS IN THE PROCEEDING

3. The Tallinn City Council is of the opinion that the petition is admissible, because it has been submitted for the protection of the constitutional guarantees of local governments and the contested provisions are capable of infringing these guarantees.

4. The Tallinn City Council argues that § 7(2) of the NAOA is in conflict with § 133(3) and § 154(1) of the Constitution, because the provision allows the National Audit Office to exercise control over the possession, use and disposal of municipal property.

The National Audit Office is an institution established by the Constitution and has the specific competence provided by the Constitution. § 132 of the Constitution establishes by way of a general rule that the National Audit Office is an independent state body responsible for economic control. The objects of control thereof are provided in § 133, pursuant to cause (3) of which the National Audit Office may only audit the use and disposal of state assets which have been transferred into the control of local governments. The petitioner is of the opinion that this provision constitutes a deliberate restriction on the extent of auditing of local governments with the aim of ensuring that the National Audit Office does not exercise any control over municipal property. This conclusion is supported by clause (2) of § 133 of the Constitution, pursuant to which the main function of the National Audit Office is to audit the use and preservation of state assets.

The petitioner is of the opinion that the constitutional chapter on the National Audit Office does not provide for a possibility to extend the competence of this institution. § 137 of the Constitution, pursuant to which the organisation of the National Audit Office shall be provided by law, does not permit to regulate the competence thereof, because competence does not constitute a part of the organisation of the Office.

Anyway, the competencies that infringe on the local governments' right to self-organisation may not be attributed to the National Audit Office by law. Thus, although § 160 of the Constitution in principle allows to subject local governments to the supervision of the National Audit Office, this is – nevertheless – impossible due to clause (3) of § 133 of the Constitution, which protects local governments against the interference of the National Audit Office into the issues beyond the use and disposal of state assets. When the National Audit Office exceeds the competence conferred to it by clause (3) of § 133 of the Constitution, this automatically amounts to a violation of local governments' autonomy.

The competence of the National Audit Office to audit the possession, use and disposal of municipal property is further contravened by the position of the National Audit Office in the system of state authorities. The National Audit Office as a state authority on the level of central power (§ 132 of the Constitution) is primarily an auxiliary to the Riigikogu and other state authorities. Consequently, its filed of activities should be related to the national level and not the level of local governments.

The extension of the competence of the National Audit Office over municipal property can not be justified by a mere reference to the principle of legality. The principle of legality does not mean that control over local governments should be exercised precisely by the National Audit Office. Especially in a situation where there are several other possibilities enabling the central power and other constitutional institutions to interfere with the activities of local governments.

5. The Tallinn City Council argues that § 7(2^1) of the NAOA is in conflict with clause(3) of § 133 of the Constitution, because the provision allows the National Audit Office to exercise full economic control over state assets, including the audit of management and performance.

As to the extent of control the petitioner argues that while clauses (1) and (2) of § 133 of the Constitution enable the National Audit Office to exercise full economic control, clause(3) of § 133 of the Constitution restricts the control, in regard to local governments, to the use and disposal of state assets which have been transferred into the control of local governments. The latter can no way be considered equal to economic control.

The petitioner is of the opinion that the audit of the use and disposal of state assets which have been transferred into the control of local governments, referred to in clause (3) of § 133 of the Constitution, can consist in the control of lawfulness or legality and not in performance control. If the National Audit Office started exercising control over other than lawfulness we could no longer speak of independent activities for the purposes of § 154 of the Constitution. What constitutes an especially extensive infringement of the right of self-organisation is the control over management, organisation and performance. Also, pursuant to Article 8(2) of the European Charter of Local Self-Government, ratified by the Riigikogu (RT II 1994, 95), any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles.

As regards the object of control the Tallinn City Council points out that clause (3) of § 133 of the Constitution allows the National Audit Office to audit only the use and disposal of state assets. § 7(21)of the NAOA, on the other hand, establishes a much broader object of control.

The state assets are defined in § 2 of the State Assets Act. Pursuant to this provision state assets are immovable and movable property belonging to the state and registered in the national state assets register. State assets do not mean financial resources. Neither do the state assets referred to in clause (3) of § 133 of the Constitution mean financial resources, because pursuant to the wording of the provision the assets must have been "transferred into the control" and be "state assets" [Estonian "*riigivara*" – a compound noun]. The assets in state ownership in more general sense are designated in the Constitution as "*riigi vara*" (clause (2) of § 133(2), § 135 of the Constitution).

As § 7(21) of the NAOA establishes that the National Audit Office is entitled, in addition to movable and immovable property, exercise control over the allocations from state budget intended for specific purposes, grants and funds allocated for the performance of state functions, the referred provisions is – in this regard – in conflict with clause (3) of § 133 of the Constitution.

6. The Tallinn City Council points out further that if the Constitution indeed allows to confer the described competence to the National Audit Office, the contested norms still disproportionately infringe the autonomy of local governments.

Extension of the parallel competence of the National Audit Office is not necessary for the achievement of the desired aim. The control within a local government (supervision over bodies, internal control, internal audit) and the external control (control by the County Governor, the Chancellor of Justice, state executive agencies and inspectorates, independent audits, mechanisms of the Anti-corruption Act) are sufficiently thorough in regard to both municipal property and state assets.

Neither are the contested norms proportional in the narrower sense, as the extensive competence of the National Audit Office rather intensively infringes the right of self-organisation. At the court hearing the representative of the petitioner further specified that in the audit reports – which can not be contested in the court and which are of high authority – one can assess the activities of the heads of local governments, and thus the audit reports of the National Audit Office may, eventually, affect the freedom of election on the local level. At the same time there is no reliable data to the effect that it is the local government level where there are extremely serous problems with lawful and rational use of property.

7. As regards the conflict of the norms with the principle of legal clarity the Tallinn City Council argues that in the contested provisions of the National Audit Office Act the extent, object and limits of control are

worded so ambiguously that it is not unambiguously clear what exactly are the activities of local governments that the National Audit Office can audit.

Due to the fact that in practice it is difficult to delimit economic activities from other activities, the National Audit Office can assess the lawfulness of local governments' activities to a very broad extent. The competencies established in § 7(2) and (21) of the NAOA are difficult to be delimited in a situation where in a certain sphere funds have been allocated both by the state and a local government. Although the state may have allocated but a fractional part of these funds, the National Audit Office is – through this allocation – entitled to exercise full control over the activities of the local government in this sphere. § 7(2) and § 7(21) of the NAOA render it impossible, in practice, to differentiate the object and extent of the control.

In addition, bearing in mind the contested provisions, it is not clear to the Tallinn City Council whether and to what extent § 7(4) of the NAOA is applicable to local governments.

8. The Constitutional Committee of the Riigikogu is of the opinion that the extension of the competence of the National Audit Office is in conformity with the Constitution. The Committee points out, on the basis of the commented publication of the Constitution, that additional competencies can be conferred upon constitutional institutions if the competencies do not exceed the area of activity of the authority and there is a good reason for such conferral. The Committee argues that these good reasons are the lack of other control mechanisms over public assets and great risk of corruption in local governments.

