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## Constitutional judgment 5-18-4

S U P R E M E C O U R T  
CONSTITUTIONAL REVIEW CHAMBER  
JUDGMENT

in the name of the Republic of Estonia

<b>Case number</b>	5-18-4
<b>Date of judgment</b>	18 January 2019
<b>Composition of court</b>	Chairman: Priit Pikamäe; members: Saale Laos, Viive Ligi, Nele Parrest and Malle Seppik
<b>Case</b>	Review of constitutionality of § 4 subsection (2 <sup>1</sup> ), § 27 subsections (1), (2) and (3), § 28 subsection (2) clause 3) and § 29 subsection (1) clause 3) of the Planning Act
<b>Basis for proceedings</b>	Application of 17 September 2018 by Tartu City Council
<b>Type of hearing</b>	Written procedure

### OPERATIVE PART

**To dismiss the application of 17 September 2018 by Tartu City Council.**

### FACTS AND COURSE OF PROCEEDINGS

1. On 28 January 2015, the Riigikogu adopted the Planning Act which entered into force on 1 July 2015 (PA; RT I, 26.02.2015, 3). Chapter 4 of the Planning Act contains provisions on the national designated spatial plan.

2. On 30 January 2017, the company EST-FOR Invest OÜ filed an application with the Ministry of Finance to initiate a national designated spatial plan in order to build a wood refinery.

3. On 19 April 2017, the Riigikogu adopted the Draft Act Amending the Planning Act and the Environmental Impact Assessment and Environmental Management System Act, supplementing § 4 of the Planning Act with subsection (2<sup>1</sup>), § 28(2) with clause 3) and § 29(1) with clause 3). The Act entered into force on 5 May 2017 (RT I, 04.05.2017, 3).

4. On 12 May 2017, by order No 141 the Government of the Republic initiated the national designated spatial plan for building a wood refinery, the necessary infrastructure for its functioning, as well as strategic environmental impact assessment.

5. On 17 May 2018, Tartu City lodged an action with Tallinn Administrative Court, seeking an order obliging the Government to terminate the proceedings on the national designated spatial plan initiated by order No 141, or to establish the unlawfulness of that order (administrative case No 3?18?982). In its action, Tartu City relied, inter alia, on an assertion of incorrect interpretation and application of § 27 subsections (1), (2) and (3) of the Planning Act ('PA'), seeking a declaration of unconstitutionality and setting aside of those provisions in the event of correctness of interpretation provided by the Government. By order of 13 June 2018, the Administrative Court returned the action without having examined it, due to lack of legal standing under § 121(2) cl. 1) of the Code of Administrative Court Procedure. By order of 15 October 2018, Tallinn Court of Appeal dismissed the appeal lodged by Tartu City against the Tallinn Administrative Court order. On 30 October 2018, Tartu City lodged an appeal with the Supreme Court against the Tallinn Court of Appeal order (administrative case No 3?18?982).

6. On 13 September 2018, Tartu City Council passed a resolution to lodge an application with the Supreme Court to declare unconstitutional and repeal § 4(2<sup>1</sup>) of the Planning Act (insofar as it allows the authority arranging the preparation of a national designated spatial plan to conclude, with a party interested in the preparation of the plan, a contract to assign to that party the obligation to bear the costs connected with the commissioning of the preparation of the plan and assessment of the impacts specified in § 4(2) cl. 5) of the PA), as well as § 27(1), (2) and (3), § 28(2) cl. 3) and § 29(1) cl. 3) of the PA. By the same resolution, the City Council also approved the text of the application. Thirty-five City Council members voted in favour of the resolution.

7. By order No 290 of 12 November 2018, the Government terminated preparation of the national designated spatial plan for planning the wood refinery and the infrastructure necessary for its functioning, as well as strategic environmental impact assessment, on account of overriding public interest under § 29(1) of the PA. By order of 10 January 2019, the Supreme Court Administrative Law Chamber terminated proceedings in case No 3?18?982 under § 152 subs. (1) cl. 4) and subs. (3) of the Code of Administrative Court Procedure without admitting the action for proceedings.

## **REASONING BY TARTU CITY COUNCIL**

8. The regulatory arrangements concerning the national designated spatial plan interfere with the right of local authorities under § 154(1) of the Constitution to determine and administer all local matters autonomously in accordance with the law (the right of self-organisation).

**9.** Even though planning of construction works under a national designated spatial plan constitutes resolving a state-level issue, intervention in local matters occurs in the course of this. These issues include spatial planning in a specific local authority as well as planning the development of the economic, social and cultural environment in the wider sense and the natural environment in a local authority, for example through the development plan and budgetary strategy. The regulatory arrangements of the national designated spatial plan interfere with the right of self-organisation of the local authority on whose territory the construction works are planned, as well as with the right of self-organisation of neighbouring local authorities if the impacts arising from the construction works manifest themselves in their territory.

