Constitutional judgment 3-4-1-3-16

SUPREME COURT

CONSTITUTIONAL REVIEW CHAMBER

JUDGMENT

in the name of the Republic of Estonia

Case number	3-4-1-3-16
Date of judgment	20 December 2016
Composition of court	Chairman: Priit Pikamäe; members: Indrek Koolmeister, Eerik Kergandberg, Jaak Luik and Jüri Põld
Basis for proceedings	Application of 30 June 2016 by Kõpu Rural Municipal Council, application of 25 August by Juuru Rural Municipal Council, application of 31 August by Abja Rural Municipal Council, Emmaste Rural Municipal Council, Illuka Rural Municipal Council, Järvakandi Rural Municipal Council, Kambja Rural Municipal Council, Kõo Rural Municipal Council, Käina Rural Municipal Council, Leisi Rural Municipal Council, Loksa Town Council, Luunja Rural Municipal Council, Lüganuse Rural Municipal Council, Mäetaguse Rural Municipal Council, Nõo Rural Municipal Council, Pala Rural Municipal Council, Pöide Rural Municipal Council, Pühalepa Rural Municipal Council, Rakke Rural Municipal Council, Tudulinna Rural Municipal Council, Vaivara Rural Municipal Council and Ülenurme Rural Municipal Council, application of 15 September 2016 by Kullamaa Rural Municipal Council, application of 21 September 2016 by Tõstamaa Rural Municipal Council, and application of 27 September 2016 by Haaslava Rural Municipal Council and Karksi Rural Municipal Council

Hearing	Oral procedure
Date of hearing	4 October 2016
Persons attending the hearing	Rural municipality mayor Siim Avi as representative of Kõpu Rural Municipal Council, sworn advocate Monika Nõlv as representative of Juuru and Tõstamaa Rural Municipal Councils, sworn advocate Paul Varul as representative of Abja, Emmaste, Haaslava, Illuka, Järvakandi, Kambja, Karksi, Kullamaa, Kõo, Käina, Leisi, Luunja, Lüganuse, Mäetaguse, Nõo, Pala, Pöide, Pühalepa, Rakke, Tudulinna, Vaivara, Ülenurme Rural Municipal Councils and Loksa Town Council, Chairman of the Riigikogu Constitutional Affairs Committee Kalle Laanet as representative of the Riigikogu, sworn advocate Jüri Raidla as representative of the Government, Minister of Public Administration Arto Aas, Minister of Justice Urmas Reinsalu, Chancellor of Justice Ülle Madise

OPERATIVE PART

1. To grant the applications by Kõpu Rural Municipal Council, Juuru Rural Municipal Council and Tõstamaa Rural Municipal Council in part.

2. To declare unconstitutional and repeal § 24(1) (second sentence) of the Administrative Reform Act in the part "but not more than for up to 100 000 euros".

3. In the remaining part, to dismiss the applications by Kõpu Rural Municipal Council, Juuru Rural Municipal Council, Tõstamaa Rural Municipal Council, and the application by Abja Rural Municipal Council, Emmaste Rural Municipal Council, Haaslava Rural Municipal Council, Illuka Rural Municipal Council, Järvakandi Rural Municipal Council, Kambja Rural Municipal Council, Karksi Rural Municipal Council, Kullamaa Rural Municipal Council, Kõo Rural Municipal Council, Käina Rural Municipal Council, Leisi Rural Municipal Council, Loksa Town Council, Luunja Rural Municipal Council, Lüganuse Rural Municipal Council, Mäetaguse Rural Municipal Council, Nõo Rural Municipal Council, Pala Rural Municipal Council, Pöide Rural Municipal Council, Pühalepa Rural Municipal Council, Rakke Rural Municipal Council, Tudulinna Rural Municipal Council, Vaivara Rural Municipal Council and Ülenurme Rural Municipal Council.

FACTS AND COURSE OF PROCEEDINGS

1. On 7 June 2016, the Riigikogu adopted the Administrative Reform Act (ARA). The President of the Republic promulgated the Act on 13 June 2016 and the Act entered into force on 1 July 2016.

2. On 30 June 2016, Kõpu Rural Municipal Council lodged an application with the Supreme Court to declare § 9(2) and § 24 of the ARA unconstitutional. **[Not translated]** Kõpu Rural Municipal Council supplemented the application, also seeking to declare unconstitutional § 9(1) (second sentence) and § 28 cl. 2) of the ARA.

3. On 25 August 2016, Juuru Rural Municipal Council lodged an application with the Supreme Court to declare the Administrative Reform Act unconstitutional in its entirety. As a second alternative, Juuru Rural

Municipal Council asked the Court to declare unconstitutional and repeal § 3, § 4(1), § 7(4) and (5), § 8, §§ 9–13 and § 24 of the ARA. **[Not translated]**.

4. On 31 August 2016, Abja Rural Municipal Council, Emmaste Rural Municipal Council, Illuka Rural Municipal Council, Järvakandi Rural Municipal Council, Kambja Rural Municipal Council, Kõo Rural Municipal Council, Käina Rural Municipal Council, Leisi Rural Municipal Council, Loksa Town Council, Luunja Rural Municipal Council, Lüganuse Rural Municipal Council, Mäetaguse Rural Municipal Council, Nõo Rural Municipal Council, Pala Rural Municipal Council, Pöide Rural Municipal Council, Pühalepa Rural Municipal Council, Rakke Rural Municipal Council, Tudulinna Rural Municipal Council, Vaivara Rural Municipal Council and Ülenurme Rural Municipal Council lodged an application to repeal § 3 and §§ 9–13 of the ARA on the grounds of being contrary to §§ 154 and 158 of the Constitution. Additionally, the applicants sought repeal of § 24(1) of the ARA to the extent that it denies a merger grant for those local authorities who have been unable to merge voluntarily during the administrative reform, as well as for those local authorities who cannot request alteration of the administrative-territorial organisation relying on § 7(3) of the ARA, on the grounds of being contrary to § 154 of the Constitution in combination with § 12(1) of the Constitution. **[Not translated]**.

5. [Not translated]

6. On 15 September 2016, Kullamaa Rural Municipal Council lodged an application with the Supreme Court to declare unconstitutional and repeal § 3, §§ 9–13 and § 24(1) of the ARA **[Not translated]**.

7. [Not translated]

8. On 21 September 2016, Tõstamaa Rural Municipal Council lodged an application with the Supreme Court to declare unconstitutional and repeal the Administrative Reform Act to the same extent and on the same grounds as indicated in the application of 25 August 2016 by Juuru Rural Municipal Council. **[Not translated]**.

9. [Not translated].

10. On 27 September 2016, Haaslava Rural Municipal Council and Karksi Rural Municipal Council lodged an application with the Supreme Court to declare unconstitutional and repeal § 3, §§ 9–13 and § 24(1) of the ARA. **[Not translated]**.

11. [Not translated].

[*The Supreme Court joined all the applications in unified proceedings*]

12. The Supreme Court Constitutional Review Chamber examined the applications at a public hearing on 4 October 2016.

APPLICATION BY KÕPU RURAL MUNICIPAL COUNCIL

13. The applicant contends that the Administrative Reform Act (in particular Chapter 3) contravenes the guarantee that local authorities would enjoy the status of individual legal entities, as well as the local authorities' financial guarantee, and violates the principles of legal clarity, legitimate expectation and democracy. Alteration of the administrative-territorial organisation as laid down in the Administrative Reform Act is not proportionate. The state has failed to consider alternative options, e.g. cooperation between local authorities.

14. The Administrative Reform Act fails to provide a reasonable period for hearing the opinion of a local authority and implementing the reform. The Act shortens the previously applicable time limits for making administrative-territorial changes as set out under § 8(1) of the Territory of Estonia Administrative Division Act (TEADA), which may cause problems in organising elections for local councils.

15. The merger grant is paid on an unequal basis, as under § 20(1) of the ARA it is paid only if local authorities merge voluntarily. Section 24(1) of the ARA precludes payment of the grant in the event of a forced merger and sets a maximum limit for costs relating to a merger.

APPLICATION BY JUURU AND TÕSTAMAA RURAL MUNICIPAL COUNCILS

16. The applicants contend that the Administrative Reform Act violates the local authorities' right of self-organisation, the guarantee of status as individual legal entities, the financial guarantee, the right to be heard, as well as the principles of democracy, proportionality, equality, legal clarity, and legitimate expectation, and lays down unreasonable time limits for implementing the reform.

17. Forced merger of local authorities on the initiative of the Government of the Republic (the Government) based on the minimum size criterion (§ 3 ARA) is disproportionate. Even though the goal of the administrative reform arises from the need to improve the capacity of local authorities to provide better public services, no standards in relation to the services have been set to enable assessment of the capacity of local authorities. The legislator has failed to justify why exactly a population of 5000 residents was chosen as the criterion. The minimum size is the only criterion to be taken into account in deciding a forced merger. Other criteria that would enable assessment of the capacity of local authorities (e.g. the circumstances set out in § 7(5) of the TEADA) have been disregarded. Exemptions from the minimum size criterion have only been provided in § 9(2) and (3) of the ARA. The legislator has failed to consider why the goals cannot be attained through improved organisation and financing of cooperation between local authorities. The applicants maintain that in the interests of legal clarity the legislative scheme concerning the administrative reform, including implementing provisions and other additional regulatory arrangements, should have been enacted simultaneously.

18. Section 9(9) of the ARA, which regulates the situation where a local authority having received a forced merger proposal from the Government submits a negative opinion on the proposal under the circumstances set out in § 9(2) and (3) of the ARA, only seemingly guarantees the right of a local authority to be heard.

19. [Not translated].

20. The Administrative Reform Act shortened the time limits laid down under the Territory of Estonia Administrative Division Act for altering the administrative-territorial organisation. Local authorities have been given an unreasonably short period for voluntary merger.

21. Section 24(1) of the ARA precludes payment of a merger grant to a local authority where a change of the administrative-territorial organisation is initiated by the Government. These local authorities are treated unequally in comparison to local authorities merging voluntarily who are paid a merger grant under § 20(1) of the ARA. Moreover, § 24(1) of the ARA lays down the maximum threshold for merger-related costs. Considering that the forced merger has been imposed by the state on a statutory basis, all the related costs should be covered from the state budget.

APPLICATION BY ABJA, EMMASTE, HAASLAVA, ILLUKA, JÄRVAKANDI, KAMBJA, KARKSI, KULLAMAA, KÕO, KÄINA, LEISI, LUUNJA, LÜGANUSE, MÄETAGUSE, NÕO, PALA, PÖIDE, PÜHALEPA, RAKKE, TUDULINNA, VAIVARA, ÜLENURME RURAL MUNICIPAL COUNCILS AND LOKSA TOWN COUNCIL

22. First, the applicants contend that the local authority minimum size criterion laid down in § 3 of the ARA contravenes the Constitution, as it interferes disproportionately with the guarantee of local authorities' status as individual legal entities arising from § 154(1) and § 158 of the Constitution.

23. The aim of the interference – to ensure that as a result of the administrative reform sufficiently capable local authorities are formed who are able to perform all the duties entrusted to them under the legislation and to provide high-quality public services – is generally in conformity with the Constitution but not sufficiently

defined. This is merely an administrative-territorial reform which cannot be implemented without an administrative reform of substance. Public services provided by local authorities, as well as the quality of those services, will be set more precisely only in the second stage of the reform. As the legitimate aim of the interference has been insufficiently defined, the interference is constitutionally unjustifiable.

24. The applicants maintain that without additional criteria and without implementing the second stage of the reform it is impossible to claim with certainty that the criterion of a minimum size of local authorities is a suitable measure for attaining the goal. The effect of the number of residents on the capacity of a local authority varies and no universal optimum size of a local authority exists. The measure is also not necessary, because the legislator has unjustifiably disregarded a milder measure for attaining the goal, i.e. cooperation between local authorities in providing public services. Although it is the duty of the state to ensure the capacity of local authorities, the state's activities in organising, promoting and financing their cooperation has been insufficient. The measure is also not proportional in the narrow sense, because interference with the legal entity status of local authorities is so intense that the aim of the interference fails to outweigh it. The interference would be milder if, in addition to the number of residents, alteration of the administrative-territorial division had also taken account of the circumstances mentioned in § 7(5) of the TEADA – however, § 9(3) of the ARA allows them to be taken into account only when making exemptions from the minimum size criterion of local authorities. The aim of the interference is not sufficiently defined, and therefore its weight cannot be assessed, and the legislator has also failed to prove the appropriateness of the measure.

25. Second, the applicants maintain that the forced merger of local authorities established in Chapter 3 of the Administrative Reform Act contravenes the guarantee of local authorities' status as individual legal entities. The interference arises from the fact that under § 9(2) and (9) cl. 2) as well as § 13(1) of the ARA the Government may decide to forcibly alter the administrative-territorial organisation of local authorities against their will. In the opinion of the applicants, the interference arising from a forced merger is disproportionate for the same reasons that lead to the unconstitutionality of § 3 of the ARA. The aim of the interference is insufficiently defined and it is impossible to claim with certainty that a forced merger of local authorities would help to raise their capacity to provide public services. Furthermore, local authorities formed as a result of a forced merger might also not reach the minimum size laid down in § 3 of the ARA. The capacity of local authorities and the quality of public services can also be improved by other measures.

26. As the goal of the administrative reform is not sufficiently defined, local authorities do not have an effective opportunity in the course of a forced merger to express their opinion on the merger. Thus, a forced merger also contravenes § 158 of the Constitution.