The Committee does not agree with the opinion of the Tallinn City Council that the concept of state assets, employed in clause (3) of § 133 of the Constitution, should be interpreted on the basis of § 2 of the State Assets Act. According to purposive interpretation the concept of state assets should include all the state assets transferred into the use of local governments by the state. Such interpretation takes into account the principle pursuant to which independent and competent economic control must be exercised over public administration in its entirety, including all public authorities, without allowing the existence of control-free spaces. The aim of the National Audit Office should be to give the Riigikogu and the public the certainty that the public sector resources are used lawfully and effectively.

The Committee is of the opinion that the constitutional guarantees of local governments have not been violated. These would be violated if the formal requirements (§ 160 of the Constitution) and substantial requirements, arising from the Charter, concerning organisation of control were violated. The National Audit Office Act is in conformity with the minimum requirements of the Charter, establishing full control over state assets and control of lawfulness of municipal assets. The extension of the competence of the National Audit Office to include municipal property is necessary in public interests and is the best solution from among other possible solutions. The National Audit Office is independent from the central power, performs its ordinary functions (aspect of economy) and is the least repressive among possible alternatives, because the Office has no right to issue precepts.

The Committee is of the opinion that the contested provisions of the National Audit Office Act are not in conflict with the principle of legal clarity. The provisions are not ambiguous, contradicting or deficient, because the legislator has defined the objects of control with sufficient precision.

9. The Minister of Justice is of the opinion that the petition of the Tallinn City Council is admissible, but it is unfounded and is to be dismissed.

The regulatory framework of control over local governments in its entirety, as established in the National Audit Office Act, and in conjunction with § 6, § 7(1)3), § 7(2) and § 7(21) of the NAOA, is not in conflict with the principle of legal clarity. Economic activities as the object of control can be delimited from non-economic activities of local governments on the basis of § 6 of the NAOA. Neither does the regulatory framework of control of the assets allocated by the state lack legal clarity, because – bearing in mind the abstraction level of law – the provision for clearer differentiation would be questionable. It is not the lack of clarity of the Act that is the issue, but the problems related to the application of the Act. The mere fact that it

might prove difficult to discriminate between the municipal assets and the funds allocated by the state does not give rise to the conclusion that the contested provisions of the National Audit Office Act lack legal clarity.

As regards the extension of competence of the National Audit Office the Minister of Justice points out that although the purpose of clause (3) of § 133 of the Constitution is the protection of local government autonomy, the provision does not exhaustively establish the competence of the National Audit Office. Local governments are bound by the principle of legality, and clear and effective possibilities must exist for ensuring legality, state supervision being the most weighty of these. National Audit Office is the most effective in this supervision. Neither does the Charter preclude the control of lawfulness exercised by state authorities. What is precluded is only the control over effectiveness of resolution of local matters.

The aim of the National Audit Office's supervision, i.e. the aim of restrictions of local governments' guarantees is to ensure the legality of local governments' activities, the lawful use of public funds and prevention of the risk of corruption. In regard to state assets the additional aim is to guarantee the purposeful and economic use of these assets. These aims are in conformity with Article 8 of the Charter.

The National Audit Office's supervision of the lawfulness of local governments' economic activities, as well as the supervision of the performance of local governments in the possession and use of state assets is a suitable measure for the achievement of the aim. This indisputably fosters the lawful use of the state assets at the disposal of local governments and diminishes the probability of commission of acts of corruption.

The supervision by the National Audit Office is also a necessary measure. The external supervision over local governments exercised by other control authorities does not offer a general picture, comparable to that created by the supervision of the National Audit Office, about the lawfulness of local government activities and the expediency of the use of state assets by local governments. The National Audit Office's supervision prevents the possibility of gaps in exercising economic control, caused by the scattering of the competencies of control bodies. Also, it is a peculiarity of the supervision exercised by the National Audit Office that its independence is guaranteed significantly better in comparison to the internal control bodies of local governments (e.g. internal audit committee) and in comparison to those external control bodies that belong to the executive branch.

The extension of the competence of the National Audit Office is also a reasonable measure for the achievement of the aim. The representative of the petitioner has failed to show convincingly why - in the case under discussion - the lawful and public-funds-efficient functioning of local governments is of lesser weight than the restriction of local governments' guarantees to a certain extent. Upon assessing the reasonableness of the infringement it has to be taken into account that the National Audit Office only interferes in the local governments' autonomy by disclosing the audit report drawn up as a result of its proceedings. This does not amount to a mandatory precept or another act directly resulting in sanctions.

Consequently, the contested provisions of the National Audit Office Act do not violate the constitutional guarantees of local governments, and they are constitutional.

10. The Minister of Finance is of the opinion that the contested provisions are in conformity with the Constitution, and the petition of the Tallinn City Council is to be dismissed.

In regard to legal clarity the Minister of Finance argues that the petition is not admissible to the extent that the petitioner fails to explain what exactly the lack of clarity consists in and how it is related to constitutional guarantees of local governments.

The Minister of Finance is of the opinion that § 133 of the Constitution is to be read to the effect that the control functions and objecst referred to therein do not exclude other functions imposed on the National Audit Office by law. Upon determining the control function in law the constitutional principles have to be taken into account, and the functions referred to in the Constitution must not be rendered impossible to

perform.

The Minister of Finance is of the opinion that the infringement caused by the contested provisions serves a legitimate aim and that the extension of control competence is a proportional measure for the achievement of this aim. Upon assessing the reasonableness of the infringement it has to be born in mind that the result of the economic control exercised by the National Audit Office is not a binding directive. The consequence of the control is that the subject of control and the public are informed of the detected deficiencies in a situation where self-checking arrangements have not yielded sufficient results. The full control over lawful and expedient use of public funds is guaranteed only when the choice of objects of control does not depend on the subjects who administer public funds. Thus, the intensity of the infringement is smaller than the importance of the desired aim.

11. The Chancellor of Justice is of the opinion that § 7(1)3), § 7(2) and § $7(2^1)$ of the NAOA are in conformity with the Constitution.

The petition of the Tallinn City Council is admissible. Upon assessing admissibility the Chancellor of Justice points out that the activities of the National Audit Office in exercising control over local governments infringes on the constitutional guarantees of the latter not because as a result of unfavourable legal effect but due to the unfavourable actual effect. The infringement consists in the fact that the audit of the National Audit Office or the possibility of auditing may affect for example the activities or organisation of the internal audit unit of a local government. Also, the observations, assessments or proposals of the National Audit Office may – despite the lack of binding effect but due to high authority – prove to be binding *de facto* . For example, an observation, assessment or proposal of the National Audit Office may serve as a ground for the County Governor to commence, under § 85 of the Government of the Republic Act, supervision proceedings over the activities of a local government.

The contested provisions are constitutional in the formal sense. The Riigikogu is competent to assign to the National Audit Office the task of exercising control over local governments. The provisions under discussion do not lack legal clarity.

As regards the extension of the competence of the National Audit Office the Chancellor of Justice specifies that this is constitutional. The Riigikogu has the competence to resolve all issues in the state. The issues that the Riigikogu is not competent to resolve must arise from the Constitution itself. These arise from the so called negative clauses of competence (e.g. §§ 87(3) and 146 of the Constitution), which exclude the competence of the Riigikogu to organise the implementation of Acts or administer justice.