**10.** Interference with the right of self-organisation is expressed primarily in five different ways. First, in the proceedings for a national designated spatial plan a temporary ban on planning and building work in the planning area may be imposed by a decision to approve pre-selection of the location (§ 42 PA). Second, the location of construction works that have a significant spatial impact within the territory of a local authority is determined by the national designated spatial plan (§ 27(1) and § 41(2) PA). Third, the national designated spatial plan determines the building rights of the envisaged construction works and other conditions that, as a rule, are determined by a detailed spatial plan (§ 43(1) and § 126 PA) and the national designated spatial plan is a basis for preparing the building design documentation of an object with a significant spatial impact (§ 27(10) PA). Fourth, adoption of a national designated spatial plan suspends the validity of any previously adopted spatial plan or part thereof in respect of the planning area. The national designated spatial plan replaces the previous spatial plan (§ 53(2) PA). Fifth, the local authority where the impacts arising from the planned construction works are manifested must deal with those impacts (including alleviating negative impacts) and accordingly modify previous development plans.

**11.** The local authority cannot prevent interference. The reason is that a local authority can participate in initiating a national designated spatial plan, its subsequent proceedings and its adoption only by filing opinions and proposals, but not by issuing any binding approvals or consent.

**12.** The above means that, with a national designated spatial plan, the state may determine the location of construction works with a significant impact in the immediate vicinity of a local authority as well as the building rights of the construction works even if this is contrary to the current planning and development documents of the local authority and the wishes of the municipal council or the population. The nature of interference with the right of self-organisation is demonstrated by the national designated spatial plan initiated by the Government Regulation of 12 May 2017 (see para. 4 above).

**13.** The provisions contested are not sufficiently clear and intelligible, thus contravening the principle of legal clarity, and are formally unconstitutional. It is not clear what should constitute “significant national interest” in the choice of location of construction works or their functioning within the meaning of § 27(1) of the Planning Act. The meaning of “significant national interest” is even more difficult to understand in the light of § 4(2<sup>1</sup>), § 28(2) cl. 3) and § 29(1) cl. 3) of the Planning Act which were passed hastily, without consideration, and having in mind an individual case. These provisions also enable a person proceeding only from private interests to bear the costs of preparation and of the impact assessment of a national designated spatial plan. In other words, by relying on them, it is possible to plan construction works that have a significant spatial impact also driven merely by private interests. At the same time, the law does not offer solutions that would ensure the objectivity of the planning procedure and the impact assessment in such a situation. It is also not clear what would be the impact of the list of fields set out in the second sentence of § 27(1) of the PA on deciding whether the national designated spatial plan can be used to plan specific construction works. It is unclear what the construction works are for the planning of which a national designated spatial plan may be used under § 27(3) of the PA.

**14.** Interference with the right of self-organisation is also not proportionate in order to achieve the objective stated in the explanatory memorandum to ensure effective planning and building of construction works significant for the state, as well as protection of public interests.

**15.**Section 27 subs. (1), (2) and (3) of the Planning Act, which enable expanding the scope of application of a national designated spatial plan, and § 4(2<sup>1</sup>), § 28(2) cl. 3) and § 29(1) cl. 3) of the Planning Act, which enable an interested person to bear the costs of preparation and of the impact assessment of a national designated spatial plan, are not suitable in their current form for attaining the desired objective. Provisions which also enable preparing a national designated spatial plan for construction works which do not fall narrowly within the fields set out in the second sentence of § 27(1) of the PA and in the functioning of which primarily private interest exists, and which furthermore enable a person proceeding from private interests to bear the costs of preparation of the spatial plan and of the impact assessment, do not contribute to effective planning and building of construction works the functioning of which is primarily important for the general public interest of the state as a whole.

**16.**Rules on the national designated spatial plan are also not necessary for the effective functioning of construction works significant for the state. First, it would be equally effective, but less burdensome on local authorities, if the national designated spatial plan could only be used for such construction works the functioning of which is important for the state and which fall narrowly within the fields set out in the second sentence of § 27(1) of the Planning Act. Second, it is possible to use a local government designated spatial plan for the same purpose (§§ 95–123 PA).

**17.**Finally, the interference caused by the provisions contested is not proportional in the narrow sense. Interference with the right of self-organisation of local authorities through the national designated spatial plan is very intense. Although in principle the objective is also very considerable, it should be kept in mind that existing norms enable using a national designated spatial plan to erect construction works with a significant spatial impact in any field, while the functioning of such construction works may be primarily in private interests. Very intense interference with the right of self-organisation cannot be considered narrowly proportional if this may take place essentially for the planning of any activities with a significant spatial impact. Interference in the right of self-organisation by the national designated spatial plan could, with certain reservations, be considered proportional in the narrow sense if a national designated spatial plan is used to plan only such construction works which are necessary in the interests of the country as a whole and in the case of which national interest prevails over private interest. Such construction works are those falling within the fields listed in the second sentence of § 27(1) of the PA.

**18.**Interference is also not made narrowly proportional by the requirement under the Planning Act to involve local authorities in the proceedings and hear their opinion in the different stages of proceedings. Namely, in no case are those opinions and proposals binding on decision-makers. To ensure proportionality in the narrow sense, in the case of interference of such intensity, local authorities should be given more rights in the proceedings and more weight should be given to existing spatial plans and development documents than provided by the current rules.