27. Additionally, a forced merger interferes with the principles of legal clarity and legitimate expectation (§ 10 Const.) as it is not clear what public services and of what quality local authorities will have to provide. Section 9(9) of the ARA is unclear in terms of legislative drafting as it fails to specify which criteria the Government may take into account in making the most important decision for the purposes of administrative reform, i.e. its final discretionary decision. Forced merger also involves interference with the principle of *vacatio legis* as the time limits set for a forced merger of local authorities are insufficient.

28. Forced merger may also interfere with guarantees involved in election of local councils (§§ 154 and 156 Const.). If local authorities subject to a forced merger fail, during the short period laid down by law, to agree on the organisation of the election, decisions concerning the organisation of the election will instead be made by the county governor (§ 12(9) ARA). A reasonable period might not be left for organising the elections. Section 9(9) of the ARA shortens the time limit laid down in § 8(1) of the TEADA under which the Government can initiate alteration of administrative-territorial organisation or boundaries not later than one year before municipal council elections. A local authority must be given sufficient time to organise an election, including an election campaign, and voters and candidates should be ensured a clear indication of the territory for which the council is to be elected. Interference with organisation of elections is particularly severe should a merger bring about judicial disputes.

29. Additionally, a forced merger has a negative impact on the right of self-organisation of local authorities and the related principles of subsidiarity and democracy, the financial guarantee, as well as the guarantee of protection of the rights of local authorities.

30. Third, the applicants maintain that the limitation on payment of the merger grant imposed under § 24(1) of the ARA contravenes the local authorities' financial guarantee (§ 154 Const.) and the principle of equal treatment (§ 12(1) Const.). Under § 20(1) of the ARA, a merger grant is paid in the case of a voluntary merger, i.e. a merger initiated by municipal councils, and the amount of the grant depends on the number of residents of a local authority. At the same time, § 24(1) of the ARA precludes payment of a merger grant in the event of a forced merger initiated by the Government. In that case, merger-related costs are compensated from the state budget on the basis of expense receipts but not more than for up to 100 000 euros. A situation where compensation paid from the state budget fails to cover the costs related to a forced merger contravenes the local authorities' financial guarantee. The applicants maintain that unequal treatment arising from § 24(1) of the ARA lacks a constitutionally-compliant aim, and the interference is disproportionate as the possibility of a voluntary merger does not necessarily depend on the will of a particular local authority.

OPINIONS OF PARTICIPANTS IN THE PROCEEDINGS

31.–69. [Not translated.]

CONTESTED PROVISIONS

70. The Administrative Reform Act (RT I, 21 June 2016, 1) § 3, § 4(1), § 7(4) and (5), § 8, §§ 9–13, § 20(1), § 24, § 28 cl. 2):

„§ 3. Criterion of the minimum size of a local authority

A local authority shall be able to ensure the professional capability necessary for organising functions arising from law and provide quality public services to all the residents of a local authority in accordance with the purpose of the administrative reform specified in § 1(2) of this Act, provided that the local authority has at least 5000 residents (hereinafter the minimum size criterion of a local authority).

§ 4. Initiation of alteration of administrative-territorial organisation of rural municipalities and cities by the council

(1) A local authority that, according to the data of the population register, does not meet the minimum size criterion of a local authority laid down in this Act and has not submitted a proposal to the councils concerned to start negotiations for alteration of administrative-territorial organisation on the basis of § 9(1) and (2) of the Territory of Estonia Administrative Division Act, has not received a respective proposal from another municipal council or has so far refused to start negotiations with another municipal council submits a proposal to start negotiations to other municipal councils by 1 October 2016 at the latest.

[...].

§ 7. Application for alteration of administrative-territorial organisation of rural municipalities and cities initiated by the council

[...]

(4) In order to apply for alteration of administrative-territorial organisation, the council concerned submits the resolutions and information required by § 9(9) cls 1), 3), 5) and 6) of the Territory of Estonia Administrative Division Act to the county governor on 1 January 2017 at the latest.

(5) The local authority bodies concerned must adopt resolutions addressing the formation of electoral

districts and polling divisions, as well as electoral committees and the number of council members, by 15 June 2017 at the latest.
[...].

§ 8. Decisions on alteration of administrative-territorial organisation of rural municipalities and cities initiated by the council

A Government regulation on alteration of administrative-territorial organisation initiated by a municipal council, except in the event laid down in § 7(3) of this Act, shall be adopted on the basis of § 3(1) and § 71(2) and (3) of the Territory of Estonia Administrative Division Act by 1 February 2017 at the latest.

§ 9. Government-initiated alteration of administrative-territorial organisation

(1) The Government will initiate an alteration of administrative-territorial organisation of a rural municipality or a city in accordance with the procedure laid down in § 8 of the Territory of Estonia Administrative Division Act, taking into consideration the specifications provided for in this section. In that case, the provisions of § 8(1), (3) cl. 3), and (4), of the Municipal Council Election Act will not be applied.

(2) The Government shall on 15 February 2017 at the latest initiate alteration of administrative-territorial organisation and alteration of borders of an administrative unit of those local authorities that do not meet the minimum size criterion of a local authority according to the data of the population register as at 1 January 2017 and regarding which the Government has not adopted a regulation for alteration of administrative-territorial organisation specified in § 8 of this Act and to which the Government does not apply an exemption provided for in subsection (3) of this section. The Ministry of Finance will submit to the municipal councils concerned a draft regulation regarding alteration of administrative-territorial organisation and alteration of borders of administrative units on the basis of § 3(1) and § 71(2) and (3) of the Territory of Estonia Administrative Division Act (hereinafter Government proposal) for provision of an opinion to be submitted on 15 May 2017 at the latest. The Government proposal may also include local authorities that meet or do not meet the minimum size criterion of a local authority regarding whom the Government has adopted a regulation for alteration of administrative-territorial organisation specified in § 8 of this Act and alteration of whose administrative-territorial organisation would have a positive effect, on the basis of the circumstances listed in § 7(5) of the Territory of Estonia Administrative Division Act, and alteration is necessary and expedient for ensuring the capability of a local authority not meeting the minimum size criterion of a local authority under § 1(2) and § 3 of this Act.

(3) In the event of a local authority not meeting the minimum size criterion, the Government may apply an exemption not initiating an alteration of administrative-territorial organisation specified in subsection (2) of this section regarding a local authority, provided that leaving the local authority as an exemption does not result in an adverse effect on the circumstances provided for in § 7(5) of the Territory of Estonia Administrative Division Act and at least one of the following conditions has been met:

1) the merger is between at least two local authorities forming a logical administrative-territorial whole, the surface area of which is at least 900 km2 in total and which has in total at least 3500 residents according to the data of the population register as at 1 January 2017;

2) the local authority borders a temporary control line of the Republic of Estonia for the purposes of § 22(1) of the State Border Act on land that has at least 3500 residents in total according to the data of the population register as at 1 January 2017 and is formed of at least four administrative territories, or parts thereof, of local authorities that are connected historically, culturally and geographically;

3) the local authority is a marine island rural municipality i.e. rural municipality on an island situated in Estonian territorial sea, the territory of which is covered fully by the rural municipality and which has independent local government administration;

4) the number of residents in a local authority being formed as a result of alteration of administrative-

territorial organisation provided for in the regulation specified in § 8 of this Act met the minimum size criterion of a local authority according to the data of the population register as at 1 January 2016, but due to a decrease in the number of residents, it no longer meets the criterion as at 1 January 2017.

(4) A local authority submits a proposal for applying an exemption under the conditions laid down in subsection (3) clauses 1), 2) and 4) of this section in an application to be submitted under § 7 of this Act. Applying for an exemption shall be justified in an explanatory memorandum as specified in § 7(1) of this Act, in addition to taking into consideration the effects and circumstances specified in § 7(5) of the Territory of Estonia Administrative Division Act, also explaining how compliance with the requirements arising from § 1(2) and § 3 of this Act can be ensured in the case of applying the exemption. In order to obtain an exemption, the local authority specified in subsection (3) clause 3) of this section must submit an application to the Ministry of Finance on 1 January 2017 at the latest and explain how the requirements specified in this section have been taken into consideration.

(5) In the event of an exemption specified in subsection (3) clause 2) of this section, the Government may in the case of a justified application by local authorities and a recommendation by a regional committee establish a local authority consisting of administrative areas without a common border upon alteration of the administrative-territorial organisation of local authorities.

(6) Under the procedure laid down in subsection (2) of this section, the Government will also initiate a merger of local authorities without a common border specified in § 7(3) of this Act applying for a merger with a local authority that does not meet the minimum size criterion of a local authority or territorial area thereof that is situated between local authorities consisting of administrative areas without a common border according to the application for alteration of the administrative-territorial organisation of a rural municipality or city initiated by the councils.

(7) In the course of alteration of administrative-territorial organisation initiated by itself, the Government may also assign a territorial area belonging to one local authority to another local authority under § 71(3) of the Territory of Estonia Administrative Division Act with respect to local authorities if the councils concerned have not agreed thereon in the case of a merger initiated by municipal councils under the procedure laid down in § 6(3) of this Act or otherwise where justified if the transfer of a territorial area ensures administrative-territorial integrity of a local authority, provided that the transfer of a territorial area is necessary and expedient for the purposes of alteration of administrative-territorial organisation of a local authority that does not meet the minimum size criterion of a local authority.

(8) If the local authority does not submit an opinion regarding a Government proposal by 15 May 2017, the proposal is deemed to have been accepted.

(9) If a local authority that received a Government proposal submits a negative opinion on the proposal, taking into consideration the circumstances provided for in subsections (2) and (3) of this section, then:

1) the Government may terminate the procedure for alteration of administrative-territorial organisation with regard to that local authority as a result of an assessment of justifications presented in the opinion of a local authority, taking into consideration the circumstances provided for in subsections (2) and (3) of this section, following which the Ministry of Finance will promptly notify the local authority thereof;

2) the Government will assess the justifications presented in the opinion of a local authority and, if it does not deem the justifications presented to be sufficiently valid, taking into consideration the circumstances provided for in subsections (2) and (3) of this section, will adopt a resolution regarding alteration of the administrative-territorial organisation of the local authorities with its regulation under § 13(1) of this Act.

(10) In the event provided for in subsection (9) clause 2) of this section, the Ministry of Finance will promptly notify the local authorities concerned before adopting the respective regulation.

§ 10. Activity by regional committees in the case of alteration of administrative-territorial organisation initiated by the Government

The Ministry of Finance will involve regional committees whose function is to provide an opinion to the Ministry of Finance regarding drafting a Government proposal and justification for applying an exemption provided for in § 9(2) and (3) in addition to the provisions of § 5(2) in the preparations for initiating an alteration of administrative-territorial organisation and development of a draft Government regulation as specified in § 9(2) and § 13(1) of this Act.

§ 11. Activity by a county governor in the case of alteration of a Government-initiated administrative-territorial organisation

A county governor submits to the Ministry of Finance opinions of municipal councils regarding the Government proposal together with the documentation arising from § 8(3) cls 1) and 2) of the Territory of Estonia Administrative Division Act on the third working day after receiving the opinion of the councils concerned at the latest.

§ 12. Activity by a local authority in the case of receiving a Government proposal

(1) Government-initiated alteration of administrative-territorial organisation takes place under the procedure laid down in § 8 of the Territory of Estonia Administrative Division Act, taking into consideration the specifications laid down in that section. The provisions of § 8 subsection (1), subsection (3) clause 3) and subsection (4) of the Territory of Estonia Administrative Division Act and § 11(4) and § 24(4) of the Municipal Council Election Act will not be applied in the event of Government-initiated alteration of administrative-territorial organisation laid down in this Act.

(2) A local authority performs the following activities following receipt of a Government proposal:
1) determines the opinion of residents regarding alteration of administrative-territorial organisation under the procedure laid down in the Government regulation established on the basis of § 7(8) of the Territory of Estonia Administrative Division Act;
2) submits to the county governor a reasoned opinion prepared in the form of a resolution concerning the Government proposal by 15 May 2017 at the latest;
3) agrees, by 15 June 2017 at the latest, with the other councils concerned, on the name of the local authority, the type and insignia of the administrative unit, settlement of any organisational, budgetary or other issues related to proprietary rights and obligations as well as issues concerning preparation of the statutes of the new local authority and making any other necessary amendments to legislation likely to arise in the context of alteration of administrative-territorial organisation or alteration of boundaries, acting on the basis of subsections (5) and (6) of this section, §§ 14?18 of this Act and § 92 of the Territory of Estonia Administrative Division Act (hereinafter merger agreement);
4) conduct, in cooperation with the councils concerned, the electoral activities laid down in the Municipal Council Election Act by 15 June 2017 at the latest.

(3) Opinion of residents is obtained in the local authorities concerned in accordance with § 6 of this Act. The time for conducting an opinion poll of residents will be determined under the procedure established on the basis of § 7(8) of the Territory of Estonia Administrative Division Act. If a local authority has not obtained the opinion of residents by 15 May 2017 at the latest, the county administration concerned will organise obtaining the opinion of residents. If local authorities that have received a Government proposal belong to different counties, obtaining the opinion of residents is organised by the county administration whose territory has the majority of residents of a local authority to be formed in the case of alteration of administrative-territorial organisation.