Clause (3) of § 133 of the Constitution does not amount to such a negative clause of competence as § 87(3) and § 146 of the Constitution. The constitutional catalogue of functions of the National Audit Office – a supervisory authority exercising ‘soft’ supervision – can not be systematically exhaustive. The constitutional catalogue of functions of an independent supervisory authority is to be treated as a guarantee of function. The legislator must not deprive an independent supervisory authority of its constitutional functions except by amending the Constitution. At the same time the Constitution does not preclude the extension of the competencies of independent supervisory authorities provided in the Constitution by adding new but essentially suitable competencies, if this does not prejudice the performance of the functions provided by the Constitution. This is how the legislator has supplemented the functions of the Chancellor of Justice.

Furthermore, § 154(1) of the Constitution provides that local governments shall operate independently pursuant to law, and § 160 of the Constitution establishes that the administration of local governments and the supervision of their activities shall be provided by law. Both provisions constitute constitutional norms delegating the authority to restrict the guarantee of local governments, emphasising at the same time the competence of the legislator to regulate the local governments and the organisation thereof. Neither can anything else be concluded from Article 4(4) of the Charter – referred to by the petitioner, the second sentence of which provides for a reservation allowing to restrict, pursuant to procedure prescribed by law, the powers given to local authorities.

As to legal clarity the Chancellor of Justice points out that although local governments can not invoke the fundamental right arising from § 13(2) of the Constitution when demanding legal clarity, they can invoke legal clarity as an objective constitutional principle. Thus, the requirement of legal clarity is applicable in the law on state administration, yet requirements as high as in regard to laws restricting fundamental rights can not be set to it. In practise it is first and foremost the public servants, who have been trained accordingly, who interpret the regulatory frameworks of the law on state administration. Only such regulatory framework could be deemed as not conforming to the requirement of legal clarity which contains an inconsistency which can not be bridged through interpretation, or the content or legal consequence of which is not comprehensible despite all the employed interpretation criteria. The National Audit Office Act contains no such regulatory framework.

With regard to substantive constitutionality of the infringement the Chancellor of Justice is of the opinion first, that clause (3) of § 133 of the Constitution does not specify the guarantees of local governments and does not establish a substantial limit to the control over local governments. It can not be concluded from clause (3) of § 133 of the Constitution that the legislator must not strengthen the supervision of local governments. Interpretation of clause (3) of § 133 of the Constitution as a prohibiting norm the addressee of which is the legislator serves no rational aim. In a democratic constitutional state it is for the legislator to decide how to organise public administration and the supervision to be exercised within the framework thereof. Furthermore, it is questionable whether the economic control exercised by the National Audit Office can at all be deemed supervision for the purposes of the Constitution and the Charter.

Next, the Chancellor of Justice assesses the proportionality of the infringement and argues that it is both suitable, necessary and proportional in the narrow sense for the achievement of the aim. On the basis of the explanatory letter to the Act establishing the contested provisions, the Chancellor of Justice considers the aim of the infringement to be the extension of competencies of the National Audit Office so that it could exercise economic control also over local governments, and this would help to ensure the lawful and expedient use of public sector funds. The extension of the competence of the National Audit Office fosters the achievement of the aim. It is also necessary for the achievement of the aim, because no other measure - referred to by the Tallinn City Council – either alone or in their conjunction serves the aim of ensuring the lawful and expedient use of public sector funds. As regards reasonableness (proportionality in the narrow sense) the Chancellor of Justice is of the opinion that the infringement is neither very intensive nor – bearing in mind the possible consequences of audits – extensive, whereas the aim of guaranteeing the lawful and expedient use of public sector funds is a weighty one. There is no control over abstract municipal property, but over the public funds i.e. the tax-payers' money. In a democratic constitutional state no control-free space should exist in this regard. The autonomy of local governments does not mean freedom from control – both the Constitution and the European Charter of Local Self-Government proceed from this understanding. Local governments, too, are bound by the principle of legality (§ 3 of the Constitution), and are obliged to guarantee rights and freedoms (§ 14 of the Constitution). The contested provisions are not unreasonable also because the audit reports of the National Audit Office are not legally binding, and the biggest incidental sanction thereto is public disclosure.

At the court hearing the Chancellor of Justice adhered to the views expressed in his written opinion.

12. The National Audit Office is of the opinion that the petition of the Tallinn City Council is not admissible, because it is obvious that the contested provisions of the National Audit Office Act can not be in conflict with the constitutional guarantees of local governments.

The National Audit Office can not, under § 7(1)3), § 7(2) and § 7(21) of the NAOA, interfere with the resolution and management of local matters and, thus, violate the right of local governments to self-organisation. No mandatory precepts are issued to the audited agencies and persons, no sanctions or coercive measures are taken as a result of the National Audit Office's audits. The audits give a professional, objective and independent overview of the actual situation and make advisory proposals to those who have been audited for the elimination of deficiencies, leaving it up to the audited entity to decide how to eliminate these

deficiencies. Pursuant to the Auditing Standards of the International Organization of Supreme Audit Institutions (INTOSAI) (which the National Audit Office adheres to on the basis of § 6(4) of the NAOA) the audit authorities shall not interfere with the management and organisation of work of the audited agencies. The only direct sanction of the National Audit Office lies in the authority of its opinions and suggestions and in the disclosure of violations. The activities of a local government as a public authority must be public and subject to criticism. The autonomy of local governments can not be used as a pretext to circumvent the duty of a public authority to guarantee the transparency and controllability of its activities.

The interpretation attributed to § 133 of the Constitution by the Tallinn City Council is not in conformity with the aim of the Constitution. Literal interpretation leads up a blind alley. Giving new areas of control (e.g. conducting environmental audits and information technology audits) to the National Audit Office is not in conflict with the spirit and purpose of the Constitution. The extension and updating of the activities of constitutional institutions has been recognised in regard to other constitutional institutions (e.g. when the Chancellor of Justice was given the duties of ombudsman and authority to adjudicate discrimination disputes).

§ 133 of the Constitution must be interpreted broadly, by rendering a meaning that is as broad as possible and meets contemporary requirements and conforms to the constitutional context to such concepts as “state assets”, “use and preservation of assets”, “state assets which have been transferred into the control of local governments” and “use and disposal of state assets”. At the court hearing the Auditor General pointed out that upon interpreting the constitutional chapter on the State Audit Office it has to be taken into account that the Constitutional Assembly had not dealt with this chapter in depth.

The interpretation of § 133 of the Constitution in conjunction with § 135 (the Auditor General shall present to the Riigikogu an overview on the use and preservation of state assets during the preceding budgetary year at the same time as the report on the implementation of the state budget is debated in the Riigikogu) leads to the conclusion that the National Audit Office must be able to conduct the audits of lawfulness in local governments. The budgets of local governments make up a part of the national budgetary system, being one level of the system. That is why local governments are involved in the single budgeting system of the state, including in regard to supervision over the implementation of the state budget. Every year the Ministry of Finance draws up a consolidated annual report of the state to be presented to the Riigikogu. The consolidated annual report includes local governments as a part of the public sector. The National Audit Office draws up an audit report concerning the consolidated annual report, in which it gives its opinion on the correctness of the annual report and on the legality of transactions serving as the basis thereof. To be able to give reliable information to the Riigikogu – which is the main function of the National Audit Office as the highest control authority for the approval of the consolidated annual report of the state the National Audit Office needs also to assess the financial information concerning local governments included in the consolidated annual report of the state. In order to give its opinion the National Audit Office must be competent to audit local governments and the persons subject to the control thereof. At the court hearing the representative of the National Audit Office added further that such a control is also necessary under the Treaty establishing the European Community, pursuant to which the Member States are required to restrict the public deficit and keep government debt under control. Pursuant to the European Union rules local governments and persons subjected to their control constitute a part of the public sector.