**19.**The right of a local authority to contest a national designated spatial plan does not compensate the interference arising from the regulatory provisions of the national designated spatial plan to the extent as to enable considering it proportional in the narrow sense. This is also not balanced by the possibility to contest, in addition to the decision on adoption of the designated spatial plan, the procedural steps taken in the course of the proceedings (on conditions under § 45(3) of the Code of Administrative Court Procedure).

## **OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS**

**20. - 39.**[not translated]

## **PROVISIONS CONTESTED**

**40.**Section 4 (“Authorities that organize planning work”), subsection (2<sup>1</sup>) of the Planning Act (RT I, 26.02.2015, 3; RT I, 29.06.2018, 38) stipulates:

„(2<sup>1</sup>) The authority arranging the preparation of the plan may conclude a contract, with the party interested in the preparation of the plan, to assign to that party the obligation to bear the costs connected to the commissioning of preparation of the plan that serves as the basis for the preparation of building design documentation and assessment of the impacts specified in clause 5 of subsection 2 of this section.“

**41.**Section 27 (“National designated spatial plans and the authority that arranges the preparation of such plans”), subsections (1), (2) and (3) of the Planning Act stipulate:

“(1) The aim of a national designated spatial plan is to erect a construction work which has a significant spatial impact and whose chosen location or whose functioning elicits significant national or international interest. A national designated spatial plan is prepared, above all, to express interests which transcend the boundaries of individual counties in the fields of national defence and security, energy supply, the transport of gas, waste management, and extraction of minerals, or for the expression of such interests in public water bodies and in the exclusive economic zone.

(2) A national designated spatial plan must be prepared in respect of the territory of Estonia or part thereof in order to construct any national road, public railway, pipeline with working pressure exceeding 16 bar, including gas pipelines, as well as any international airport, international port, construction work serving national defence purposes or construction work of security authorities, power station with nominal electricity generation capacity exceeding 150 megawatts, overhead electrical power line with voltage equal to or exceeding 110 kilovolts, hazardous waste disposal site and any construction works required for the functioning of such installations, provided the construction works meet the criteria set out in subsection 1 of this section.

(3) A national designated spatial plan is prepared in order to construct a construction work that is not mentioned in subsection 2 of this section but meets the criteria set out in subsection 1 of this section if the Government of the Republic makes the corresponding reasoned decision.”

**42.**Section 28 (“Initiation of the preparation of national designated spatial plans and of the conduct of strategic environmental assessment”), subsection (2) clause 3) of the Planning Act stipulates:

„(2) Initiation of the preparation of a national designated spatial plan and of the conduct of strategic environmental assessment is foregone above all where:

[...]

3) no funds are available in the budget of the authority arranging the preparation of the plan to bear the costs attaching to the preparation of the plan, to commissioning the preparation of the plan and to the assessment of impacts, and the party interested in the preparation of the plan does not bear such costs.”

**43.**Section 29 (“Termination of the preparation of the national designated spatial plan and of the conduct of strategic environmental assessment”), subsection (1) clause 3) of the Planning Act stipulates:

„(1) The authority arranging the preparation of the national designated spatial plan may terminate the preparation of the plan and the conduct of the strategic environmental assessment above all in cases where:

[...]

3) no funds are available in the budget of the authority arranging the preparation of the plan to bear the costs attaching to the preparation of the plan, to commissioning the preparation of the plan and to the assessment of impacts, and the party interested in the preparation of the plan does not bear such costs.”

**OPINION OF THE CHAMBER**

**44.**Tartu City Council asks the Supreme Court to adjudicate the case in oral procedure. By relying on § 51(2) of the Constitutional Review Court Procedure Act (CRCPA), the Chamber found that adjudication of the issue raised in the application does not presume holding an oral hearing.

**45.**The Chamber will first assess the admissibility of the application (I). Second, the Chamber will clarify the substance of the relevant constitutional guarantee of local authorities and explain whether and how the provisions of the Planning Act contested by Tartu City Council interfere with it (II). Third, the Chamber will check the formal conformity of the relevant provisions with the Constitution (III). Subsequently, the Chamber will give meaning to the provisions under review (IV) and assess their substantive constitutionality (V).

## I

**46.**Tartu City Council asks the Supreme Court to declare unconstitutional and repeal § 4(2<sup>1</sup>) of the Planning Act to the extent concerning the national designated spatial plan, and § 27 subsections (1)–(3), § 28(2) cl. 3) and § 29(1) cl. 3) of the Planning Act on account of conflict by these provisions with the right of self-organisation of local authorities. Since the right of self-organisation of local authorities laid down under § 154(1) of the Constitution belongs among the constitutional guarantees of local authorities and the application alleges conflict of the contested provisions with this guarantee, then under § 7 of the CRCPA the Tartu City Council application is admissible in substance (as of the Supreme Court *en banc* judgment of 10 March 2010 in case No 3?4?1?8?09, paras 22 *et seq.*).