(4) In the case of choosing a name and type of administrative unit for a local authority specified in subsection (2) clause 3) of this section, local authorities must first obtain the opinion of the Place Names Board of Estonia established under § 20(1) of the Place Names Act. The insignia specified in subsection (2)

clause 3) of this section must be agreed on between the councils concerned in accordance with the terms and conditions laid down in § 14(3) of the Local Government Organisation Act (LGOA), having obtained the opinion of the Government Office before agreeing on the insignia, which must be taken into consideration in the case of using the insignia.

(5) A draft merger agreement shall be displayed for public examination, setting a time limit for submitting proposals and objections that must not be shorter than 15 calendar days from publication of the draft. The merger agreement shall be approved by a resolution of all councils concerned that received a Government proposal and shall be published on the website of the rural municipality or city.

(6) If a Government proposal was received by local authorities of whom at least two have approved a merger contract under § 91 of the Territory of Estonia Administrative Division Act and concerning whom the Government has adopted a regulation as specified in § 8 of this Act, merger agreements associated with Government-initiated alteration of administrative-territorial organisation shall be formalised as an amendment to a merger contract that shall be signed by all councils concerned.

(7) If all councils concerned do not approve the merger agreement and they are local authorities of whom at least two have approved the merger contract under § 91 of the Territory of Estonia Administrative Division Act and concerning whom the Government has adopted a regulation as specified in § 8 of this Act, the agreements reached in the merger contract will be taken as a basis in the case of resolving the issues specified in subsection (2) clause 3) of this section. If the merger agreement is not approved and the merger contract has not been approved, §§ 14?18 of this Act shall be taken as a basis. Use of the name, type and insignia of a local authority in accordance with subsection (4) of this section shall be based on the name, type of administrative unit and insignia of the local authority with whom a local authority that does not meet the minimum size criterion of a local authority is merged or assimilated.

(8) If the Government has initiated a merger of two or more such local authorities that do not meet the minimum size criterion of a local authority that have not approved a merger agreement, the name, type of administrative unit and insignia of a local authority not meeting the criterion that has the largest number of residents will be adopted under subsection (4) of this section. At the proposal of the Place Names Board of Estonia, the Government may also assign another name to the local authority.

(9) If the councils concerned have not carried out the actions and adopted resolutions laid down in subsection (2) clause 4) of this section by 15 June 2017 at the latest or if the resolutions of the councils are not identical, the county governor of the location of the local authority will in cooperation with the councils concerned carry out electoral activities as laid down in § 703 of the Municipal Council Election Act and approve the resolutions by an order by 19 July 2017 at the latest.

(10) If local authorities that have received a Government proposal, one of whose territorial area has been assigned to another local authority by the Government, do not agree on settlement of budgetary and other issues concerning proprietary obligations and rights related to alteration of administrative-territorial organisation in the merger agreement, the following assets shall be transferred to the local authority that the territorial area is assigned to as a result of alteration of administrative-territorial organisation:
1) immovable property located within the territorial area of the local authority;
2) debt obligations specified in § 34(2) and (7) of the Local Government Financial Management Act directly related to the immovable property of a local authority located within the territorial area;
3) debt obligations specified in § 34(2) and (7) of the Local Government Financial Management Act that are not related to the immovable property of a local authority located within the territorial area proportionally to the number of residents in the local authority, unless the amount of the specified debt obligations is less than 1000 euros.

§ 13. Decisions on Government-initiated alteration of administrative-territorial organisation of rural municipalities and cities

(1) A Government regulation on Government-initiated alteration of administrative-territorial organisation will be adopted on the basis of § 3(1) and § 71(2) and (3) of the Territory of Estonia Administrative Division Act by 15 July 2017 at the latest.
(2) Government-initiated alteration of administrative-territorial organisation and alteration of the list of administrative units of rural municipalities and cities resulting therefrom will enter into force in 2017 on the date of announcement of the results of regular local council elections.

§ 20. Basis for paying a merger grant, and its rates

(1) Under §§ 21–23 of this Act, in addition to the provisions of this section, local authorities formed as a result of alteration of administrative-territorial organisation initiated by municipal councils will be paid a merger grant. The provisions of the Promotion of Local Authorities Merger Act, excluding the list of costs specified in § 6(2) thereof and subsections (3), (6), (7), (8) and (9) of the same section, will not be applied. [...].

§ 24. Covering costs related to Government-initiated alteration of administrative-territorial organisation of rural municipalities and cities

(1) A local authority formed as a result of Government-initiated alteration of administrative-territorial organisation of local authorities will not be paid a merger grant, excluding for those local authorities regarding alteration of administrative-territorial organisation of whom the Government has established a regulation as specified in § 8 of this Act or who have applied for a merger under the terms and conditions specified in § 7(3) of this Act and regarding alteration of administrative-territorial organisation of whom the Government has established a regulation specified in § 13(1) of this Act. A local authority formed as a result of Government-initiated alteration of administrative-territorial organisation will be compensated from the state budget for the actual costs specified in § 6(2) cls 1)–41) of the Promotion of Local Authorities Merger Act or § 12(2) cl. 4) of this Act on the basis of expense receipts, but not more than for up to 100 000 euros.
(2) The minister responsible for the area may establish more detailed terms and conditions and procedure for compensating the costs specified in subsection (1) of this section. The Government will approve the amount of compensation for merger costs for a local authority formed as a result of a merger by order.
(3) Costs incurred by a county governor arising from performance of the provisions of § 12(3) and (9) of this Act will be covered according to the procedure established under § 58(3) of the State Budget Act.

§ 28. Amending the Administrative Reform Act
The following amendments are introduced to the Administrative Reform Act:

[...]
2) § 12(1) is amended and worded as follows:
„(1) Government-initiated alteration of administrative-territorial organisation will take place under the procedure laid down in § 8 of the Territory of Estonia Administrative Division Act, taking into consideration the specifications laid down in this section. The provisions of § 8 subsection (1), subsection (3) clause 3) and subsection (4) of the Territory of Estonia Administrative Division Act and § 11(4) and § 17(3) of the Municipal Council Election Act will not be applied in the event of alteration of a Government-initiated administrative-territorial organisation as laid down in this Act.”.”

OPINION OF THE CHAMBER

Introduction

71. The Supreme Court has received applications from 26 local authorities under § 7 of the Constitutional Review Court Procedure Act (CRCPA) to check the constitutionality of the Administrative Reform Act. In essence, these constitute three applications which the Supreme Court is examining in joined proceedings. The first is an application from Kõpu Rural Municipal Council, the second an application from Juuru and Tõstamaa Rural Municipal Councils, and the third an application from Abja, Emmaste, Haaslava, Illuka, Järvakandi, Kambja, Karksi, Kullamaa, Kõo, Käina, Leisi, Luunja, Lüganuse, Mäetaguse, Nõo, Pala, Pöide, Pühalepa, Rakke, Tudulinna, Vaivara and Ülenurme Rural Municipal Councils and Loksa Town Council (hereinafter the joint application).

72. The rural municipal councils ask the Court to declare unconstitutional and repeal § 3, § 7(4) and (5), § 8 of the Administrative Reform Act (ARA) and §§ 9–13 of the ARA regulating the alteration of the administrative-territorial organisation by the Government (Chapter 3 of the Act), as well as § 20(1), § 24 and § 28 cl. 2) of the ARA. Juuru and Tõstamaa Rural Municipal Councils, in one of the alternatives raised in the application, ask the Court to declare the Administrative Reform Act unconstitutional and repeal it in its entirety.

73. The Chamber will first deal with the admissibility of the applications (II). It will then assess the constitutionality of the regulatory provisions for alteration of the administrative-territorial organisation (III), the provisions concerning the elections of municipal councils in 2017 (IV), and the provisions concerning financing the alteration of the administrative-territorial organisation (V).

II

Admissibility of the applications

74. Under § 7 of the CRCPA, a municipal council may submit an application to the Supreme Court to repeal an Act if it contravenes the constitutional guarantees of the local authority.

75. In line with Supreme Court jurisprudence, the Supreme Court is competent to review on the merits applications lodged under § 7 of the CRCPA if the applications meet two preconditions: first, the application should be lodged by a municipal council and, second, the application should assert that a legal act mentioned in § 7 of the CRCPA, or a provision of that act, contravenes the constitutional guarantees of local authorities (Supreme Court *en banc* judgment of 16 March 2010 in case No 3-4-1-8-09, para. 44).

76. To meet the first precondition, it is necessary that a resolution of a municipal council to lodge an application with the Supreme Court under § 7 of the CRCPA should have been adopted by a majority of votes of the municipal council (§ 45(5) (second sentence) LGOA). In the instant case, all the municipal councils concerned have submitted to the Supreme Court proof that the councils have passed the resolutions to have recourse to the Supreme Court by a majority of votes of the membership of the councils concerned.

77. Section 45(5) (second sentence) of the LGOA does not specify whether a majority of votes of a municipal council is needed only for a decision to lodge an application with the Supreme Court under § 7 of the CRCPA, or whether the requirement applies to a vote on the application itself that is submitted to the Supreme Court.

78. In the instant case, Kõpu Rural Municipal Council has decided by the required majority of votes to submit an application under § 7 of the CRCPA to the Supreme Court (clause 1 of Kõpu Rural Municipal Council decision No 33 of 21 June 2016) and authorised the chairman of the Municipal Council to draw up and sign the application (clause 2 of the same decision). The Municipal Council has not voted on the application drawn up under this authorisation. All the other municipal councils that have sought recourse to the Supreme Court have voted on the application lodged with the Court.

79. The Chamber finds that the primary purpose of the requirement established under § 7 of the CRCPA and § 45(5) (second sentence) of the LGOA in the relevant part is to ensure increased legitimacy of the decision to have recourse to the Supreme Court through a higher than ordinary majority (a majority of the votes of the membership of the council), which should also rule out unjustified instances of recourse to the Supreme Court. Moreover, these provisions are meant to ensure that a municipal council's wish to have recourse to the Supreme Court was developed freely and with full knowledge of the substance of the resolution adopted. This precondition arising from the principle of democracy should also ensure that an application for constitutional review does not become an instrument of political struggle.

80. In addition, § 8(1) of the CRCPA stipulates that an application for constitutional review of a legal act must be reasoned and should state the provisions or principles of the Constitution which the contested legal act contravenes. The Chamber believes that this requirement is also meant to ensure that the council holds the required vote on the substance of the application and does not limit itself merely to a general authorisation for having recourse to the Supreme Court.

81. For these reasons, in the future the Chamber will interpret the substance of § 45(5) (second sentence) of the LGOA as requiring a municipal council to vote on the final text of the application to be lodged with the Supreme Court under § 7 of the CRCPA. This interpretation will help to avoid subsequent disputes over whether the final text of the council's application corresponds to the wish expressed by the council in its authorisation granted in advance.

82. Since in its previous jurisprudence the Supreme Court has not unequivocally addressed the admissibility of applications from this perspective, the Chamber does not consider it justified to rely on the interpretation given in paragraph 81 above in assessing the admissibility of the application by Kõpu Rural Municipal Council. Moreover, in the instant case the Chamber has no reason to presume that Kõpu Rural Municipal Council adopted the decision to have recourse to the Supreme Court for review of constitutionality of the provisions of the Administrative Reform Act based on too little information or that the decision was biased for any other reason. The debate over core issues of constitutionality of the administrative reform has been long-term and public, and the risk that ignorance of council members could somehow be misused through advance authorisation is therefore almost non-existent.

83. To comply with the second precondition, the application must assert contravention of a constitutional guarantee of a local authority. In the instant case, all the applicants have asserted that the provisions of the Administrative Reform Act violate the guarantees of local authorities established under the Constitution: i.e. the guarantee of status of local authorities as individual legal entities under §§ 154 and 158 of the Constitution, and the financial guarantee under § 154 of the Constitution.

84. On that basis, the Chamber is of the opinion that all the submitted applications are admissible and should be examined.

III
Assessment of the constitutionality of the regulatory regime for alteration of administrative-territorial organisation
(A)
Prohibition of arbitrariness

85. The applicants contend that the regulatory regime for alteration of the administrative-territorial organisation of rural municipalities and cities interferes disproportionately with the guarantee of local authorities' status as individual legal entities, which in their opinion follows from § 154(1) and § 158 of the Constitution.

86. Section 154(1) of the Constitution, under which all local matters are determined and administered by local authorities discharging their duties autonomously in accordance with the law, prohibits the legislator

from abolishing the legal institution of the local authority (guarantee of the local authority as a legal institution) by any act lower than the Constitution and protects the right of local authorities to resolve local matters autonomously in accordance with the law (local authority autonomy, i.e. the right of self-organisation). The provision circumscribes the legislator's universal competence and the related specific competence under § 160 of the Constitution to lay down organisation of the work of local authorities.

87. The Chamber finds that neither § 154(1) nor § 158 of the Constitution prohibits altering boundaries of local authorities, including terminating the status of a local authority as a legal entity, on condition that this does not lead to abolition of the local authority as a legal institution from the Estonian legal order. However, the Chamber is of the opinion that these provisions in combination give rise to a prohibition against arbitrary action by the state authority (prohibition of arbitrariness) in respect of a local authority when altering local government administrative-territorial organisation. The prohibition is a specific manifestation of the prohibition against arbitrary exercise of governmental authority, as enshrined in § 3(1) (first sentence) of the Constitution, in respect of a specific local authority and, as such, is an expression of the guarantee accorded to local authorities within the meaning of § 7 of the CRCPA. The Chamber affords the prohibition the following substance.