Finally, the National Audit Office points out that if the Court should find that the competence given to it by the contested provisions infringe the autonomy of local governments, this infringement is a constitutional one. The competence to audit local governments guarantees legality and realization of the principle of democracy. Auditing helps to ensure the observance of the European Union law in local governments and to prevent violations. The National Audit Office does not run parallel to state supervision authorities or internal control of local governments. The audits of the National Audit Office help to guarantee that local residents as well as the tax-payers at large have the possibility to be informed of the activities of local governments, including their economic activities. The extension of the competence of the National Audit Office is a suitable, necessary and reasonable measure for the achievement of the desired aim – to decrease the risk of corruption, to disclose possible incidents of corruption, and thus to contribute to the increase of legitimacy of

public authority in general.

Bearing in mind the aforesaid, in Estonia, too, the local governments and persons subject to their control are part of the public sector, and that is why the expenditure, the cost-benefit ratio and debt obligations of local governments are reflected in both the preparatory documents of state budget and the consolidated annual report of the state. The latter is approved by the Riigikogu and it contains also information concerning local governments. According to the State Budget Act the National Audit Office has to draw up its audit report concerning the consolidated annual report. Inevitably, to be able to verify the accuracy of information it is extremely important that the National Audit Office have such a function.

The contested provisions do not lack legal clarity. These give sufficiently clear starting points for deciding on the competence of the National Audit Office in each concrete case, and guarantee the foreseeability of the activities to be carried out.

13. The Association of Estonian Cities has appended to its written opinion its letter of 11 April 2005 addressed to the Constitutional Committee and the members of the Riigikogu, concerning the draft Act Amending the National Audit Office Act and the Local Government Organisation Act.

It is argued in the letter that the draft was not constitutional because it would infringe the institutional guarantee of local governments, the purpose of which is to guarantee that local governments manage local issues independently and on their own responsibility. The term “state assets” utilised in § 133 of the Constitution can not be interpreted as including municipal property. Further, it was argued that the draft would not solve the problem: on the basis of the draft the National Audit Office would start selectively conducting audits of individual cases, on the basis of which one can not draw generalisations and the Riigikogu can not be convinced that the public sector funds are used legally. If the National Audit Office started carrying out checks on local governments to the same extent as on state agencies, it would be necessary to increase its personnel five times. The National Audit Office has failed to fulfil its duty to audit local governments in regard to state assets transferred into their control and to the allocations intended for specific purposes. The control mechanism should be improved in its entirety, through the analysis of all the institutions subject to control.

14. The Association of Municipalities of Estonia (hereinafter “the AME”) agrees with the arguments and justifications submitted by the Tallinn City Council in its petition, and argues that on the basis thereof it is justified to conclude that the contested provisions are in conflict with the constitutional guarantees of local governments and the principle of legal clarity. A letter concerning the draft Act Amending the National Audit Office Act and the Local Government Organisation Act, addressed to the Ministry of Justice, has been appended to the written opinion.

According to the letter the AME does not agree with the view that the interpretation of § 133(3) of the Constitution to the effect that the circle of persons to be audited and the extent of auditing are exhaustively delimited is no longer justified in our existing legal situation and that – due to the requirements that have changed in time - it is expedient to render this provision a modern content. As the provisions on the National Audit Office and on local governments were approved upon adoption of the Constitution, and neither the constitutional regulation of local governments nor the guarantees thereof have changed by now, there is no ground for arguing that the competence of the National Audit Office must be rendered a modern content also in regard to the economic control concerning local governments.

Local governments are not institutions that did not exist at the time of adoption of the Constitution or the essential nature of which has changed; also, the terms used in § 133(3) of the Constitution have not essentially changed. Neither is there no question about whether the list included in § 133 of the Constitution is exhaustive or not, because the extension of competence through a law, by providing for an amendment which the text of the Constitution expressly prohibits in § 133(3), amounts to an amendment of the Constitution.

CONTESTED PROVISIONS

15. § 7 of the NAOA provides as follows:

"§ 7. Audited entities
(1) The National Audit Office shall exercise economic control over the following bodies and persons:

[…]

3) local governments, taking into account the provisions of subsections (2) and (2^1) of this section;

[…]

(2) The National Audit Office shall, to the extent established in § 6(2) 1), 2) and 4) of this Act, exercise control over:

1) local governments in so far as they possess, use and preserve municipal property;

2) foundations and non-profit associations founded by or whose members include local governments;

3) companies where the local governments exercise dominant influence through a majority holding or in any other manner, and the subsidiaries of such companies.

(2^1) The National Audit Office shall exercise control over local governments to the extent established in § 6(2) and (3) of this Act in so far as they use immovable and movable property of the state transferred into their possession, allocations for specific purposes and subsidies granted from the state budget, and funds allocated for the performance of state functions."

OPINION OF THE CONSTITUTIONAL REVIEW CHAMBER

16. First, the Constitutional Review Chamber shall examine the admissibility of the petition of the Tallinn City Council and the existence of infringement of constitutional guarantees of local governments (I). When analysing the substance of the application the Chamber shall first analyse the allegation that the contested provisions lack legal clarity (II) and shall thereafter assess whether these provisions are in conflict with § 133 (3) of the Constitution (III and IV). In part V of the judgment the Chamber shall examine whether the infringement of constitutional guarantees of local governments caused by the contested provisions is a proportional measure for the achievement of the desired aim.

I.

17. Pursuant to § 7 of the Constitutional Review Court Procedure Act (hereinafter "the CRCPA") (RT I 2002, 29, 174) a local government council may submit a request to the Supreme Court to repeal an Act which has entered into force or a provision thereof if it is in conflict with constitutional guarantees of the local government.

18. Thus, a petition submitted by a local government council alleging the existence of a conflict between a legislation referred to in § 7 of the CRCPA or a provision thereof with the constitutional guarantees of local government is admissible. In addition, the infringement of local government's constitutional guarantees by the contested legislation or a provisions thereof must be possible (Constitutional Review Chamber of the Supreme Court judgment of 16 January 2007 in case no. 3-4-1-9-06 – RT III 2007, 3, 19, paragraph 16).

19. The petition was submitted to the Supreme Court by the Tallinn City Council who argues that § 7(1)3), § 7(2) and § 7(2^1) of the valid National Audit Office Act are in conflict with the constitutional guarantees of local governments and with the principle of legal clarity. To determine the issue of admissibility the Chamber shall check whether the contested provisions are capable of infringing the constitutional guarantees

of local governments.