**47.**By resolution of 13 September 2018 Tartu City Council decided to lodge an application with the Supreme Court. Thirty-five out of forty-nine Tartu City Council members voted in favour of the resolution. Since Tartu City Council passed the application to the Supreme Court by a majority of votes of the members and the final text of the application was appended to the draft resolution, other conditions for admissibility of an application lodged under § 7 of the CRCPA are also fulfilled (see Supreme Court Constitutional Review Chamber judgment of 20 December 2016 in case No 3?4?1?3?16, paras 76 and 81).

## II

**48.**Under § 154(1) of the Constitution, all local matters are determined and administered by local authorities, who discharge their duties autonomously in accordance with the law. The main substance of local authorities' right of self-organisation arising from this provision is local authorities' discretion of decision and choice in resolving local issues (Supreme Court Constitutional Review Chamber judgment of 16 January 2007 in case No 3?4?1?9?06, para. 22).

**49.**Under § 6(1) of the Local Government Organisation Act, the functions of a local authority include organising spatial planning in the rural municipality or city unless that function is assigned by law to other persons. Autonomy of planning, as the right of local authorities to decide whether and how to resolve the issues of spatial planning within their boundaries, is covered by local authorities' right of self-organisation and thus falls within the scope of protection of § 154(1) of the Constitution.

**50.**In addition, Tartu City Council has pointed out in its application that local authorities also exercise the authority of planning in the wider sense, by integrating and coordinating the development of different walks of life. The Chamber agrees that local government autonomy also includes the right to develop the living environment of specific local authorities with a view to promoting local life. Under § 2(1) of the Local Government Organisation Act, local government means the right, authority and duty of the bodies of power of a local authority to independently organise and manage local issues pursuant to law and based on the legitimate needs and interests of the residents of the rural municipality or city, and considering the specificities of development of the rural municipality or city.

**51.**According to the Tartu City Council application, the contested regulatory arrangements of the designated spatial plan interfere with local authorities' right of self-organisation because a decision to locate construction works subject to the designated spatial plan in the territory of a specific local authority essentially puts an end to the local authority's planning autonomy within the territory covered by the particular national designated spatial plan (see, in more detail, the reasoning by Tartu City Council, para. 10). In addition, interference is expressed in the fact that the local authority must deal with the harmful effects potentially arising from the object of the designated spatial plan to its economic, social and cultural development, as well as to the natural environment, and respectively adjust its previous development plans.

**52.**The Chamber agrees that the provisions of the Planning Act regulating the national designated spatial plan have a negative effect on independently deciding and organising local issues. Under § 53(2) of the PA, adoption of a national designated spatial plan suspends the validity of any previously adopted comprehensive, detailed or designated spatial plan or part thereof in respect of the relevant local authority area, and the national designated spatial plan replaces entirely or in part the solutions laid down in those plans. Under § 41(3) of the Planning Act, the decision to accept pre-selection of the location of a national designated spatial plan may include a temporary ban on planning and building work in the planning area. The Chamber agrees with the applicant's assertion that erecting an object of a national designated spatial plan in the territory of a local authority restricts the local authority's more general discretion of decision and choice which it enjoys in developing the particular local authority's living environment with a view to promoting local life.

**53.**In the opinion of Tartu City Council, interference with the local authority right of self-organisation is exacerbated by the fact that § 4(2<sup>1</sup>) of the PA enables a person interested in preparation of a designated spatial plan to bear the costs of commissioning the national designated spatial plan and of assessing the resulting impacts, as well as by the related provisions in § 28(2) cl. 3) and § 29(1) cl. 3) of the PA under which no national designated spatial plan is initiated or its preparation is terminated if no relevant funds are available in the budget of the authority arranging preparation of the plan and the party interested in preparation of the plan does not bear such costs.

**54.**In the opinion of the Chamber, the provisions mentioned in the previous paragraph do not interfere with the local authority right of self-organisation. A significant national or international interest, which is a precondition for a national designated spatial plan, may also be present if the construction works subject to the spatial plan at the same time serve the interests of the person interested in preparation of the spatial plan (see also Supreme Court Administrative Law Chamber order of 11 October 2018 in case No 3?17?2132, para. 11). If that person, on the basis of a contract, bears the costs of commissioning the national designated spatial plan and of the impact assessment, fulfilment of the conditions set out in § 27 subs. (1)–(3) of the Planning Act is a precondition for initiating the national designated spatial plan. In the event of lawful activity by the authority arranging preparation of the national designated spatial plan, a person interested in preparation of the spatial plan cannot influence further designated spatial plan proceedings through funding.

**55.**Under § 4(2<sup>1</sup>) of the PA, the authority arranging preparation of a national designated spatial plan (i.e., under § 27(7) of the PA, the Ministry of Finance or, upon a decision of the Government, a government agency responsible for matters of national defence or security) may enter into a contract with a person interested in preparation of the national designated spatial plan only for the purpose of covering the costs of commissioning the designated spatial plan and assessing the impacts set out in § 4(2) cl. 5) of the PA. Also, if the costs are borne by the above person, all the necessary steps for preparing the spatial plan, e.g. organising public tenders or disclosing the spatial plan and obtaining the necessary approvals, are carried out by the authority arranging preparation of the national designated spatial plan.