88. The prohibition of arbitrariness presumes that formal constitutional requirements must be complied with when altering local government administrative-territorial organisation, which the Chamber will examine in part (C) of the judgment (see paras 106–113 of the judgment). In addition to compliance with formal requirements, alteration of local government administrative-territorial organisation must also be constitutional in substantive terms, i.e. serving the constitutional goal and contributing to its attainment (being appropriate for attaining it). The Chamber will examine the requirement in part (D) of the judgment (see paras 114–130 of the judgment). The provision of § 158 of the Constitution, stipulating that the administrative area of a local authority may not be changed without hearing the opinion of the particular authority, should also be taken into account. The Chamber will examine compliance with this requirement in part (E) of the judgment (see paras 131–136 of the judgment).

89. Under § 2(2) of the Constitution, in terms of the organisation of its government, Estonia is a unitary state with administrative divisions prescribed by law. The Chamber finds that this provision affords a wide margin of appreciation for the legislator in establishing and changing local government administrative-territorial organisation. Local self-government denotes resolving local matters independently under the law by the permanent inhabitants of a local authority in line with the requirements of unique aspects of local life (see also Art 3 of the European Charter of Local Self-Government). Thus, the function of local government is to perform certain public functions as close to the people as possible. However, the Supreme Court has repeatedly expressed the view that even though local authorities do exist in the interests of decentralising public authority and circumscribing and balancing the state authority, in line with the Constitution they are not meant to be "states within a state" (most recently the Supreme Court Constitutional Review Chamber judgment of 15 January 2016 in case No 3-4-1-30-15, para. 29). Thus, the legislator enjoys a wide margin of appreciation in shaping the system of local authorities.

90. In assessing the substantive constitutionality of altering administrative-territorial organisation, it should also be taken into account that in view of § 14 of the Constitution imposing on local authorities, alongside the legislature, the executive, and the judiciary, a duty to guarantee fundamental rights, a local authority itself can be not the bearer but only the addressee of fundamental rights (see Supreme Court Constitutional Review Chamber judgment of 19 January 2010 in case No 3-4-1-13-09, para. 18; Supreme Court Administrative Law Chamber judgment of 23 November 2010 in case No 3-3-1-43-10, para. 33).

91. As the Constitution affords the Riigikogu a wide margin of appreciation for establishing the administrative division of state territory, unlike the participants in the proceedings the Chamber does not find it possible to follow the requirements of the proportionality check in assessing the constitutionality of the Administrative Reform Act. The Chamber will only assess whether in establishing the Act the legislator complied with the conditions of the prohibition of arbitrariness. In the opinion of the Chamber, the instant case is significantly different from case No 3-4-1-8-09 cited in the application, in which the Supreme Court *en banc*

in its judgment issued on 16 March 2010 checked compliance with the constitutional guarantees of local authorities by relying on the requirements of the proportionality test. The legal circumstances serving as the basis for that judgment do not overlap with the circumstances of the instant case because one of the key issues in the judgment of 16 March 2010 was compliance with the constitutional financial guarantee of local authorities that had already been formed, while in the instant case the dispute is over the constitutionality of altering administrative-territorial organisation.

(B)

Description of the regulatory regime

92. At the core of the dispute stands the issue whether the Government is obliged to alter the administrative-territorial organisation of those local authorities with less than 5000 residents in respect of whom it cannot make an exception under § 9(3) of the ARA and leave the administrative-territorial organisation unchanged. This issue is directly linked to § 9(2) and (9) of the ARA.

93. To resolve the issue, the Chamber will first clarify the substance of the statutes regulating administrative-territorial organisation.

94. The Administrative Reform Act that entered into force on 1 July 2016 regulates alteration of the administrative-territorial organisation of rural municipalities and cities – the merger or assimilation of two local authorities in the course of which the boundaries of the local authorities may also be changed (§ 2(1) and (2) ARA). The Administrative Reform Act is a specific Act in relation to the Territory of Estonia Administrative Division Act which has regulated the administrative-territorial organisation of rural municipalities and cities, including their boundaries and names, since as long ago as 1995. The provisions of both Acts should also be applied in implementing the administrative reform, taking into account the specifications set out in the Administrative Reform Act (§ 1(4) ARA).

95. Under § 2(3) of the ARA, alteration of administrative-territorial organisation may take place on the initiative of a municipal council or the Government (ARA Chapter 2, §§ 4–8, or ARA Chapter 3, §§ 9–13, respectively). Also under § 7(4) of the TEADA alteration of the administrative-territorial organisation, and changes to the boundaries and names, of rural municipalities and cities may be initiated by the council concerned or by the Government. Under both Acts alteration of administrative-territorial organisation is decided by the Government by way of a regulation.

96. However, the Territory of Estonia Administrative Division Act does not provide regulative arrangements for a situation when local authorities do not agree with the Government’s proposal or fail to perform the tasks laid down in § 8(3) of the TEADA for altering administrative-territorial organisation. In that case, the Government proposal under the TEADA remains unimplemented and the Government will not issue a regulation on altering the administrative-territorial organisation. However, under the Administrative Reform Act, the Government can alter the administrative-territorial organisation of a local authority that has not consented to a Government proposal issued under the Act.

97. Unlike the Territory of Estonia Administrative Division Act, the Administrative Reform Act links Government-initiated administrative-territorial reform with the minimum size criterion of a local authority. Under § 3 of the ARA, the minimum size criterion of a local authority is 5000 residents.

98. Under § 4 of the ARA, a local authority who does not meet the minimum size and is not in a pending merger process submits a proposal to start negotiations to other municipal councils by 1 October 2016 at the latest. If the local authorities reach an agreement, they will conclude a merger contract based on which the Government will issue, by 1 February 2017 at the latest, a regulation on altering the administrative-territorial organisation (§ 8 ARA).

99. If on 1 January 2017 the number of residents in a local authority is below 5000 but a merger initiated by the council had not led to conclusion of a merger contract or the council has not initiated a merger, the Government will initiate alteration of the administrative-territorial organisation (also called a forced merger in the applications lodged by the applicants) on 17 February 2017 at the latest (§ 9(2) (first sentence) ARA).

100. The applicants are of the opinion that the minimum size criterion of a local authority laid down in § 3 of the ARA is binding in deciding Government-initiated alteration of administrative-territorial organisation, and the Government must decide on alteration of a local authority who fails to meet the minimum criterion, unless a basis exists for applying the exceptions under § 9(3) of the ARA. The Chamber is of the opinion that the minimum size criterion of a local authority is binding on the Government only in initiating the proceedings but not in making its final decision, because the ARA also lays down the conditions under which the Government may decide not to alter the administrative-territorial organisation of a local authority not meeting the minimum size criterion by terminating the proceedings.

101. The first sentence of § 9(2) of the ARA imposes an obligation on the Government to initiate alteration of the administrative-territorial organisation in local authorities with less than 5000 residents. The third sentence of § 9(2) of the ARA entitles the Government also to propose altering administrative-territorial organisation to those local authorities who already have 5000 residents as at 1 January 2017, as well as to local authorities who have agreed on a merger and would have at least 5000 residents after the merger.

102. Under § 9(9) of the ARA, all local authorities who have received a proposal from the Government under § 9(2) of the ARA may submit a reasoned negative opinion with regard to the proposal (i.e. reject the Government's proposal by providing reasons) and the Government may terminate proceedings for altering the administrative-territorial organisation of a local authority who received the proposal (§ 9(9) cl. 1) ARA) or decide to alter the administrative-territorial organisation of the local authority by issuing a regulation laid down in § 13(1) of the ARA (§ 9(9) cl. 2) ARA).

103. It is important that under § 9(9) of the ARA, when deciding on alteration of administrative-territorial organisation, the Government is required to assess the justification of a negative opinion submitted by a local authority. Thus, the law imposes a duty of consideration on the Government. Under § 9(9) of the ARA, in reaching its decision the Government must take into consideration the circumstances set out in subsections (2) and (3) of the same section, so that the Government's margin of appreciation and the circumstances to be determined have been laid down first and foremost in these provisions. The Government's margin of appreciation referred to in § 9(9) of the ARA has been worded as follows in § 9(2) (third sentence) of the ARA: alteration of administrative-territorial organisation must have a positive effect, on the basis of the circumstances listed in § 7(5) of the TEADA, and it must be necessary and expedient for ensuring the capability of a local authority not meeting the minimum size criterion of a local authority under § 1(2) and § 3 of the ARA.

104. In the opinion of the Chamber, it follows from § 9(9) and (2) of the ARA that if a local authority not meeting the minimum size criterion to whom no exception can be made under § 9(3) of the ARA is capable of ensuring the necessary professional capability to perform the functions arising from the law and provide good-quality public services to the residents of the local authority in line with the goal of administrative reform set out in § 1(2) of the ARA, the Government is not required to complete the administrative-territorial reform initiated by itself in respect of that local authority. Thus, under § 9(9) cl. 1) of the ARA the Government may also terminate the proceedings for alteration of administrative-territorial organisation in respect of a local authority who in their reasoned negative opinion find that they are capable of properly performing their functions even when the number of residents in that local authority is less than 5000.

105. Thus, the minimum size criterion of a local authority laid down in § 3 of the ARA is binding on the Government only in initiating (i.e. in making a proposal for) alteration of administrative-territorial organisation. The Government is not required to complete initiated proceedings by issuing a regulation mentioned in § 13(1) of the ARA and altering the administrative-territorial organisation of a local authority

who has received a proposal. Under § 9(9) cl. 1) of the ARA the Government may leave unchanged the administrative-territorial organisation of a local authority who received the proposal. If the Government has decided under § 9(2) of the ARA to alter the administrative-territorial organisation of a local authority, in the event of a dispute the court can verify whether in issuing a regulation under § 9(9) cl. 2) of the ARA the Government correctly established the facts and correctly exercised its right of discretion.

(C)

Formal constitutionality of the Administrative Reform Act

106. In accordance with § 3(1) (first sentence) of the Constitution, governmental authority is exercised solely pursuant to the Constitution and laws which are in conformity with it. A law is formally in conformity with the Constitution if in its adoption the requirements of competence, procedure, and form, as well as the principles of parliamentary reservation, legal certainty and legal clarity were complied with (most recently the Supreme Court *en banc* judgment of 26 April 2016 in case No 3-2-1-40-15, para. 40).

107. The Riigikogu passed the Administrative Reform Act on 7 June 2016 and the President of Estonia promulgated it on 13 June 2016. The Act was published in the *Riigi Teataja* gazette on 21 June 2016 (RT I, 21 June 2016, 1).

108. Inter alia, the Administrative Reform Act sets out electoral activities relating to election of municipal councils. Under § 104(2) cl. 4) of the Constitution, the Municipal Council Election Act may only be amended by a majority of the members of the Riigikogu. The Riigikogu passed the Administrative Reform Act with 56 votes in favour; thus the requirement of § 104(2) cl. 4) of the Constitution was complied with.

109. – 110. [Not translated].

111. The principle of parliamentary reservation or essentiality arising from § 3(1) (first sentence) of the Constitution requires that in a democratic country essential issues must be decided by the legislator. The Constitution does not prohibit delegating to the executive authority issues within the competence of the legislator, if the law defines with sufficient clarity the bases and conditions for actions by the executive in order to prevent arbitrary executive action.

112. The Chamber finds that the Administrative Reform Act does not contravene the principle of essentiality. Altering administrative-territorial organisation is an issue of national importance, on which the legislator should be competent to decide. Under § 2(2) of the Constitution, administrative division of Estonian territory is established by law. Administrative division of territory within the meaning of this provision also includes territorial organisation of local authorities. The requirement to decide administrative division by law must at the same time guarantee the autonomy of local government. The Chamber finds that in the Administrative Reform Act the legislator has laid down the purpose, bases and procedure of the reform. The legislator has also allowed for the possibility that altering the administrative-territorial organisation of local authorities is decided by the Government, granting the Government a margin of appreciation (see paras 102–105 of the judgment). In the opinion of the Chamber, the bases and procedure for the Government-initiated alteration of administrative-territorial organisation of local authorities has been sufficiently regulated in the Act. The Act lays down the procedure and time limits for initiating and carrying out the proceedings, as well as the general frame for the exercise of the margin of appreciation.

113. With regard to legal clarity, the Chamber notes that the wording of the key norms in the Administrative Reform Act (in particular § 9 and § 12 ARA) is not the most articulate nor does it always conform to the traditions of legislative drafting established to date. Several norms in the Act have been unjustifiably worded as long complex sentences (in particular § 9(2) and (4) ARA). A single sentence seeks to express several different ideas, even though in terms of legislative drafting it would have been better to express them, for example, as separate subsections or clauses. As complicated sentence structures (extremely long complex

sentences) have been used to express the legislator's will in the Administrative Reform Act, this renders reading and understanding the Act a time-consuming process and may lead to diverse interpretations. Understanding the norms is further complicated due to occurrence of many references to other provisions of the same Act and other legislation. The norms cited in references form an inseparable part of the set of norms in the Administrative Reform Act. Therefore, in order to understand the norms in the Administrative Reform Act it needs to be read in parallel with several other legal acts. The Chamber finds it regrettable when insufficient attention has been given to linguistic and style requirements while drafting statutes. The language of a Draft Act should be clear, unambiguous and precise. The above shortcomings indeed compromise the ability to follow the Administrative Reform Act but do not render the Act in its entirety or its individual norms legally unclear within the meaning of the Constitution. However, the Chamber emphasises once again that linguistic and stylistic requirements for legal acts should be observed when drafting statutes, including the necessity to ensure that sentences are not excessively long and with complicated structures. The Chamber will assess the legal clarity of specific norms of the Administrative Reform Act when dealing with those norms in substance.