20. The contested provisions allow for an extensive control over the activities of local governments in the possession, use and disposal of state assets as well as municipal property. The possibility that on the basis of these provisions the right to resolve and manage all local issues independently pursuant to law (right to self-organisation) - arising from § 154(1) of the Constitution - could be adversely affected, can not be excluded. Thus, the petition of the Tallinn City Council is admissible and is to be heard on the merits.

21. The Chamber is of the opinion that the infringement of local governments' right to self-organisation more specifically consists in the side-effects of the auditing conducted on the basis of the contested provisions. During the auditing a local government must tolerate procedural acts (§§ 43(2), 44 and 45 of the NAOA) and create the conditions necessary for these procedural acts, including provision of necessary premises and means of communication (§ 49 of the NAOA). After the receipt of audit report the local government is required to submit its written opinion concerning the recommendations regarding it to the National Audit Office, and it must notify the National Audit Office within a reasonable period of time specified by the National Audit Office of the measures implemented (§ 50(4) of the NAOA).

The performance of the duties enumerated and the obligation to tolerate incidental to the procedural acts unfavourably affect one aspect of the right to self-organisation, namely the freedom to organise the work of a local government.

22. The Chamber does not agree with the allegation of the Tallinn City Council that the disclosure of the audit report of the National Audit Office, which has no binding consequences for a local government, constitutes an infringement of the right to self-organisation.

Pursuant to the spirit of the Constitution the activities of the public sector – embracing also local governments – are public and subject to public control. The disclosure of the audit report of the National Audit Office is one of the measures to inform the public and, thus, to allow for public control. The argument that because of its authority the National Audit Office, by disclosing its audit reports, may infringe the local governments' right to self-organisation, is erroneous, because the opinions of none of the state authorities have a predetermined weight.

On the other hand, the approval in the audit report of the lawfulness and cost-effectiveness of the use of public funds positively affects the reputation and activities of local governments. Also, the effect of proposals for the elimination and further avoidance of deficiencies can only be favourable and considerate of the interests of the public. If a local government is of the opinion that the condemning opinions and proposals are wrong or unjustified, it can react by submitting objections in its written opinion. The National Audit Office can take the latter into account when drawing up its final report (§ 50(5) of the NAOA), but even when the opinion is disregarded, the National Audit Office is required under § 51(2) of the NAOA to disclose the opinion together with its audit report. Consequently, a local government has sufficient possibilities to publicly defend its positions. For the referred considerations the Chamber does not consider the disclosure of audit reports to constitute an infringement of the right to self-organisation.

II.

23. Although the contested provisions do infringe the right to self-organisation of local governments, this does not mean that the provisions are unconstitutional. The restriction of constitutional guarantees of local governments is permissible when it is lawful in formal and substantive senses (Constitutional Review Chamber of the Supreme Court judgment of 8 June 2007 in case no. 3-4-1-4-07, paragraph 19, the second subindent).

24. As for the formal constitutionality the Tallinn City Council argues that the entire regulatory framework of the control over local governments as established in the National Audit Office Act (§§ 7(1)3), 7(2) and 7(2 ^{1})) is in conflict with the principle of legal clarity, arising from § 13(2) of the Constitution. Pursuant to the

principle of legal clarity the competence of the National Audit Office must be regulated unambiguously and clearly, so as to preclude the arbitrariness of the National Audit Office.

25. The Chamber points out the fact that local governments, being the exercisers of public authority, can not invoke § 13(2) of the Constitution. This provision, pursuant to which the law shall protect everyone from the arbitrary exercise of state authority, is located in Chapter II "Fundamental Rights, Freedoms and Duties" of the Constitution. Chapter II primarily deals with the relations between persons and those who exercise public authority.

26. Nevertheless, the legislator must consider the principle of legal clarity also when regulating the relations between local governments and the state. Legal clarity, i.e. the certainty about the content of valid law, constitutes one of the foundations of a state based on the rule of law. Pursuant to the preamble of the Constitution the principle of a state based on the rule of law is one of the founding principles of the Estonian statehood. Although a local government can not invoke § 13(2) of the Constitution as a source of the principle of legal clarity, it still can – bearing in mind what has been said in this paragraph – invoke the principle of legal clarity as a part of the principle of a state based on the rule of law.

27. In evaluating the legal clarity of the contested provisions the Chamber proceeds from the fact that the addressees and implementers thereof are public servants with appropriate professional training, who must be capable to overcome – through interpretation – the possible ambiguities or implementation difficulties related to differentiating economic activities from other activities and to supervision over performance in the spheres co-financed by the state and local governments. What is also to be taken into account is the fact that the required level of legal clarity of these provisions is not the same regarding all the norms; instead it depends on the consequences of application of these norms (see in this regard the Constitutional Review Chamber of the Supreme Court judgment in case no. 3-4-1-33-05, paragraph 22). With regard to what was pointed out in paragraph 21 above the consequences of application of the contested regulatory framework are not very extensive. Indeed, the control does infringe the right to self-organisation of local governments, but it does not directly result in sanctions or precepts.

28. Thus, on the one hand the contested provisions allow the National Audit Office to decide what, to what extent and how it can audit, and on the other hand the provisions make it possible for local governments to foresee the possible activities of the National Audit Office.

III.

29. The Tallinn City Council is of the opinion that § 7(2^1) of the NAOA is in conflict with § 133(3) and § 154 of the Constitution. The contested provision of the National Audit Office Act authorises the National Audit Office to exercise economic control over how a local government uses the state immovable and movable property, transferred under its control, the allocations from the state budget intended for specific purposes, grants and funds allocated for the performance of state functions. In the course of economic control the National Audit Office may, under § 6(2) of the NAOA, assess internal control, financial management, financial accounting and financial statements of the local governments; the legality of the economic activities, including economic transactions; the performance of the local government with regard to its management, organisation and activities (see in this regard § 6(3) of the NAOA), and the reliability of the information technology systems.

The petitioner argues that such competence of the National Audit Office is not in conformity with the auditing of "the use and disposal of state assets which have been transferred into the control of local governments" for the purposes of § 133(3) of the Constitution. What is in conflict with the referred provision of the Constitution is the possibility of auditing the performance of a local government, established in § 7(2^1) of the NAOA.

30. Consequently, the Chamber must ascertain how the provision of § 133(3) of the Constitution that "the National Audit office shall audit the use and disposal of state assets which have been transferred into the

control of local governments" is to be interpreted. The first issue to be resolved is whether, for the purposes of this provision, the state assets which have been transferred into the control of local governments can be interpreted to mean the objects enumerated in § 7(2^1) of the NAOA. Secondly, it has to be assessed whether full economic control, described in § 6(2) and (3) of the NAOA, can be exercised over the state assets which have been transferred into the control of local governments.

31. These questions can not be answered merely on the basis of the wording of § 133(3) of the Constitution. Neither the term of state assets nor the extent of economic control are determined in this provision or in the National Audit Office Act.