**56.** Additionally, § 4(2<sup>1</sup>) of the PA does not enable transfer to the interested person the assessment of the impacts on the economic, cultural, social and the natural environment, as set out in § 4(2) cl. 5) of the PA, or the participation of that person in ascertaining those impacts. The authority arranging preparation of the national designated spatial plan may, for the purpose of bearing the costs resulting from assessment of the impacts set out in § 4(2) cl. 5) of the PA, enter into a contract with a person interested in the designated spatial plan, but must nevertheless itself assess the impacts or, if necessary, commission expert assessment by using due procedure. At the final instance, the planning solution and its impacts are considered by the Government, which will make a decision on pre-selection of the location of the national designated spatial plan (§ 41(1) PA), as well as a decision on acceptance of the national designated spatial plan (§ 49(1) PA), adopt the national designated spatial plan (§ 53(1) PA), or decide to terminate preparation of the plan (§ 29(1) PA).

**57.** For the same reason, the local authority right of self-organisation is also not interfered with by § 28(2) cl. 3) of the PA or § 29(1) cl. 3) of the PA, which stipulate that ? if no funds are available in the budget of the authority arranging preparation of the plan to bear the costs attaching to preparation of the plan, to commissioning preparation of the plan and to assessing impacts, and the party interested in preparation of the plan does not bear such costs ? then initiation of the preparation of a national designated spatial plan and of the conduct of strategic impact assessment is foregone or the preparation of the designated spatial plan and the strategic impact assessment is terminated.

**58.** The Chamber notes that the local authority right of self-organisation is not interfered with by § 27 subs. (1)–(3) of the PA as taken individually, but interference occurs in combination with other provisions which entitle the Government to initiate, prepare and adopt a national designated spatial plan on the conditions set out in § 27 subs. (1)–(3) of the PA without binding consent of the local authority concerned. Therefore, the Chamber will next check whether the Government’s right to initiate, prepare and adopt a national designated spatial plan on the conditions set out in § 27 subs. (1)–(3) of the PA interferes unconstitutionally with the local authority right of self-organisation.

### III

**59.** First, the Chamber will check whether § 27 subsections (1)–(3) are formally constitutional. Since the Chamber has no doubt that these provisions have been adopted in compliance with the requirements of competence, procedure, and form, it will only assess their conformity with the principle of legal clarity.

**60.** Legal clarity means that legislation must be sufficiently clear and intelligible, so that local authorities would have a reasonable possibility to foresee the state’s actions and adapt their own actions accordingly (Supreme Court *en banc* judgment of 16 March 2010 in case No 3?4?1?8?09, para. 141). Tartu City Council in its application found that § 27 subsections (1)–(3) violate this principle.

**61.** The Chamber reiterates that not any lack of clarity leads to unconstitutionality of a law, in particular in a situation where a municipal council makes use of the possibility under § 7 of the CRCPA to initiate abstract constitutional review in the Supreme Court – unconstitutional lack of legal clarity exists only if issues arising with regard to interpretation of norms cannot be reasonably resolved by taking account of the purpose of the norms and the process of their development, as well as other legislation, general principles of law, etc., and if such lack of clarity prevents a local authority from identifying and fulfilling its statutory duties (Supreme Court Constitutional Review Chamber judgment of 14 October 2015 in case No 3?4?1?23?15, para. 98).

**62.**In particular this holds true for spatial plans, as being complicated administrative decisions which must balance a large number of different interests and take account of many circumstances in an individual case. That is why planning law is characterised by purpose-oriented rules providing a broad margin of discretion and containing undefined legal concepts, while not prescribing one and the only solution for specific cases, instead leaving it for administrative authorities to decide what solutions are appropriate for achieving the purpose (judgment, cited above, in case No 3747123715, para. 99). The principle of legal clarity does not rule out use of undefined legal concepts or laying down the right of discretion (Supreme Court Constitutional Review Chamber judgment of 31 March 2011 in case No 3747119710, para. 40).

**63.**Assessment of the specific provisions of the Planning Act must also take into account that their addressees and implementers are not meant to include everyone, but only public servants who must be able to overcome potential lack of clarity or implementing problems through interpretation (Supreme Court Constitutional Review Chamber judgment of 19 March 2009 in case No 3747117708, para. 27).

**64.**When assessing the legal clarity of § 27 subs. (1)–(3) of the PA in abstract constitutional review proceedings, the Chamber finds that even though the provisions are not good in terms of legislative drafting technique or linguistically, they are also not so unclear as not to be able to give them reasonable meaning through customary methods of interpretation. This observation does not mean that in individual cases application of the Planning Act might not raise questions requiring initiation of specific constitutional review in a specific court case (just like the cited judgment in case No 3747123715, para. 101). The Chamber will deal in more detail with the substance of the above provisions in the next part.

#### IV

**65.**Checking the constitutionality of § 27 subs. (1)–(3) of the PA – contested by Tartu City Council – in abstract constitutional review proceedings presumes giving meaning to them. Without interpreting the provisions interfering with the local authority right of self-organisation, it is not possible to assess the compatibility of these provisions with the Constitution. The reason is, inter alia, that § 27 subs. (1)–(3) of the PA contains the purpose of the national designated spatial plan as the type of planning that most extensively interferes with the local authority right of self-organisation.