(D)

Substantive constitutionality of the regulatory regime for Government-initiated alteration of administrative-territorial organisation

114. The Chamber will assess whether the regulatory regime for altering administrative-territorial organisation has a constitutional goal and whether the regulatory regime helps to attain the goal.

115. Under § 1(2) of the ARA, the purpose of the administrative reform is to support increased capacity by local authorities to offer high-quality public services, using regional preconditions for development, increasing competitiveness, and ensuring more consistent regional development. To achieve this purpose, the Act lays down alteration of administrative-territorial organisation of rural municipalities and cities, as a result of which local authorities must be able to independently organise and manage local life and perform functions arising from law. Administrative reform is also implemented in accordance with the aims of state governance reform in relation to organising public administration, which includes ensuring the quality and availability of public services and cost savings.

116. The Chamber is of the opinion that the goal set by the legislator to improve the capacity of local authorities to provide public services is constitutional.

117. Under the Local Government Organisation Act, the Riigikogu has already previously imposed on local authorities the duty to organise, for example, social services and benefits and other social assistance, welfare services for the elderly, youth work, housing and utilities, supply of water and sewerage, provision of public services and amenities, waste management, spatial planning, public transportation within a rural municipality or city, and construction and maintenance of rural municipal roads and city streets unless these functions are assigned by law to other persons (§ 6(1) LGOA). Local authorities must also organise maintenance of pre-school child care institutions, basic schools, upper secondary schools, hobby schools, libraries, community centres, museums, sports facilities, shelters, care homes, health care institutions and other local agencies in the ownership of a local authority (§ 6(2) LGOA).

118. Public services that local authorities are required to provide are related to fundamental rights and freedoms which it is also the duty of local authorities under § 14 of the Constitution to guarantee. If local authorities are unable to provide services on a sufficient level, fundamental rights may be left unprotected. The Supreme Court *en banc* has found that the state cannot allow a situation where availability of essential public services depends largely on the economic capacity of the local authority of a person's residence or registered office (cf. the Supreme Court *en banc* judgment of 16 March 2010 in case No 3-4-1-8-09, para. 67).

119. To raise the capacity of local authorities, the legislator has established a regulatory regime for altering administrative-territorial organisation which lays down, as a rule, formation of local authorities with at least 5000 residents (§ 3, § 9 ARA). The legislator has entrusted to the Government the final right of decision on the number of residents that local authorities formed as a result of administrative reform should have (see paras 102–105 of the judgment). In the opinion of the Chamber, the measure chosen by the legislator for attaining the goal is not clearly inappropriate. It should also be taken into account that prior to establishing the minimum number of residents the legislator also tried to promote formation of larger local authorities by other means, passing the Promotion of Local Authorities Merger Act for this purpose as long ago as 2004. However, this measure did not prove to be effective, as according to the data of Statistics Estonia there were 213 local authorities in Estonia as at 1 January 2016. Opportunities for local authorities to cooperate have also failed to significantly improve the capacity of local authorities.

120. The Chamber has no reason to doubt the legislator's presumption that forming larger local authorities would improve the capacity of local authorities to provide public services. Presumably, local authorities with over 5000 residents can better perform the functions imposed on them than local authorities with a smaller number of residents. The Chamber does not deny that, *in abstracto*, other criteria besides the number of residents could also be used to assess the capacity of local authorities, but the judiciary cannot assume the place of the legislator in offering different angles of approach. Under § 2(2) and § 3(1) of the Constitution, establishing the basic principles for capacity of local authorities is an issue of national importance which only the Riigikogu is competent to decide. On that basis, the Chamber sees no reason to question the constitutionality of forming local authorities with at least 5000 residents.

121. It should also be taken into account, as already indicated in paras 103–105 of this judgment, that the legislator has left a wide margin of appreciation for the Government in making the final decision in altering administrative-territorial organisation initiated by itself. The Riigikogu has not linked altering administrative-territorial organisation rigidly with the minimum size criterion of a local authority. The legislator has mandated the Government to assess the actual capacity of a local authority when initiating alteration of administrative-territorial organisation (application of the exceptions laid down in § 9(3) of the ARA). Under § 9(9) of the ARA, by using its margin of appreciation the Government may also terminate pending proceedings if other criteria affirm that merging local authorities is not expedient merely for achieving minimum size. In the latter case, § 9(9) of the ARA links exercise of the margin of appreciation by the Government with the provisions of § 9(2) and (3) of the ARA under which the Government must take into account the provision of § 7(5) of the TEADA.

122. On that basis, the Chamber is of the opinion that the provisions of the Administrative Reform Act that authorise the Government to decide on altering administrative-territorial organisation (in particular §§ 3 and 9 ARA) do not contravene the Constitution. The regulatory regime has a constitutional goal and the regulatory regime helps to attain it.

123. In the opinion of the Chamber, the regulatory regime under the Administrative Reform Act is also not rendered unconstitutional by the fact that due to the absence of relevant statutes it is currently unclear what functions local authorities will have to perform after administrative-territorial reform, what requirements will apply for public services provided in the future, and what the financial means for performing those functions will be. The applicants believe that this amounts to lack of legal clarity, rendering the Administrative Reform Act unconstitutional.

124. Under § 154 of the Constitution, local authorities must deal with two types of function: to determine local matters and perform state-level duties imposed on them.

125. At the time of the present judgment it is not clear what new state-level duties will be imposed on local authorities in the future; however, this cannot render the Administrative Reform Act unconstitutional. The legislator may impose state-level duties on local authorities by observing the requirements of § 154(2) (second sentence) of the Constitution. The Constitution does not require that a local authority should know

in advance what state-level duties would be imposed on it in the future. The state may also impose these duties on a local authority unilaterally in accordance with the law.

126. Often, but not always, qualitative and quantitative requirements for provision of a public service are set in the case of state-level functions imposed on a local authority. The Chamber is of the opinion that absence of these requirements cannot be imputed to the government in the abstract and with a view to the future.

127. With regard to the duty of resolving local matters, the Supreme Court *en banc* in the judgment of 16 March 2010 in case No 3-4-1-8-09 noted that local functions that need to be performed cannot be listed exhaustively. These functions may also differ in the case of different local authorities, depending on the specific needs of the local authority as well as on the preferences of the local community. These are local functions the performance of which can reasonably be expected from the local authority at the given time and in the given space. Important local functions, as well as the required extent of their performance, vary over time. These largely depend on the overall socio-economic situation and the level of welfare of society. Changes in the socio-economic environment may change both local functions that need to be performed as well as the presumable extent and quality of performance of those functions (para. 67).

128. Local functions that need to be performed are also affected by the legislator's activity in addition to development of society. The Constitutional Review Chamber in its judgment of 8 June 2007 in case No 3-4-1-4-07 reached the position that on the basis of a simple statutory reservation under § 154 of the Constitution the legislator may, by a reasoned decision, restrict the independence of local authorities by excluding some essentially local matters from the list of local matters, while preserving the constitutional guarantee of local government (para. 12). It is also not excluded that a currently local matter is turned into a national matter.

129. The Supreme Court *en banc* in its judgment of 16 March 2010 in case No 3-4-1-8-09 emphasised that under § 154(2) (second sentence) of the Constitution the performance of duties imposed by law on a local authority must be funded from the state budget, and a local authority may request that absence of a regulatory scheme that would ensure full funding of a state-level duty imposed by law on the local authority be declared to be in conflict with § 154(2) (second sentence) of the Constitution. A local authority to whom no money necessary for performing a state-level function has been allocated may have recourse to the court to request that under § 154(2) (second sentence) of the Constitution the state be ordered to provide the funds required but lacking for performing the state-level function (para. 74). The right arising from § 154(1) of the Constitution to receive sufficient funds for performance of local government functions requires that the state should establish a regulatory regime to ensure at least the minimum required amount of funds for local authorities to perform local functions, i.e. enabling them to perform the minimum necessary local functions to the minimum necessary extent (ibid. para. 65). This is an issue of substantive constitutionality of funding local authorities in the future.

130. On that basis, the Chamber holds that future legislative amendments and potential problems with funding of local authorities do not pose a legal obstacle to implementing the administrative-territorial reform initiated by the Government. In a situation where under § 107(1) of the Constitution the President of the Republic has not yet promulgated an Act that is to take effect in the future, the underlying premise in applying § 9(9) of the ARA should be the capacity of local authorities to perform the functions defined under current legislation.

(E)

Hearing local authorities who have received a Government proposal

131. Under § 158 of the Constitution, the boundaries of local authorities may not be altered without hearing the opinion of the local authorities concerned.

132. The Chamber finds that the hearing of local authorities assured under the Administrative Reform Act in

the case of a Government-initiated alteration of administrative-territorial organisation is substantive, not merely formal. The Chamber justifies its opinion as follows.

133. Under § 9(2) (second sentence) of the ARA, the Ministry of Finance submits to the municipal councils concerned a draft regulation regarding alteration of administrative-territorial organisation and alteration of borders of administrative units. A municipal council can submit an opinion on the proposal on 15 May 2017 at the latest (§ 9(2) (second sentence) and § 9(8) ARA). In view of the fact that the Government must initiate alteration of administrative-territorial organisation on 15 February 2017 at the latest, a local authority has at least three months to express an opinion on the Government proposal.

134. A local authority submits to the county governor a reasoned opinion prepared in the form of a resolution concerning the Government proposal (§ 12(2) cl. 2) ARA). Upon receiving a reasoned opinion of a local authority, the Government may terminate the proceedings for alteration of administrative-territorial organisation with regard to that local authority (§ 9(9) cl. 1) ARA). If the Government does not deem the justifications presented by the local authority to be sufficiently valid, it will adopt a regulation on alteration of the administrative-territorial organisation of the local authorities concerned (§ 9(9) cl. 2), § 13 ARA). In the latter case, the Ministry of Finance will promptly notify the local authorities concerned before adopting the respective regulation (§ 9(10) ARA). The local authorities concerned may contest the legality of the Government regulation in court.

135. The Administrative Reform Act imposes on a local authority receiving a Government proposal a duty to establish the opinion of its residents by conducting an opinion poll (§ 12(2) cl. 1) and (3) ARA).

136. The duty to establish the opinion of residents does not arise from § 158 of the Constitution. The Chamber is of the opinion that § 158 gives rise to a duty on the part of the executive to hear the opinion of a local authority body. The Chamber notes that the European Charter of Local Self-Government also does not require hearing the opinion of local residents. Article 5 of the Charter stipulates: “Changes in local authority boundaries shall not be made without prior consultation of the local communities concerned, possibly by means of a referendum where this is permitted by statute.” Thus, the Charter leaves it to the State Party to decide whether to hold a referendum, which is binding under the Estonian legal order, or an opinion poll, which has no binding legal force in the Estonian legal order, or whether to give the competence of expressing the residents’ opinion to a local authority body representing the community.

(F)

Procedural time limits in Government-initiated alteration of administrative-territorial organisation

137. The applicants have also contested the time limits during which a local authority, having received a Government proposal, must carry out the statutory steps or adopt statutory decisions after 15 February 2017. Failure to carry out these steps or adopt the decisions results in the state executive making these decisions instead of the local authority that received the Government proposal (§ 12(3) (third and fourth sentence) and § 12(9) ARA), or the consequences clearly and unequivocally laid down by the law will occur (§ 9(8) and § 12(7), (8) and (10) ARA).

138. The Chamber is of the opinion that in the event of failure to take the necessary statutory steps and decisions it is inevitable that the competence to take them transfers to the state executive or the consequences clearly and unequivocally laid down by law will occur. Thus, it is necessary to assess whether the statutory time limits are sufficient to allow a local authority to exercise the right of self-government with regard to the relevant issues. If time limits are too short, they could be unconstitutional. Even though several time limits laid down under the Administrative Reform Act are shorter than those laid down under the Territory of Estonia Administrative Division Act, this fact alone cannot bring about the unconstitutionality of the time limits laid down under the Administrative Reform Act. Therefore, the Chamber does not agree

with the argument by Kõpu Rural Municipal Council claiming unconstitutionality of § 9(1) (second sentence) of the ARA and the amendments to it introduced under § 28 cl. 2) of the ARA entering into effect on 1 January 2017, according to which § $9(3^1)$, (8) (second sentence), (9) cl. 2), and (13), § 9^1(1) cls 3), 4), 5), 6) and 7) of the TEADA, as well as § 11(4) and § 17(3) of the Municipal Council Election Act (MCEA) do not apply in the event of alteration of administrative-territorial organisation initiated by the Government.

139. Next the Chamber will deal with what a local authority must do after the Government, on 15 February at the latest, has made it a proposal for altering administrative-territorial organisation.

140. First, a local authority must establish, in accordance with the procedure laid down by Government regulation No 87 of 28 July 2016, the opinion of its residents on altering the administrative-territorial organisation (§ 12(2) cl. 1) ARA). To establish the opinion of residents, an opinion poll must be held on 23 and 24 April 2017 (§ 17(3) of the procedure). The results of the poll are confirmed by the municipal council (§ 17(6) of the procedure). Under § 12(3) of the ARA, the opinion of residents must be established by 15 May 2017 at the latest.