32. These terms can not be substantiated through other legislation, either. Due to historical reasons and greater level of abstraction the content of the terms used in the Constitution can not be dependent on the definitions used in lower-ranking legislation, although they may overlap. If the content of constitutional terms could be bindingly substantiated by lower-ranking legislation, this would mean that the content of the Constitution is subjected to the will of the legislator. Consequently, the opinion of the petitioner that the constitutional term "state assets" does not include financial resources because this has not been provided in § 2 of the State Assets Act, is not correct. Similarly, due to the requirement of autonomous interpretation the term "in control", used in § 133(3) of the Constitution, can not be substantiated through the Law of Obligations Act (RT I 1993, 39, 590).

33. It appears from the short-hand notes of the Constitutional Assembly that the drafters of the Constitution attempted to word § 133 of the Constitution is such a manner that it would enable to exercise control over all the assets of the state irrespective of who or in which legal form has control over these (see discussions over the wording of § 133(3) of the Constitution, Põhiseadus ja Põhiseaduse Assamblee [Constitution and the Constitutional Assembly]. Tallinn, 1997, pp 558, 765). This aim is apparent also in the valid wording of § 133 of the Constitution, which – at the time it was adopted – subjected to the National Audit Office's auditing all the assets of the state, irrespective of who possessed these.

34. The possibility of auditing – proceeding from the aim of the provision which becomes apparent from the genesis thereof – must not depend on the subject who uses state assets; likewise, the possibility of auditing must not depend on the class of state assets, i.e. on whether the assets are in the form of things or rights. It is in public interest that there must be the possibility of exhaustive control over the state assets. The transfer of public funds from the state to other persons (including local governments) must not mean that the state and the public lose overview concerning the use of public funds.

35. Thus, the Constitution does not restrict the possibilities of the National Audit Office to exercise economic control over all classes of state assets and the users of the assets.

36. Chapter X of the Constitution does not specify the content of the economic control exercised by the National Audit Office. The extent and organisation of the economic control has been left for the legislator to decide (§ 137 of the Constitution). Such regulation ensures flexible reaction to changes in state administration and development of methods of control. When establishing the extent and organisation of economic control the legislator must make sure that the control is exhaustive and facilitates the protection of persons from the arbitrary exercise of state authority. The economic control must give both the public and the legislator an overview concerning the use of state assets, as well as to assist those who exercise public administration to assess the quality of their activities and detect and eliminate deficiencies in their activities. Furthermore, the control must guarantee the transparency of exercise of public authority, which in turn fosters confidence in the public authority.

37. On the basis of the aforesaid the Chamber is of the opinion that neither Chapter XI of the Constitution in its entirety nor § 133(3) of the Constitution in itself restrict the freedom of the legislator to regulate the extent of control over sate assets in regard to different subjects. The National Audit Office may also exercise performance control concerning state assets as prescribed in § 6(3) of the NAOA.

38. Unlike the petitioner, the Chamber is of the opinion that the freedom of the legislator regarding this issue is not restricted by the Charter, either.

Pursuant to Article 8(2) of the Charter any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities. In regard to this provision the Explanatory Report to the Charter points out that administrative supervision should normally be confined to the question of the legality of local authority action and not its expediency. One particular but not the sole exception is made in the case of delegated tasks, where the authority delegating its powers may wish to exercise some supervision over the way in which the task is carried out. This should not, however, result in preventing the local authority from exercising a certain discretion as provided for in Article 4(5) of the Charter (available athttp://conventions.coe.int/treaty/en/Reports/Html/122.htm [1]).

Thus, the Charter does not preclude economic control over the state assets allocated to local governments in the extent described in § 6 of the NAOA, if the control is exercised - in conformity with Article 8(2) of the Charter – "according to such procedures and in such cases as are provided for by the constitution or by statute". In the case under discussion this requirement is met.

39. Taking into account what has been said above the Chamber is of the opinion that the term "state assets" used in § 133(3) of the Constitution includes monetarily appraisable things and rights belonging to the state and the financial funds of the state irrespective of the user thereof. Consequently, it is not in conflict with § 133(3) of the Constitution that economic control is exercised over the state movable and immovable property transferred into the control of local governments, the allocations from state budget intended for specific purposes, grants and funds allocated for the performance of state functions.

As regards the extent of economic control the Chamber is of the opinion that § 133(3) of the Constitution does not restrict the legislator's freedom to regulate the extent of economic control, referred to in § 132 of the Constitution, when auditing the state assets. Consequently, it is allowed to provide for the control established in § 6(2) and (3) of the NAOA over the state assets transferred into the control of local governments, i.e. control concerning internal control, financial management, financial accounting and financial statements of the local governments; the legality of the economic activities, including economic transactions; the performance of the local government with regard to its management, organisation and activities, and the reliability of the information technology systems.

Consequently, § $7(2^1)$ of the NAOA is not in conflict with § 133 of the Constitution.

40. The Chamber shall assess the proportionality of the infringement of the right to self-organisation of local governments caused by the auditing in part V of this judgment.

IV.

41. The Tallinn City Council is of the opinion that § 7(2) of the NAOA is in conflict with §§ 133(3) and 154 of the Constitution. The National Audit Office may, on the basis of § 6(2) 1), 2) and 4) of the NAOA, exercise control over local governments in so far as they possess, use and preserve municipal property; foundations and non-profit associations founded by or whose members include local governments; and companies where the local governments exercise dominant influence through a majority holding or in any other manner, and the subsidiaries of such companies. Pursuant to this provision the National Audit Office has no right to exercise control over these persons in regard to their management, organisation or performance.

The petitioner is of the opinion that § 133(3) of the Constitution excludes any competence of the National Audit Office in regard to municipal property.

42. Pursuant to the wording of § 133 of the Constitution the National Audit Office can not exercise control over the municipal property of a local government or over other persons where local government have a holding.

§ 133 of the Constitution defines the activities of the National Audit Office as economic control over the state assets. In regard to “riigivara” [state assets] and the term “riigi vara” [state assets] used in § 133(2) of the Constitution the Chamber pointed out in paragraph 39 of this judgment that it must be understood to mean monetarily appraisable things and rights belonging to the state and the financial funds of the state irrespective of the user thereof. State assets do not include municipal property.

This opinion is supported by the wording of § 114 of the Constitution, pursuant to which the procedures for the possession, use, and disposal of state assets shall be provided by law. For the purposes of § 114 of the Constitution state assets mean the assets of the state as legal person in public law, and not the assets of other persons.

Consequently, the question is whether § 133 of the Constitution precludes the possibility of imposing such duties on the National Audit Office as established in § 7(2) of the NAOA.

43. On the one hand § 133 of the Constitution gives a guarantee to the National Audit Office against the legislator’s interference into the competence of the National Audit Office as an independent audit body. The Riigikogu may not deprive the National Audit Office of the competence established in § 133 of the Constitution, because this would prejudice the possibilities of the public and the Riigikogu to have an independent overview of the use of state assets. § 133 of the Constitution ensures, among other things, that the legislator does not impose on the National Audit Office such duties that are not related to the main activities of the National Audit Office and that may render the discharge of the main duties more difficult.

44. On the other hand, the purpose of § 133 of the Constitution is to delimit the competence of the National Audit Office as a state body, and this is based on the constitutional aim of restricting the public authority and protecting the people against the arbitrary exercise of state authority.

45. Taking into account the aforesaid the imposition of additional duties on the National Audit Office must be justifiable by some good reason.