**66.**The national designated spatial plan was introduced as a type of planning by the Planning Act entering into force in 2015. The explanatory memorandum to the Draft Act defines as the overall objective of the national designated spatial plan ensuring effective planning and building of construction works important for the state, as well as protection of the public interest (Draft Planning Act, XII composition of the Riigikogu, 571 SE, explanatory memorandum, page 80). This objective is also reflected in § 27(1) of the Planning Act, according to which a national designated spatial plan is prepared, above all, to express interests which transcend the boundaries of individual counties to erect a construction work which has a significant spatial impact and whose chosen location or whose functioning elicits a significant national or international interest. The object of a designated spatial plan are mostly construction works the impact of which is not limited to one territorial unit only, but extends across the boundaries of local authorities, as well as the boundaries of counties as territorial units.

**67.**The central condition which a construction work planned on the basis of a national designated spatial plan must meet is the significant national or international interest set out in the first sentence of § 27(1) of the PA. “Significant national interest” and “significant international interest” are undefined legal concepts and the authority applying the law has discretion in giving them meaning. In the case of each national designated spatial plan, justifications must be provided as to whether a construction work planned in a specific case serves such an interest. First of all, it is the duty of the administrative authority initiating and processing a national designated spatial plan to define the concept of significant national or international interest and ascertain its existence. In the second order, the courts can review on a case-by-case basis whether the administrative authority has erred in giving meaning to and ascertaining that significant interest.

**68.**A partially undefined legal concept is also the “significant spatial impact” set as the second condition in the first sentence of § 27(1) of the PA. Under § 6 cl. 13) of the PA, significant spatial impact means an impact which, in comparison with previous conditions at the envisaged location of the construction work, causes a significant change in the volume of transport, concentration of pollutants, number of visitors, visual impact, smell, noise, demand for raw materials or labour and whose impact extends to a large territory.

**69.**In addition, the second sentence of § 27(1) of the PA sets out the fields in which construction works planned under a national designated spatial plan must belong. As fields in the case of which preparing a national designated spatial plan is justified, the law mentions national defence and security, energy supply, transport of gas, waste management, and extraction of minerals. These are fields for the organisation of which significant national or international interest is presumed to exist.

**70.**One cannot also exclude a situation where national or international interest arises in a field not listed in the second sentence of § 27(1) of the PA. The participants in the proceedings have different positions as to whether initiating a national designated spatial plan under § 27(3) of the PA is possible in that situation. The Chamber concedes that, even though the grammatical interpretation of the provision seems to indicate that the list is exhaustive, the legislator’s will in this regard cannot be sufficiently clearly ascertained from the materials concerning the proceedings of the Draft Act. The majority of the participants in court proceedings support the view that the expression “above all” [Estonian *wordeelkõige*] in the second sentence of § 27(1) of the PA applies to both “interests which transcend the boundaries of individual counties” as well as the subsequent list of fields. The Chamber also considers it probable that the expression “above all” has not been repeated in order to avoid linguistic repetition.

**71.**The Chamber finds that if a national designated spatial plan is prepared under § 27(3) of the PA, when initiating the national designated spatial plan the Government must already justify what constitutes a significant national or international interest in erecting the specific construction works. In other words, the document on initiating a national designated spatial plan under § 27(3) of the PA must indicate whether and how the specific designated spatial plan corresponds to the purpose of the national designated spatial plan as the instrument ensuring erection of objects significant for the state, i.e. whether the conditions for the national designated spatial plan as the type of planning having the strongest impact on the local authority right of self-organisation are fulfilled.

**72.**As laid down by § 27(3) of the PA, under a reasoned decision by the Government of the Republic, a national designated spatial plan may also be prepared in order to construct a construction work not mentioned in § 27(2) of the PA if it meets the criteria set out in § 27(1) of the PA, i.e. if a significant national or international interest exists in the choice of location of a planned construction work or its functioning, and the spatial plan is prepared above all for expression of interests transcending county boundaries in the fields of national defence and security, energy supply, transport of gas, waste management, extraction of minerals, or for the expression of the above interests in public water bodies and in the exclusive economic zone (explanatory memorandum to the Draft Planning Act, page 80).

**73.**The Chamber is of the opinion that if the Government initiates a national designated spatial plan under § 27(3) of the PA to erect a construction work not contained in the list of construction works set out in § 27(2) of the PA or not in the list of fields set out in the second sentence of § 27(1) of the PA, more comprehensive justification must be given for erecting the construction work than in the case of construction work being included in those lists. Namely, the national or international interest is presumably stronger in the event of consideration given by the legislator itself than in the case of construction works listed in § 27(2) of the PA and the fields listed in the second sentence of § 27(1) of the PA.