141. Second, by 15 May 2017 at the latest a local authority must submit to the county governor a reasoned opinion on the Government proposal (§ 12(2) cl. 2) ARA).

142. Failure to establish the opinion of residents and either submitting or failing to submit a reasoned opinion to the county governor by 15 May 2017 does not relieve the local authority of the duty to take subsequent steps.

143. Third, by 15 June 2017 at the latest an agreement should be reached with the other municipal councils concerned on the name of the local authority, type and insignia of the administrative unit, settlement of any organisational, budgetary or other issues related to proprietary rights and obligations as well as issues concerning preparation of the statutes of the new local authority and making any other necessary amendments to legislation likely to arise in the context of alteration of administrative-territorial organisation or alteration of boundaries, acting on the basis of § 12(5) and (6) and §§ 14?18 of the ARA, and § 9^2 of the Territory of Estonia Administrative Division Act (§ 12(2) cl. 3) ARA).

144. Fourth, a draft merger agreement must be displayed for public examination, setting a time limit for submitting proposals and objections that must not be shorter than 15 calendar days from publication of the draft. The merger agreement must be approved by resolution of all the councils concerned that received a proposal from the Government, and it must be published on the website of the rural municipality or city. The law does not lay down a clear time limit within which councils should approve the merger agreement. As § 13(1) of the ARA requires that Government regulation should be adopted by 15 July 2017 at the latest, this deadline can serve as an orientation for councils in adopting their decisions.

145. Fifth, § 12(2) cl. 4) of the ARA obliges the council, in cooperation with other councils concerned, to conduct the electoral activities laid down in the Municipal Council Election Act by 15 June 2017 at the latest.

146. Sixth, in choosing the name for the local authority and type of administrative unit as set out in § 12(2) cl. 3) of the ARA, local authorities must first obtain the opinion of the Place Names Board of Estonia established under § 20(1) of the Place Names Act, and the insignia specified in § 12(2) cl. 3) of the ARA must be agreed on with the councils concerned in accordance with the terms and conditions laid down in § 14(3) of the Local Government Organisation Act. Prior to agreeing on the insignia, the opinion of the Government Office must be obtained; this has to be taken into consideration in the case of using the insignia.

147. The Chamber is of the opinion that the period for carrying out these steps or adopting the decisions, which starts to run from 16 February 2017, is not clearly insufficient (see Part IV of the judgment on electoral activities). A local authority can mandate the rural municipality or city administration to decide on issues not assigned to the exclusive competence of the municipal council under the law. A local authority can also schedule the dates for meetings of the council and city administration and plan meetings prior to

establishing the opinion of residents, all before the deadline for submitting objections to the merger agreement.

(G)

Other contested provisions of Chapter 3 of the Administrative Reform Act

148. – 163. [Not translated]

(H)

Application by Juuru and Tõstamaa Rural Municipal Councils to repeal the Administrative Reform Act in its entirety

164. – 169. [Not translated]

IV

Assessment of the constitutionality of provisions concerning 2017 election of municipal councils

170. Kõpu Rural Municipal Council has contested § 9(1) (second sentence) of the ARA under which, to the extent specified in that provision, the Territory of Estonia Administrative Division Act is not applied in the course of administrative-territorial reform initiated by the Government. It is claimed in the application that due to contestation of the Government regulations in court a situation may arise where a local community has no clear indication in which local authority the vote is taking place and for whom to vote.

171. The Chamber is of the opinion that Kõpu Rural Municipal Council has not lodged this application to protect local authority constitutional guarantees. The application has been lodged to protect the active electoral rights of voters. A municipal council cannot lodge an application for protection of the electoral rights of the rural municipality's residents (cf. Supreme Court *en banc* judgment in case No 3-4-1-8-09, para. 46).

172. The Chamber notes that constitutional problems in the exercise of subjective electoral rights may indeed arise due to court disputes during and after elections in the course of Government-initiated administrative-territorial reform. However, these problems do not concern the local authority's right of self-organisation as a local authority constitutional guarantee. A local authority cannot lodge an application with the Supreme Court to protect the subjective electoral rights of its residents. Under § 7 of the CRCPA, a municipal council may contest a statute in the Supreme Court if it contravenes the constitutional guarantees of local authorities.

173. The rural municipal councils who lodged a joint application contend that if rural municipal councils fail to agree on the organisation of elections within the unreasonably short period laid down by the Administrative Reform Act, then under § 12(9) of the ARA essential decisions will be made by the county governor instead of by the councils. The joint application claims a violation of § 154(1), § 156(1) and § 12(1) of the Constitution. Both the time limits for electoral activities by local authorities that have received a Government proposal, as well as the competence of the county governor, are laid down in Chapter 3 of the Administrative Reform Act, the constitutionality of which has been contested in its entirety by the joint applicants.

174. The Chamber understands the application as contesting the time limits laid down for electoral activities performed by the council in the course of Government-initiated administrative-territorial reform, as well as

the county governor's competence to perform electoral activities of which performance would otherwise lie within the competence of local authorities.

175. Section 12(9) of the ARA grants the county governor competence to perform electoral activities laid down in § 70^3 of the Municipal Council Election Act (MCEA) unless councils perform them by 15 June 2017. Under § 70^3(2) of the MCEA in the amended version entering into force on 1 January 2017, these electoral activities include approving the number of council members of a local authority, forming an electoral district, establishing polling divisions, appointing members and alternate members of the electoral committee of a rural municipality or city, and specifying the seat of the electoral committee.

176. The Chamber is of the opinion that a local authority decides on the substance of these kinds of electoral activities on the basis of the right of self-organisation within the limits established by the law. A violation of the right of self-organisation could arise if the period for performing electoral activities were insufficient or if transfer of decision-making competence to the county governor were unjustified.

177. Under § 9(2) of the ARA, the Government initiates alteration of the administrative-territorial organisation of a local authority on 15 February 2017 at the latest by making a relevant proposal to local authorities who meet the conditions described in the same provision. The Government proposal is deemed to be accepted if a local authority that receives the proposal does not submit an opinion on it by 15 May 2017 (§ 9(8) ARA). After receiving the Government proposal the local authority will perform the electoral activities set out in the Municipal Council Election Act in cooperation with the councils concerned by 15 June 2017 at the latest (§ 12(2) cl. 4) ARA). In the case of Government-initiated alteration of administrative-territorial organisation under the Administrative Reform Act, the time limits laid down under § 8(1), (3) cl. 3), and (4) of the TEADA are not applied (§ 9(1) (second sentence) ARA).

178. It is true that in the case of Government-initiated alteration of administrative-territorial organisation under the Administrative Reform Act the time limits for performing electoral activities are shorter than laid down under the Territory of Estonia Administrative Division Act for performing electoral activities in the case of Government-initiated alteration of administrative-territorial organisation. The Chamber also concedes that a local authority who receives a proposal from the Government may have less time for performing electoral activities than those local authorities whose merger was initiated by municipal councils. However, these differences cannot bring about the unconstitutionality of the contested provisions. It is also significant whether the time limits are sufficient in relation to the complexity of the activities, whether the activities could be performed after receiving a Government proposal, and whether transfer of performance of electoral activities to the county governor is constitutional.

179. The Chamber is of the opinion that approving the number of council members, forming electoral districts and polling divisions, appointing members and alternate members of the electoral committee of a rural municipality or city, and specifying the seat of the electoral committee are not complicated electoral activities. The legislation leaves a period of at least four months for performing them and the Chamber does not find this unreasonably short.

180. The Chamber concedes the problem with performing electoral activities where local authorities who received a Government proposal do not wish to merge or are unable to reach a merger agreement. However, the Chamber does not think that councils face any insurmountable hurdles for performing electoral activities subsequent to receiving a Government proposal.

181. The law lays down the procedure for performing electoral activities when municipal councils have failed to perform them or have performed them incompatibly with the requirements laid down by law. Section 9(9) of the ARA stipulates that if a local authority who receives a Government proposal fails to take the steps or adopt the decisions set out in § 70^3 of the MCEA by 15 June 2017, or if the decisions are not similar, the county governor will take those steps or adopt those decisions by 19 July 2017 at the latest.

182. The Chamber is of the opinion that in the situation described in § 70^3 of the MCEA, taking into

consideration sufficient time for performing electoral activities and the absence of insurmountable hurdles, actually no better solution is available for performing electoral activities than transferring their performance to a government body (cf. judgment in case No 3-4-1-4-07, para. 12). As municipal councils have been granted an opportunity under the law to perform electoral activities, transfer of the competence to the county governor in the event of failure to use the opportunity or in the event of controversial use does not amount to a violation of the right of self-organisation (§ 154 Const.).

183. The substantive aspects of electoral activities by the county governor have been laid down in § 70^3 of the MCEA. Under § 14 of the CRCPA, the Chamber cannot check the constitutionality of § 70^3 of the MCEA, because the applicants have not contested the constitutionality of this provision. Nonetheless, the Chamber notes the following. Transfer to the county governor of electoral activities performed on the basis of the right of self-organisation does not harm local democracy in forming polling divisions, as under § 70^3 (2) cl. 3) of the MCEA the county governor will form polling divisions on the basis of the polling divisions formed in the previous election. In the opinion of the Chamber, neither does it harm local democracy if the county governor determines the number of council members, because under § 70^3(2) cl. 1) of the MCEA the county governor is bound by the number of council members laid down in § 7(1) and (2) of the MCEA. However, serious interference in local democracy, on which the right of self-organisation is largely based, may arise from § 70^3(2) cl. 2) of the MCEA under which the county governor can form only one electoral district. Under § 8(2) cl. 2^1) of the MCEA, without the presence of statutory preconditions a council can form several electoral districts in the case of a local authority to be formed as a result of a merger. Formation of only one electoral district by the county governor for elections of a council to be convened after the entry into force of Government-initiated administrative-territorial organisation may have an impact on election results and representation in the council, for example, to the detriment of residents of so-called peripheral areas.

V

Assessment of the constitutionality of provisions relating to the funding of alteration of administrative-territorial organisation

184. Next, the Chamber will examine the applications as regards compensation of costs of altering administrative-territorial organisation.

185. Under § 154(2) (second sentence) of the Constitution, funds to cover expenditure related to state-level duties which have been imposed by law on a local authority are provided from the national budget. This provision is one of the financial guarantees of local authorities, giving rise to the right of a local authority to have state-level duties imposed on it to be fully funded from the state budget. This provision protects local authorities from being compelled to use funds intended for discharging local government duties for performing statutorily imposed state-level functions. A situation where, in order to perform state-level duties, a local authority is compelled to find money on account of local functions or choose which duties to perform, is contrary to § 154(2) (second sentence) of the Constitution. Section 154(2) (second sentence) of the Constitution requires that state-level duties imposed by law on local authorities should be funded so as to be able to assess whether the state actually covers from the state budget all the costs relating to state-level duties imposed on local authorities (see Supreme Court judgment of 16 March 2010 in case No 3-4-1-8-09, para. 74).

186. There is no dispute in the instant case that altering administrative-territorial organisation, whether on the initiative of a local authority or the Government, is a state-level function imposed on local authorities by law, the costs of which must be compensated from the state budget.

187. If altering administrative-territorial organisation is initiated by a municipal council, the local authorities formed as a result of the alteration are paid a merger grant (§ 20(1) (first sentence) ARA). In that case, the

rate of the merger grant is 50 euros for each resident of the merged local authority. The minimum amount of the grant for a merged local authority is 150 000 euros and the maximum amount 400 000 euros (§ 20(2) ARA). The basis for calculation, payment and use of the merger grant is laid down in §§ 21–23 of the ARA. A merger grant allocated from the state budget can be used to cover costs related to the actions set out in § 6(2) of the Promotion of Local Authorities Merger Act, and it is also used to pay lump-sum compensation to the chairman of the municipal council concerned, the rural municipality mayor and city mayor upon termination of their mandate (§ 23(1) and (2) ARA).

188. If altering administrative-territorial organisation is initiated by the Government, no merger grant is paid to the local authority formed as a result of the alteration (§ 24(1) (first sentence) ARA). In that case, the local authority formed as a result of alteration of the administrative-territorial organisation is compensated from the state budget in the amount of costs actually incurred on the basis of expense receipts, but not more than for up to 100 000 euros, for activities set out in § 6(2) cls 1)–4^1) of the Promotion of Local Authorities Merger Act or § 12(2) cl. 4) of the ARA.

189. Activities directly related to altering administrative-territorial organisation, the costs arising from which must be compensated from the state budget, are set out first and foremost in § 6(2) cls 1)–4^1) of the Promotion of Local Authorities Merger Act: conduct of research, analyses and consultations related to the merger (clause 1)); ascertaining the opinion of residents of a rural municipality or city (clause 2)); actions related to changing the name and status of a local authority (clause 3)); reorganisation of local authority administrative agencies or bodies administered by such administrative agencies, including payment of compensation (clause 4)); and payment of lump-sum compensation to the chairman of the council of a relevant local authority, rural municipality and city mayor upon termination of their mandate (clause 4^1)). The activities set out in § 6(2) cls 5)–8) of the Promotion of Local Authorities Merger Act (e.g. financing of investments prescribed by the development plan or agreed upon in the merger contract (clause 6)) are not directly related to implementing administrative-territorial reform as a state-level function, so that the costs related to these activities are not compensated from the state budget in the case of Government-initiated alteration of administrative-territorial organisation.