46. The Chamber is of the opinion that in the case under discussion the fact that the National Audit Office has been given the possibility of exercising the control described in § 7(2) of the NAOA is justified by the necessity to guarantee the transparency and lawfulness of the exercise of public authority. The requirement of transparency of the activities of local governments arises from the principle that the people are the source of public authority and the highest power is vested in the people, and the people wish to be informed of the activities of the bodies of power. The transparency of exercise of power, control and lawfulness are the weighty reasons on the basis of which the interests of the public are served.

Furthermore, the principle of unitary state and the principle of legality, established in the Constitution, support the imposition of the exercise of the control, established in § 7(2) of the NAOA, to the National Audit Office as a state body.

Pursuant to § 2(2) of the Constitution the Republic of Estonia is politically a unitary state wherein the division of territory into administrative units shall be provided by law. The local governments act in the same space as the state level both in the factual and legal senses. They are a part of the public sector and of the system of exercise of public authority, concerning whose activities in the use of public funds the people in who the state power is vested and who represent local communities have a legitimate interest. The interest of the state in the lawful activities of local governments is also related to the fact that these are a part of the state budgetary system and their activities affect the economic situation of the state.

The principle of legality (§ 3(1) of the Constitution), extends also to local governments and pursuant to this

principle they must exercise their authority on the basis of the Constitution and the legislation enacted by the state and by themselves. One of the duties of the National Audit Office is to ensure the observance of this principle through their audits of lawfulness.

47. As the additional duties imposed on the National Audit Office offer a possibility to interfere with the autonomy of a local government, the fact that is to be taken into account is that the right to self-organisation may be interfered with only on a basis expressly established in the Constitution.

The legal basis for the Riigikogu to establish control over the subjects referred to in § 7(2) of the NAOA to the extent established in § 6(2)1), 2) and 4) of the NAOA is stipulated in § 160 of the Constitution. Pursuant to the referred provision "the administration of local governments and the supervision of their activities shall be provided by law". On the basis of its general legislative competence (§ 65(1) of the Constitution) the legislator has a wide margin of appreciation in choosing the extent and method of supervision and the supervising authorities. In this context it is difficult to see what would be the aim of such an interpretation of § 133 of the Constitution pursuant to which the imposition of the duties established in § 7(2) of the NAOA on the National Audit Office is precluded. Nevertheless, the legislator must keep in mind that the infringement of the right to self-organisation caused by the supervision must be proportional.

48. The Chamber is of the opinion that it is on the basis of § 160 of the Constitution in conjunction with § 65(1) of the Constitution that the Riigikogu has established control – to the extent that is being disputed over local governments and other persons in who the local governments have a holding.

The Chamber is of the opinion that bearing in mind the good reasons set out in paragraph 46 above the decision of the Riigikogu to choose the National Audit Office to exercise this control and to provide for the possibility of such control in § 7(2) of the NAOA, is justified, too. It appears from the explanatory letter to the Act amending the National Audit Office Act (Explanatory Letter to the draft Act 614 SE Amending the National Audit Office Act and the Local Government Organisation Act, http://web.riigikogu.ee/ems/plsql/motions.show?assembly=10&id=614 [2]) that the author of the draft had also weighed other possibilities of strengthening control over local governments. Nevertheless, in the course of thorough analysis the conclusion was reached that the best solution would be to extend the competence of the National Audit Office: "In the form of the institution of the National Audit Office we have a functioning, reliable body that has proven its efficiency through its activities: it has both the experience of exercising economic control over the public sector and the staff with relevant specialist knowledge. Making use of the possibilities that already exist is one of the economically most favourable solutions, and it is also essentially the most efficient method for the achievement of the desired aim. There is no doubt that, as regards the auditing competence of the National Audit Office, the extra value consists in obtaining a general picture of the economic activities of the public sector as a whole." (See the explanatory letter referred above.)

Neither is the solution chosen by the legislator in conflict with the more general objective of the National Audit Office to give the people, in who the supreme power of the state is vested, and to the Riigikogu as the representative of the people the feeling of certainty that public finds are used legally and efficiently, and to ensure the transparency of the use of these funds.

49. As the additional duties imposed on the National Audit Office by § 7(2) of the NAOA do not restrict the competence given to the National Audit Office by § 133 of the Constitution, these tasks being inherent to the National Audit Office as a body exercising independent economic control, there is no information to the effect that the additional duties would undermine the performance of the main functions of the National Audit Office, and because there are weighty reasons for imposing the additional duties on the National Audit Office, the Chamber is of the opinion that § 7(2) of the NAOA is not in conflict with § 133 of the Constitution.

50. Establishment of control over local governments in the extent provided for in § 6(2)1), 2) and 4) of the NAOA is not in conflict with Article 8(2) of the Charter, either. The provision expressly provides for the possibility to establish the control of lawfulness of local governments' activities.

The control of the use, possession and disposal of municipal property would be in conflict with the Charter. This possibility is not provided for in the National Audit Office Act.

V.

51. Nevertheless, the formal constitutionality of the contested provisions and the fact that the review is permissible in principle do not mean that the infringement of the right to self-regulation is constitutional. To preserve the essence of the local governments' right to self-organisation the restriction thereof must be proportional, i.e. suitable for achievement of the desired aim, necessary and reasonable (see the Constitutional Review Chamber of the Supreme Court judgment of 16 January 2007 in case no. 3-4-1-9-06 – RT III 2007, 3, 19; paragraph 23). The same requirement concerning administrative control is expressed in Article 8(3) of the Charter.

52. Pursuant to § 154(1) and § 160 of the Constitution the right to self-organisation may be restricted and supervision may be established by law. This means that the legislator is free to determine the aims for the achievement of which the right to self-organisation may be restricted. These aims must not be in conflict with the Constitution, though.

The legislator enacted the contested provisions in order to strengthen the external control of the lawful and expedient use of public funds, to decrease the risk of corruption and to facilitate the disclosure of possible incidents of corruption (explanatory letters to draft Acts 603 SE and 614 SE amending the National Audit Office Act and the Local Government Organisation Act, http://web.riigikogu.ee/ems/plsql/motions.show?assembly=10&id=-603 [3]).

The Chamber is of the opinion that the aims of the amendments to the National Audit Office Act are not unconstitutional; the pursuance of these aims is lawful.

53. There is no doubt that the possibility of control established by the contested provisions is suitable for the achievement of the described aims.

54. The possibility of control can be necessary if the described aims can not be achieved by some other measure that is less cumbersome on local governments. The Tallinn City Council is of the opinion that it is not necessary to extend the supervision exercised by the National Audit Office, because the internal control of local governments as well as the external control exercised on the basis of various Acts guarantee the achievement of the same aim.

The Chamber is of the opinion that the legislator has a wide margin of appreciation in regulating the supervision of local governments. The court can interfere with the general organisation of supervision if the legislator has not reasonably availed itself of its freedom to decide.

It appears unambiguously from the referred explanatory letter that different methods of supervision had been considered in their conjunction. As a result the Riigikogu concluded that to achieve the aims set it would still be expedient to entrust the National Audit Office with the supervision of local governments. The Chamber has no reason to doubt the reasonableness of the legislator's decision, as it is set out in the explanatory letter. The more so that the infringement of the local governments' right to self-organisation, described in part I of this judgment, does not have an extensive negative effect on the local governments.