**74.**For example, § 27(2) of the PA presents a representative list of construction works in the case of which (as well as in the case of construction works necessary for their functioning), when preparing a national designated spatial plan, it must be indicated in each individual case that they correspond to the conditions expressed in § 27(1) of the PA, but in the case of which fulfilment of those conditions is presumed on the level of statute. Another function of that subsection is to lay down a list of objects, for the planning of which a national designated spatial plan is a mandatory type of planning where the conditions set out in the first sentence of § 27(1) of the PA are met.

**75.**In the opinion of the Chamber, the phrase “under a reasoned decision by the Government of the Republic” in § 27(3) of the PA cannot lead to the conclusion that no justification at all needs to be given for preparation of a national designated spatial plan for erecting construction works listed in § 27(2) of the PA. Section 27(2) of the PA stipulates that a national designated spatial plan for erecting construction works listed in that provision is prepared if the construction works comply with the conditions set out in subsection (1) of the same section. If no reasoning is given for compliance with the conditions, review of the decision made in the national designated spatial plan proceedings is not effective.

**76.**Thus, the function of this part of the sentence is to establish that if a national designated spatial plan is prepared under § 27(3) of the PA, the preconditions laid down by the legislator in the previous subsections of § 27 of the PA are replaced by the special duty of reasoning by the administrative authority. In the opinion of the Chamber, reasoning must be given for initiating a national designated spatial plan under § 27(3) of the PA regardless of the fact that initiation of the plan cannot in general be contested. Although, as a rule, the Supreme Court Administrative Law Chamber has linked the extent of reasoning of a procedural measure to the possibility of its contestation (as of the Supreme Court Administrative Law Chamber judgment of 14 January 2009 in case No 3?3?1?62?08, para. 10), it may be deduced from § 27(3) of the PA as a special rule that reasoning in that case must already be provided when initiating preparation of a national designated spatial plan. In the case of initiating a national designated spatial plan as a measure having a significant impact and attracting public attention, such reasoning also serves the aims of transparency of administration and demonstrates that the decision is well-considered. The above does not mean that a material procedural error has been committed if a decision on initiation does not contain sufficient reasoning, but reasoning is contained in the decision on pre-selection of the location or adoption of the national designated spatial plan, and it can be concluded from the reasoning that the choice of the type of spatial plan was lawful. The choice of the type of spatial plan is an issue of the substantive lawfulness of a spatial plan, which can be contested when contesting the decision on adoption of the plan or decision on pre-selection (see the order in case No 3?17?2132, para. 10, cited above).

## V

**77.**Next, the Chamber will check the substantive compatibility of the grounds and restrictions for adoption of a national designated spatial plan set out in § 27 subs. (1)–(3) of the PA.

**78.**According to the explanatory memorandum to the Draft Planning Act, the main objective of a national designated spatial plan is to ensure effective planning of construction works important for the state, more specifically planning and erecting construction works serving a national or international interest in the case of which giving the right of decision on their planning and building to a local authority (or authorities) may lead to a situation where erection of a nationally significant construction work may be excluded because of its planned location (or locations) due to opposition by a local authority (or authorities) (explanatory memorandum to the Draft Planning Act, pages 80–82).

**79.**The Chamber is of the opinion that initiating, preparing and adopting a national designated spatial plan as an instrument ensuring erection of objects important for the state constitutes a state-level issue in the regulation of which the Riigikogu enjoys a broad margin of appreciation. Therefore, as well as for the reason that a local authority is not a bearer of fundamental rights in the Estonian legal order, no requirements of review of proportionality need to be observed when interfering with the local authority right of self-organisation in resolving a state level issue (cf. *mutatis mutandis* Supreme Court Constitutional Review Chamber judgment of 20 December 2016 in case No 3?4?1?3?16, paras 89–91).

**80.**By adding the institution of the national designated spatial plan in the Estonian legal order, the legislator has exercised its margin of appreciation, laying down in § 27 subs. (1)–(3) of the PA the conditions in the presence of which national designated spatial plan proceedings as an exceptional spatial planning procedure in relation to the ordinary types of spatial plans are justified (or mandatory in terms of choice of the type of spatial plan). In the opinion of the Chamber, by enabling initiating, preparing and adopting a national designated spatial plan in the event of fulfilment of these conditions without the binding consent of the local authority (authorities) concerned, the legislator has not arbitrarily used that margin of appreciation. The Chamber provides the following reasoning to this effect.

**81.**One of the reasons for introducing the national designated spatial plan was that giving local authorities the right to decide on the planning of certain construction works may lead to the situation where erecting them is excluded because of opposition from local authorities (explanatory memorandum to the Draft Planning Act, pages 81–82). If, in the course of the designated spatial plan proceedings, a local authority could exclude the location of the construction works which are the object of the plan, a nationally significant construction work might not be erected at all. In view of the fact that the purpose of a national designated spatial plan is resolving a state-level issue, no compelling reason exists to request that local authorities be given essentially veto rights in the proceedings for resolving this issue.