190. Thus, the Administrative Reform Act stipulates how the costs related to altering administrative-territorial organisation are covered from the state budget: in the case of an alteration initiated by local authorities the costs are compensated by paying the rate-based merger grant, while in the case of a Government-initiated alteration the costs are compensated on the basis of expense receipts. In the instant case it has not been questioned whether the merger grant laid down in §§ 20–23 of the ARA allows all the costs relating to alteration of administrative-territorial organisation initiated by a municipal council to be covered from the state budget.

191. The applicants contend that the maximum threshold for compensation of costs related to Government-initiated alteration of administrative-territorial organisation is unconstitutional. For that reason, Kõpu Rural Municipal Council asks the Court to declare unconstitutional § 24 of the ARA, and Juuru and Tõstamaa Rural Municipal Councils ask the Court to declare unconstitutional and repeal § 24(1) of the ARA to the extent that it stipulates the maximum cost threshold. The joint application does not seek to repeal the maximum cost threshold set in § 24(1) (second sentence) but the applicants find that the maximum threshold interferes with the financial guarantee under § 154(2) (second sentence) of the Constitution if compensation is not sufficient to cover costs.

192. The Chamber holds that § 24(1) (second sentence) of the ARA, to the extent that it stipulates that costs related to Government-initiated alteration of administrative-territorial organisation are compensated not more than for up to 100 000 euros, contravenes the financial guarantee laid down in § 154(2) (second sentence) of the Constitution.

193. In the explanatory memorandum to the Draft Administrative Reform Act, setting the threshold is explained only by the argument relating to preventing local authorities from incurring unreasonable expenses prior to merger. The Chamber finds that this cannot be a legitimate reason for deviating from the

requirement laid down in § 154(2) (second sentence) of the Constitution. The requirement laid down in § 14(1) (second sentence) of the ARA that costs are compensated on the basis of expense receipts should be sufficient to prevent unjustified expenses. Moreover, the Minister responsible for the area may establish more detailed conditions and procedures for compensating costs (§ 24(2) ARA). Even though the procedure for compensating costs based on expense receipts may be more costly for the state, it does not violate the financial guarantee laid down in § 154(2) (second sentence) of the Constitution.

194. In the Draft Administrative Reform Act no justification was given exactly why 100 000 euros was chosen as the maximum threshold for costs. According to the representative of the Government, to date the costs related to mergers of local authorities have not exceeded 100 000 euros, but have mostly remained within the range of 70 000 euros (direct costs of Audru rural municipality *ca* 26 000 euros, Hiiu rural municipality *ca* 42 000 euros, Lääne-Nigula rural municipality *ca* 70 000 euros, Lüganuse rural municipality *ca* 75 000 euros, Põlva rural municipality *ca* 50 000 euros and Viljandi rural municipality *ca* 85 000 euros). The Chamber notes that the examples given by the Government involved a voluntary merger of two, three (Lüganuse rural municipality and Lääne-Nigula rural municipality) or four (Viljandi rural municipality) local authorities. It is unknown how many rural municipalities would be merged in the case of a Government-initiated alteration of administrative-territorial organisation, but it is not ruled out that it may involve more than four local authorities. Therefore, it cannot be ruled out that in the case of a Government-initiated alteration of administrative-territorial organisation the costs could exceed 100 000 euros.

195. The Chamber does not agree with the Government's view that setting the maximum threshold would interfere with the financial guarantee only if the actual substantiated merger costs are clearly higher than 100 000 euros, and this can only be assessed within proceedings for specific constitutional review of legislation. The Chamber finds that the financial guarantee arising from § 154(2) (second sentence) of the Constitution has been set in the form of a rule which is violated if costs related to performing a state-level function statutorily imposed on a local authority are not compensated from the state budget, including if the costs are compensated only partially. Therefore, a statute (§ 24(1) (second sentence) ARA) which partially rules out compensation of costs contravenes the Constitution and should be repealed in the relevant part. The Chamber also does not agree with the Government that if the actual costs exceed the maximum threshold laid down in § 24(1) (second sentence) of the ARA the Government may compensate costs from the state budget. If § 24(1) (second sentence) of the ARA is valid in its present form, no legal basis exists for compensating costs exceeding the maximum threshold.

196. On that basis and relying on § 15(1) cl. 2) of the Constitutional Review Court Procedure Act, the Chamber declares unconstitutional and repeals § 24(1) (second sentence) of the ARA in the part "but not more than for up to 100 000 euros".

197. The applicants also claim that § 24 of the ARA contravenes the financial guarantee laid down in § 154(2) (second sentence) of the Constitution, in combination with the principle of equal treatment arising from § 12(1) of the Constitution, because it rules out payment of a merger grant to the majority of local authorities in the case of Government-initiated alteration of administrative-territorial organisation. Therefore, Kõpu Rural Municipal Council seeks to declare unconstitutional § 24 of the ARA, Juuru and Tõstamaa Rural Municipal Councils seek to repeal § 24 of the ARA and declare unconstitutional § 20(1) of the ARA to the extent that it does not lay down a merger grant in the case of Government-initiated alteration of administrative-territorial organisation. The remaining applicants ask to declare unconstitutional and repeal § 24(1) of the ARA to the extent that it denies a merger grant for those local authorities who have been unable to merge voluntarily during the administrative reform, as well as for those local authorities who cannot request alteration of administrative-territorial organisation relying on § 7(3) of the ARA.

198. The Chamber holds that non-payment of a merger grant in the case of Government-initiated alteration of administrative-territorial organisation does not interfere with the financial guarantee of local authorities arising from § 154(2) (second sentence) of the Constitution. As already explained above, the financial guarantee is violated only if the costs related to state-level functions imposed on a local authority are not compensated from the state budget.

199. The Chamber holds that a local authority is not a bearer of fundamental rights and, therefore, cannot rely on the fundamental right of equality enshrined in § 12(1) of the Constitution. However, this does not mean that the Constitution would allow unjustified unequal treatment of local authorities in implementing administrative-territorial reform. The principle of the rule of law guaranteed under § 3 of the Constitution gives rise to the general requirement that the state must not exercise its authority arbitrarily. This is also affirmed by § 152(2) of the Constitution, under which the Supreme Court repeals any law or other legislation that is in conflict with the letter and spirit of the Constitution. Thus, the Chamber will only check whether the law arbitrarily treats local authorities unequally in funding alteration of administrative-territorial organisation.

200. Sections 20(1) and 24(1) (first sentence) of the ARA treat local authorities differently in compensating costs related to alteration of administrative-territorial organisation depending on whether alteration is initiated by municipal councils themselves or by the Government (apart from the exceptions mentioned above). Different treatment is expressed in the fact that in the first case local authorities do not have to prove their actual merger-related costs and they are paid a merger grant according to the basis for calculation laid down by law, i.e. based on the number of residents. Moreover, the list of activities for which a merger grant may be used is longer (§ 6(2) Promotion of Local Authorities Merger Act). In the latter case, however, a local authority must submit expense receipts for compensation of costs, and the list of activities for which costs are compensated is shorter (§ 6(2) cls 1)–4^{1}) Promotion of Local Authorities Merger Act, and § 12(2) cl. 4) ARA). In the event of a merger initiated by a municipal council, the sum allocated to the local authority from the state budget is probably significantly higher than in the event of Government-initiated alteration of administrative-territorial organisation.

201. Under § 24(1) (first sentence) two exceptions are established to the rule that no merger grant is paid in the event of Government-initiated alteration of administrative-territorial organisation. According to the first exception, a merger grant is also paid if the Government has adopted a regulation mentioned in § 8 of the ARA for alteration of administrative-territorial organisation. In that case, local authorities have already merged on the initiative of the councils, but the Government will assimilate one or more local authorities with the existing already-merged local authority. According to the second exception, a merger grant is also paid to those local authorities who have applied for a merger under the conditions set out in § 7(3) of the ARA and for alteration of whose administrative-territorial organisation the Government has adopted a regulation as mentioned in § 13(1) of the ARA. This is a situation where local authorities wish to merge but they do not have a common border, and therefore the Government will merge them with the local authority located between them.

202. The applicants maintain that no constitutionally-compliant goal for this kind of unequal treatment exists, and the interference is disproportionate because the possibility of a voluntary merger need not depend on the behaviour of a local authority.

203. The Chamber holds that unequal treatment of local authorities is not arbitrary. The purpose of different compensation of costs related to altering administrative-territorial organisation is to promote merger of local authorities on the initiative of councils. If alteration of administrative-territorial organisation takes place on the initiative of municipal councils, state interference in a local authority's right of self-organisation is on a smaller scale, while the local authority has better opportunities to make choices and more time to carry out the merger. The legislator has also established exceptions for cases where the Government alters the administrative-territorial organisation of a local authority in a situation where councils have already merged on their own initiative (first alternative in § 24(1) (first sentence) ARA) or have been unable to merge due to factual obstacles (second alternative in § 24(1) (first sentence) ARA).

204. On that basis, the Chamber holds that § 20(1) of the ARA and § 24(1) (first sentence) of the ARA comply with the Constitution.

VI

In conclusion

205. On that basis, the Chamber grants the applications by Kõpu Rural Municipal Council, Juuru Rural Municipal Council and Tõstamaa Rural Municipal Council in part. Based on § 15(1) cl. 2) of the Constitutional Review Court Procedure Act, the Chamber declares unconstitutional and repeals § 24(1) (second sentence) of the Administrative Reform Act in the part "but not more than for up to 100 000 euros".

206. In the remaining part, the Chamber dismisses the applications based on § 15(1) cl. 6) of the Constitutional Review Court Procedure Act.

Concurring opinion of Supreme Court Justice Jüri Põld to the Constitutional Review Chamber judgment of 20 December No 3-4-1-3-16

1. I concur with the operative part of the judgment. However, I believe that with a view to avoiding potential later confusion and ensuring effective judicial protection of local authorities' status as legal entities, the judgment should, by way of *obiter dictum*, have dealt with problems relating to the issue of the type of judicial proceedings in which a dispute concerning a Government regulation issued under § 13(1) of the Administrative Reform Act (ARA) should be adjudicated. I believe that currently sufficient clarity regarding the issue is lacking.

2. The problem arises from the fact that two types of proceedings have been established for judicial adjudication of disputes under public law between local authorities and the state – administrative court proceedings and constitutional review proceedings. Significant differences exist between these two proceedings.

3. Under § 4(1) of the Code of Administrative Court Procedure (CACP), administrative courts are competent to adjudicate disputes arising in public law relationships unless the law provides a different procedure. Under §§ 5 and 6 of the CACP, the competence of the administrative court is limited to adjudicating actions against administrative acts and administrative measures. The administrative court has no competence to adjudicate an action seeking repeal of a legislative act. However, under § 7 of the Constitutional Review Court Procedure Act (CRCPA), a municipal council may have direct recourse to the Supreme Court to ask the Court to declare unconstitutional a Government regulation that has not entered into force or to repeal a Government regulation, or a provision thereof, that has entered into force, if it contravenes the constitutional guarantees of local authorities.

4. I believe that a Government regulation issued under § 13(1) of the ARA is a legislative act, i.e. an act of general application (a regulation in the substantive sense). Notably, a regulation issued under § 13(1) of the ARA results in amending the list of administrative units of Estonian territory adopted by Government regulation No 159 of 3 April 1995 (§ 13(2) ARA). To date, amendments to the list have been made by Government regulations on alteration of administrative-territorial organisation of particular local authorities (e.g., § 8 of regulation No 139 of 16 June 2005 and § 3 of regulation No 137 of 28 August 2014). The validity of the list extends throughout Estonian territory and to all local authorities, setting their status as local authorities. Regardless of whether it amends the list, a regulation issued under § 13(1) of the ARA also affects the residents of a local authority as it affords them the right to vote in elections for the council of a particular local authority and excludes the right to vote in other local authorities. The regulation also affects opportunities to participate in elections to the Riigikogu. For these reasons, I believe that a regulation issued under § 13(1) of the ARA is a legislative act.

I note that the Supreme Court *en banc* in its judgment of 17 March 2000 in case No 3-4-1-1-00 expressed the opinion that a statute containing legal norms as well as individually addressed regulatory provisions would be treated by the Supreme Court as a legislative act (para. 12). The same principle should also apply to regulations.

5. I consider that a situation where a regulation issued under § 13(1) of the ARA directly contravenes the constitutional guarantees of local authorities is unlikely, yet possible. After all, a regulation is issued on the basis of a statute, so that first of all the issue arises of a regulation contradicting the statute. In other words, the fact that a regulation contradicts a statute does not necessarily mean that the regulation contravenes the constitutional guarantees of local authorities. When adjudicating an application lodged under § 7 of the CRCPA the Supreme Court cannot repeal a regulation on the grounds of its being contrary to the underlying statute. However, as already noted, the administrative court cannot adjudicate a complaint against a regulation as a legislative act. This might certainly lead to the conclusion that under current legislation none of the courts is competent to adjudicate a dispute as to whether a regulation issued under § 13(1) of the ARA is compatible with the underlying statute.

6. An action lodged under the Code of Administrative Court Procedure may pass through all three court instances. However, an application lodged under the Constitutional Review Court Procedure Act is lodged directly with the Supreme Court and the Supreme Court is the only instance adjudicating the dispute.