55. Taking into account the low intensity of the infringement and the importance of the aims that justify the infringement the exercise of the control established by the contested provisions is a reasonable solution. The Chamber evaluates the effect of the infringement on the basis of § 40 of the NAOA, pursuant to which a notice of proceedings must be submitted to the entity to be audited, and also on the basis of § 48 of the NAOA, which prohibits to interfere with the work of an audited entity more than necessary for the performance of procedural acts and requires that the National Audit Office notify an entity to be audited of the audit and the aims thereof within a reasonable period of time before the commencement of the audit.

Consequently, the procedure established in the National Audit Office Act and adherence to international auditing standards guarantees the alleviation of the negative impacts of the discussed infringement.

The local governments are not subjected to the National Audit Office as a result of its control; there is no relation of subordination between local governments and the National Audit Office. Local governments make decisions independently, and the persons who have made decisions bear legal and political liability pursuant to the procedure established in legislation. The activities of the National Audit Office do not result in direct sanctions. Pointing out lawful activities and directing these activities back into lawful tracks can not be regarded as interference with local governments' autonomy.

The Chamber is of the opinion that the aims pursued by the contested provisions are of essential importance for the public. The lawfulness and expediency of the use of public funds, the transparency of such use, and the prevention of the risk of corruption constitute legal rights on the level of the state as well as the local government, and the Chamber has no reason to doubt their value.

56. Consequently, the infringement of constitutional guarantees of local governments, caused by the contested provisions, is a solution proportional for the achievement of the desired aim.

57. On the basis of the considerations set out above the Chamber has come to the conclusion that § 7(1)3), in conjunction with § 7(2) and § 7(21) of the NAOA, is constitutional. Thus, the petition of the Tallinn City Council is to be dismissed under § 15(1)6) of the CRCPA.

Dissenting opinion of justice Indrek Koolmeister

I do not agree with the judgment of the Constitutional Review Chamber of the Supreme Court of 19 March 2009 in case no. 3-4-1-17-08 for the following reasons:

1. The reasoning in the judgment to the effect that the state supervision of local governments infringes the local governments' right to self-organisation is not legally convincing or justified. I find that the infringement of the local government's right to self-organisation primarily occurs as a by-product of legal regulation of the activities of local governments by Acts. The right to self-organisation is restricted by the Acts that establish prohibitions and obligations on local governments or that in some other way regulate the activities of local governments in the resolution of local issues and in the use of their property. In this case the question about excessive nature of such regulatory framework and the unconstitutionality thereof was not raised. At the same time there is reason to presuppose that the state is not only allowed but also required to create supervisory mechanisms to control the observance of laws by all relevant addressees of norms, including local governments.

The aforesaid gives rise to the duty of the addressees of norms to comply with such control, i.e. to tolerate it. The infringement of the right to self-organisation concurrent with the duty to tolerate is but a seeming one. Naturally, it has to be presumed that supervision is exercised in observance of the principles of sound administration and the requirements arising from the Constitution and the law. Nevertheless, it can not be precluded that the supervision may infringe the right to self-organisation also e.g. when the supervision is exercised in the spheres and regarding the issues that are not regulated by the law or when it is exercised in an unreasonably burdensome manner or without a purpose, etc. These aspects have not been raised in this case. Bearing in mind the aforesaid it is necessary to conclude within abstract norm control that the exercise of the control of lawfulness of the activities of local governments by the state is in conformity with the Constitution and does not result in the infringement of the right to self-organisation.

2. In this review case the Tallinn City Council has based its petition on the two following aspects: the permissibility of exercising supervision of the use and disposal of municipal property, and the entrusting of this supervisory competence with the National Audit Office.

I am of the opinion that the state supervision of the use and disposal of municipal property is in conformity with the Constitution if what is controlled is the observance of the requirements arising from law in the use and disposal of municipal property. As I already underlined, in this case no attention has been attributed to whether the state has constitutionally established the rules on the use and disposal of municipal property or what other legal acts regulate such activities. That is why no conclusion can be drawn as regards whether and to what extent the exercise of state supervision of the spheres referred to in § 7(2) of the NAOA is lawful.

One of the main issues of this case is related to the argument that it is not constitutional to give the National Audit Office the competence to exercise such supervision. I agree with the petitioner that the competence of the National Audit Office is exhaustively established in § 133 of the Constitution. In the present case the competence of the National Audit Office in regard to local governments has been extended by the Act Amending the National Audit Office Act and the Local Government Organisation Act. In this judgment the majority of the 5-member panel of the Constitutional Review Chamber is of the opinion that it is justified to impose on the National Audit Office duties additional to the competence thereof established in the Constitution.

Without dealing with the justifications set out in the judgment in substance (necessity to ensure that public authority is exercised transparently and lawfully, the principle of a unitary state based on the rule of law, serving the public interests, etc) I argue that these justifications have nothing to do with the extension of the competence of the National Audit Office. The judicial practice of the Supreme Court as well as Estonian legal thinking have predominantly been based on the principle that the constitutional norms establishing the organisation of the state, including the competence of the constitutional institutions of the state, can not be interpreted broadly (even upon adjudicating constitutional review cases). The referred norms shape, among other things, the mechanism of balance of powers, avoid excessive concentration of authority in one institution, and serve as the guarantees of legitimacy of the exercise of public authority. It should be underlined that also the judgment of the Supreme Court *en banc* of 23 February 2009 in case no. 3-4-1-18-08 was based on the strict observance of these norms. By way of a historical parallel it is worth pointing out that an issue similar to that raised in this case emerged in the discussions of the Rahvuskogu [National Assembly] while drafting the Constitution of 1937. Namely, J. Uluots argued then that when the competence of the National Audit Office is determined in the Constitution, then – as a rule – this competence can not be extended by ordinary law (Põhiseadus ja Rahvuskogu [Constitution and the national Assembly], Tallinn 1937, p 229).

3. The opinion expressed in the judgment that § 160 of the Constitution constitutes a sufficient legal basis for the establishment of state supervision of the use and disposal of municipal property and for giving relevant competence to the National Audit Office, is an erroneous one. Pursuant to the referred provision the administration of local governments and the supervision of their activities shall be provided by law. At the same time the referred provision does not delimit the object of supervision, the authority exercising supervision, or pertinent procedure. I argue that § 160 of the Constitution must be interpreted in conjunction with other constitutional norms, including the provisions of Chapter XIV. An Act organising supervision of local governments must be based on those provisions of the Constitution that determine the procedure for exercising state authority, as well as on those provisions that relate to the constitutional guarantees of local governments.

4. I am of the opinion that on the basis of the considerations set out above the exercise of control (supervision) of lawfulness of the use and disposal of municipal property in itself does not infringe the right to self-organisation of local governments. What is unconstitutional is the entrusting of the supervisory competence with the National Audit Office by law.

Links

[1] http://conventions.coe.int/treaty/en/Reports/Html/122.htm
[2] http://web.riigikogu.ee/ems/plsql/motions.show?assembly=10&id=614
[3] http://web.riigikogu.ee/ems/plsql/motions.show?assembly=10&id=-603