**82.**However, in the opinion of the Chamber, the constitutional guarantee of the local authority right of self-organisation requires that, in addition to reasoning for compliance with the conditions set out in § 27 subs. (1)–(3) of the PA when initiating a national designated spatial plan, the Government must consider a significant national or international interest in relation to the legitimate interests of a local authority (authorities) in a manner that enables subsequent review. Only in that case can the court exercising review of decisions made in the designated spatial plan proceedings verify whether the Government has exercised its discretion lawfully, including in line with the requirements, i.e. where possible taken into account the local authority right of self-organisation as a constitutional guarantee. Such a duty of consideration also arises from the relevant provisions of the Planning Act.

**83.**Under § 4(2) cl. 5) of the PA, the duties of the authority that organises planning work include assessment of the relevant economic, social, cultural and environmental impacts resulting from the implementation of the spatial plan. Under § 10(1) of the PA, the authority that organises planning work – in the case of a national designated spatial plan, the Government of the Republic – must balance different interests, including public interests and values, and consider them in the light of the principles of planning and the objectives of the spatial plan. Under § 10(2) of the PA, a spatial plan expressing national interests must be guided by national interests, taking into account local needs and interests where this is possible.

**84.** National designated spatial plan procedure takes place in two stages and, under § 27(9) of the PA, consists of pre-selecting a location for the construction work, and after finding the location for that construction work, preparing the corresponding detailed solution. Section 30(2) of the PA lays down that when pre-selecting the location in the context of a national designated spatial plan, several alternative options must be considered, and if several equivalent applications have been received that seek preparation of the national designated spatial plan, the possible locations set out in the applications must also be considered when performing pre-selection. The duty to consider several alternative locations in pre-selecting the location for a national designated spatial plan serves, inter alia, the aim of finding the most suitable location for the planned construction works, taking into account, on balance, the economic, social, cultural impacts as well as the impact on the natural environment.

**85.** Under § 41(1) of the PA, pre-selection of the location is completed by adopting a decision on pre-selection. Under § 41(2) of the PA, the Government of the Republic (in the text of the Act “the authority arranging the preparation of the national designated spatial plan”, i.e. under § 27(2) of the PA the Ministry of Finance or, upon a decision of the Government of the Republic, a government agency responsible for matters of national defence or security, but relying on the explanatory memorandum to the draft “Act on Amending the Government of the Republic Act and other Acts on Account of Termination of Activity of County Governments” (Riigikogu XIII composition, 432 SE), the Chamber reads that what is meant is the Government of the Republic, which under subsection (1) of the same section makes the decision on pre-selection of the national designated spatial plan), by accepting the decision concerning pre-selection of the location, confirms that the selected location is the most suitable for erecting the construction work envisaged in the national designated spatial plan and that the location of the construction work, the general conditions of its erection, pre-selection of the location, the decision on pre-selection of the location and the report concerning the first stage of the strategic environmental assessment are in conformity with the relevant legislation and that the information contained in the report concerning the first stage of the strategic environmental assessment is sufficient for making the choice between the different locations under consideration.

**86.** In its application, Tartu City Council has raised the argument that, in terms of procedural rights, the current regulatory arrangements on cooperation and involvement under the national designated spatial plan procedure equate the local authorities concerned with any other persons who have expressed the wish to be involved in pre-selection. In response, the Chamber notes that although the procedural position of a local authority concerned is the same as that of other persons involved, this does not mean that the interests of all the persons involved in the national designated spatial plan procedure carry the same weight. Under § 10(2) of the PA, a spatial plan expressing national interests must also take into account local needs and interests where this is possible. The procedural position thus enables a local authority to present and protect its relevant interests in the national designated spatial plan procedure.

**87.** As noted, the national designated spatial plan procedure involves two stages, under § 27(9) of the PA: it consists of pre-selecting a location for the construction work, and after finding the location for that construction work, preparing the corresponding detailed solution (see, in more detail, the order cited above, in case No 3?17?2132, paras 12–13). The Chamber is of the opinion that in addition to contesting, under § 54 of the PA, the decision on adoption of a national designated spatial plan, § 44(5) of the Code of Administrative Court Procedure also enables contesting the decision on pre-selecting the location of the national designated spatial plan as a preliminary administrative act preceding adoption of the national designated spatial plan.

**88.**In conclusion, the Chamber finds that by delimiting the discretion of the Government of the Republic in § 27 subs. (1)–(3) of the PA, the legislator has not arbitrarily exercised its margin of appreciation in resolving the state-level issue in question. The lawfulness of interference with the local authority right of self-organisation by each specific national designated spatial plan is ensured by the requirement of reasoning for compliance with the conditions laid down in § 27 subs. (1)–(3) of the PA (paras 71–76 of the judgment), the duty to consider a significant national or international interest in relation to local interests (paras 82–85 of the judgment), involvement of the local authority concerned in different stages of the procedure (para. 86 of the judgment), and judicial review of the discretionary decisions issued by the Government of the Republic in the national designated spatial plan procedure (paras 67, 82 and 87 of the judgment). The Government’s right to initiate, prepare and adopt a national designated spatial plan on conditions set out in § 27 subs. (1)–(3) of the PA does not interfere unconstitutionally with the local authority right of self-organisation.

Priit Pikamäe, Saale Laos, Viive Ligi, Nele Parrest, Malle Seppik

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