7. Under § 46(1) of the CACP, the time limit for lodging an annulment action with the administrative court is thirty days, calculated from the date of notifying the administrative act to the applicant. At the same time, no time limit for lodging an application with the Supreme Court is prescribed under the CRCPA. Thus, an application contesting a regulation issued under § 13(1) of the ARA can be lodged so long as the regulation remains valid.

8. Different time limits have also been set for adjudication of the action and the application in court.

9. Possibilities for interim relief also differ. Under § 12 of the CRCPA, interim relief can only be applied in respect of a legislative act that has not yet entered into force, allowing for suspension of the contested act until entry into force of the Supreme Court judgment. Under §§ 249 and 251 of the CACP, the administrative court may apply interim relief in respect both of legislative acts that have or have not entered into force.

10. Section 9^2 of the Territory of Estonia Administrative Division Act regulates legal succession of local authorities. A local authority formed as a result of alteration of administrative-territorial organisation acquires passive legal capacity on the date of announcement of the results of municipal council elections (subsection (1)). Upon formation of a local authority as a result of a merger, the merging local authority is terminated as a legal person in public law. A local authority formed as a result of a merger is the universal successor of the merged local authorities (subsection (2)). As a result of reorganisation of a local authority following assimilation, only the assimilated local authority is terminated as a legal person in public law. The local authority with which the assimilated local authority was joined is the universal successor of the assimilated local authority (subsection (3)). Alteration of administrative-territorial organisation initiated by the Government and alteration of the list of administrative units of rural municipalities and cities resulting therefrom enters into force in 2017 on the date of announcement of the results of regular local council elections (§ 13(2) ARA).

11. Judicial protection of local authorities might prove illusory if it is unclear what type of judicial proceedings is appropriate for adjudicating a dispute concerning a regulation issued under § 13(1) of the ARA. Both an action lodged with the administrative court as well as an application lodged with the Supreme Court would be returned without examination if adjudication of the dispute does not fall within the competence of the administrative court (§ 121(1) cl. 1) CACP) or the Supreme Court (§ 11(2) CRCPA), respectively. An appeal may be lodged with the court of appeal against an order by which the court returns

the action, and the order entered by the court of appeal in respect of the appeal may be further appealed to the Supreme Court (§ 121(4) CACP). However, under § 158(4) of the CACP the composition of the administrative court where the action was filed may adjudicate the matter on the merits, declaring absence of regulatory provisions unconstitutional and initiating constitutional review court proceedings. Subsequently, under § 95(3) of the CACP another composition of the administrative court may stay its proceedings until the judgment of the Supreme Court within the constitutional review proceedings becomes final, if this may affect the validity of a legislative act applicable in the administrative matter.

Clarity as to the type of judicial proceedings appropriate for adjudicating the dispute could be achieved by a Supreme Court ruling only after a local authority as a legal entity has ceased to exist. It is unfortunate if only after cessation of a local authority as a legal entity is it found that an action or an application was lodged with a court that is not competent to adjudicate it.

12. I believe that the legislator should quickly establish legal clarity with regard to the procedure. The legislator is competent to decide which type of proceedings should apply to adjudicating a dispute concerning a regulation issued under § 13(1) of the ARA and how adjudication of the dispute differs from the rules currently applicable in the relevant judicial proceedings.

13. I note that the guarantee of status as legal entity of a local authority who has had recourse to the court is also illusory if the new local authority formed as a result of a merger, in the capacity of the legal successor of the local authority who lodged the action or application with the court, withdraws the action or application after announcement of the municipal council elections. A possible solution would be to stipulate in § 13 of the ARA that a Government-initiated alteration of administrative-territorial organisation and the resulting amendment to the list of administrative units of rural municipalities and cities would not enter into force before completion of the judicial dispute.

Concurring opinion of Supreme Court Justice Indrek Koolmeister to the Constitutional Review Chamber judgment of 20 December No 3-4-1-3-16

I concur with the operative part of the Chamber’s judgment. However, I consider some aspects of the reasoning of the judgment as problematic and occasionally unconvincing.

As the main problematic issue, I would emphasise some questionable aspects in dealing with the aims of the administrative reform. Under § 1(2) of the Administrative Reform Act (ARA), the main purpose of the administrative reform is to support increased capacity by local authorities to offer high-quality public services, using regional preconditions for development, increasing competitiveness, and ensuring more consistent regional development. Such wording makes the question of legitimacy of the aim essentially redundant. Such a comprehensive definition of the aim certainly reflects values compatible with society’s development needs and, more narrowly, also with basic constitutional principles. However, the problem arises from the fact that the aim of the administrative reform in this wording has been afforded a regulative meaning in the Act. The criterion of the minimum size of a local authority has been derived from this aim (§ 3 ARA), and this aim has also been set as the criterion for the margin of appreciation in relation to Government decisions concerning implementation of the administrative reform. Participants in the proceedings in their opinions submitted in the case underline the weight of the aim and argue that imposing the minimum size criterion conforms to the aim of the administrative reform (Riigikogu, Government, Minister of Justice). The Chamber in its judgment has also dwelt on the aim as a legal argument (see, e.g.,

paras 103–104). However, the applicants have asserted that the aim is not sufficiently defined.

Even though the latter opinion does not lead to unconstitutional lack of legal clarity in this case, the applicants' argument is nevertheless a serious one. In the case of an insufficiently defined aim of the reform, it is hard to find arguments either to affirm or disprove justification for the minimum size criterion of local authorities. Thus, not only 5000 but also 11 000, 50 000 or various other numerical minimum size criteria could be considered constitutional. However, this numerical criterion forms the most important foundation for the administrative reform.

The above also relates to the issue of exercise of the margin of appreciation by the Government. I can only agree with the conclusion of the judgment that the Government enjoys a wide margin of appreciation in implementing the reform, including in merging local authorities, and the yardstick for measuring it is the coping ability of local authorities, i.e. attainability of the aim of the administrative reform. However, in view of the foregoing, review of the proper exercise of that margin of appreciation is essentially complicated if not impossible.

A circumstance indicating the alleged indefinability of the aim also relates to the post-reform situation. Completion of the administrative reform forms part of implementation of government reform in general. Reshaping the network of local authorities inevitably brings about change in local government functions. Presumably, not only will the organisation of local administration of the state change but the discharge of many current functions of the state will also be transferred to local authorities. In order to make reasoned choices within a so-called voluntary merger, it would also be necessary to be informed about the situation after the territorial changes. The Administrative Reform Act does not refer to any such functions.

We noted above that the main yardstick for the merger and assimilation of local authorities is the number of residents. However, such a dominant criterion may lead to formation of territorially and functionally inexpedient units. Unfortunately, the Administrative Reform Act does not provide for application of the principle or criterion of functional zoning. At the stage of forced mergers subsequent to voluntary mergers of local authorities, it is not possible to eliminate discrepancies caused by a previous merger. Thus, the use of regional development advantages, seen as one of the goals of the reform, also only remains a wish of which the fulfilment is not certain.

In a situation of abstract constitutional review of legislation, the circumstances mentioned in this concurring opinion do not lead to a conclusion of unconstitutionality of the regulatory regime. However, in the frame of specific constitutional review, these shortcomings may lead to different results. As the above issues were raised by the applicants, the judgment should have given them the necessary attention.

Dissenting opinion of Supreme Court Justice Jaak Luik to the Constitutional Review Chamber judgment of 20 December No 3-4-1-3-16

I concur with the Chamber's reasoning and conclusions concerning the admissibility of the applications and granting the application of three rural municipalities in part. However, I cannot agree with the Chamber's conclusion that the key norms of the Administrative Reform Act (ARA) comply with the requirements arising from the principle of legal clarity.

1. The concept of prohibition of arbitrary exercise of governmental authority has been defined by the

requirement under § 3(1) of the Constitution to exercise governmental authority solely pursuant to the Constitution and laws which are in conformity with it, and § 11 of the Constitution under which rights and freedoms may only be circumscribed in accordance with the Constitution, while any such circumscription must be necessary in a democratic society and may not distort the nature of the rights and freedoms circumscribed.

2. I find that local authorities as addressees of fundamental rights and freedoms are at the same time bearers of constitutional rights. Thus, the Constitution ensures local authorities the right to autonomously decide and administer local issues in accordance with the law (§ 154 (1) Const.) as well as the right to be heard with regard to the issue of altering the boundaries of local authorities (§ 158 Const.). Article 3 of the European Charter of Local Self-Government also describes the right of local self-government as the right of a local authority's permanent residents, within the limits of the law, to manage local public affairs in line with the requirements of unique aspects of local life.

3. Under § 1(2) of the ARA, the aim of the administrative reform is to support increased capacity by local authorities to offer high-quality public services, using regional preconditions for development, increasing competitiveness, and ensuring more consistent regional development. To achieve this, the Act lays down alteration of administrative-territorial organisation of rural municipalities and cities, as a result of which local authorities must be able to independently organise and manage local life and perform functions arising from the law. Administrative reform is also implemented in accordance with the aims of state governance reform in relation to organising public administration, which includes ensuring the quality and availability of public services and cost savings.

The aim described can lead to the conclusion that altering administrative-territorial organisation (the measure) is one of the preconditions of the administrative reform: local authorities acquire the capacity to independently manage and administer local life and perform the functions arising from the law as a result of alteration of their administrative-territorial organisation. Thus, the legislator has planned this measure with a view to building the capacity of local authorities. I find it practically credible that the actual function of this measure is harmonisation of the capacity of local authorities.

4. In the opinion of the Chamber, it follows from § 9(9) and (2) of the ARA that if a local authority not meeting the minimum size criterion to whom no exception can be made under § 9(3) of the ARA is able to ensure the necessary professional capability to perform functions arising from the law and provide good-quality public services to the residents of the local authority in line with the aim of administrative reform set out in § 1(2) of the ARA, the Government is not required to complete the administrative-territorial reform initiated by itself in respect of that local authority (para. 104).

If the Government has decided under § 9(2) of the ARA to alter the administrative-territorial organisation of a local authority, in the event of a dispute the court can verify whether in issuing a regulation under § 9(9) cl. 2) of the ARA the Government correctly established the facts and correctly exercised its right of discretion (para. 105).

Thus, the Chamber reached the opinion that the Government enjoys a wide margin of appreciation in making the final decision in altering administrative-territorial organisation initiated by itself.

5. The right of discretion refers to the theory of principles which defines as principles those rules that require something to be carried out to as great an extent as possible in comparison to actual and legal possibilities. Legal possibilities are linked to rules and counter-principles.

Unlike a principle (optimisation command), a rule (definitive command) cannot be carried out to a variable extent, but has to be carried out as the rule requires. According to G. H. von Wright, the main structure of a deontic rule consists of what is obligatory, forbidden or permitted (the subject of a rule), and its required existence in the form of command, prohibition, or permission. The manner of applying a definitive command (rule) is by subsumption, while in the case of an optimisation command (principle) it is

discretionary.

6. One can agree that the legislator has authorised the Government to assess the actual capacity of a local authority in altering administrative-territorial organisation (applying the exceptions set out in § 9(3) ARA) and in terminating proceedings already pending (right of discretion under § 9(9) ARA).

However, following from § 2(2) and § 3(1) of the Constitution, the legislator is competent to lay down the criteria for assessing the actual capacity of local authorities as an issue of national importance. The Riigikogu has not laid down these criteria by statute. Therefore, I cannot understand what other factors (criteria) besides the number of residents the Chamber has in mind with regard to assessing the actual capacity of local authorities. As the Government cannot rely on arbitrarily chosen indicators or arbitrary value judgments in assessing the capacity of local authorities, it should be concluded that assessment of a local authority's actual capacity is rigidly linked to the minimum size criterion. Thus, § 9(9) and (2) of the ARA are still more like rules.

7. Based on the foregoing analysis, I contend that the key norms of the administrative reform lack legal clarity. Due to lack of legal clarity these norms contravene the Constitution. In view of this situation, in my opinion hearing of local authorities concerning Government-initiated alteration of administrative-territorial organisation (§ 158 Const.) is not guaranteed, nor is their effective judicial protection.

Under § 9(2) (second sentence) of the ARA, the Ministry of Finance will submit to the municipal councils concerned a draft regulation regarding alteration of administrative-territorial organisation and alteration of borders of administrative units.

A local authority submits to the county governor a reasoned opinion prepared in the form of a resolution concerning the Government proposal (§ 12(2) cl. 2) ARA). Upon receiving a reasoned opinion from a local authority, the Government may terminate proceedings for alteration of administrative-territorial organisation with regard to that local authority (§ 9(9) cl. 1) ARA). If the Government does not deem the justifications presented by the local authority to be sufficiently valid, it will adopt a regulation altering the administrative-territorial organisation of the local authorities concerned (§ 9(9) cl. 2), § 13 ARA). In the latter case, the Ministry of Finance will promptly notify the local authorities concerned before adopting the regulation (§ 9(10) ARA). The local authorities concerned may contest the legality of the Government regulation in court (para. 134).

As the Act fails to clearly provide for the circumstances based on which the Government may terminate alteration of the administrative-territorial organisation of a local authority, and the Government is also not required to present these circumstances in its draft regulation, hearing local authorities amounts to a mere formality. For the same reason, one cannot speak of effective judicial protection of local authorities.

8. Even though the Act at issue is characterised by extreme superficiality (lack of thoroughness) and ambiguity (lack of clarity) and fragmentation (lack of a complete picture), I wish a good will and a peaceful mind both to those conducting the proceedings as well as the participants in the proceedings in interpreting and applying the Administrative Reform Act.
