



# S U P R E M E C O U R T

## C O N S T I T U T I O N A L R E V I E W C H A M B E R

### J U D G M E N T

in the name of the Republic of Estonia

<b>Case number</b>	5-23-20
<b>Date of judgment</b>	30 March 2023
<b>Judicial panel</b>	Chair Villu Kõve, members Velmar Brett and Nele Parrest
<b>Case</b>	Complaints by the Estonian Conservative People's Party against National Electoral Committee decision No 66 of 14 March 2023 and decision No 77 of 17 March 2023
<b>Participants in the proceedings</b>	Estonian Conservative People's Party National Electoral Committee
<b>Manner of examination</b>	Written procedure

### OPERATIVE PART

**To deny the complaints.**

### FACTS AND COURSE OF PROCEEDINGS

1. The State Electoral Office – the body responsible for organising electronic voting in Riigikogu elections and ascertaining the results of electronic voting (§ 15(1) clause 1 of the Riigikogu Election Act (REA)) – set up an electronic voting system on 16 February 2023. On the following day, 17 February 2023, the State Electoral Office tested the electronic voting system (trial run of electronic voting). From 27 February to 4 March 2023, electronic voting took place in the 2023 Riigikogu elections.
2. On 5 March 2023, after 8 p.m., the State Electoral Office ascertained the results of electronic voting (§ 60<sup>1</sup>(1) REA). This action was performed in public, in the presence of observers.
3. On 6 March 2023, the State Electoral Office carried out a check of the integrity of the electronic voting system, at the end of which the head of the State Electoral Office signed the results of electronic voting (§ 60<sup>1</sup>(10) REA) (confirmation of the results of electronic voting). This act was also performed in public, in the presence of observers. The results of electronic voting were published in the election information system and on the website valimised.ee late in the evening of 5 March 2023. The signed file of the results of electronic voting was published on the website valimised.ee in the afternoon of 8 March 2023.
4. On 6 March 2023, Martin Helme, Chairman of the Estonian Conservative People's Party (EKRE), submitted an information request to the State Electoral Office for information about the electronic voting system – information stored in the system's logs and who has access to the electronic voting system during the 2023 Riigikogu elections.

5. On 8 March 2023, the State Electoral Office responded to M. Helme's request for information, explaining the composition of the task force on electronic voting and official access to the electronic voting system and the conditions for access. The response noted that the logs of the time identification of voters in electronic voting, the logs of the voting time and the response logs of the registration service would be separately handed over to the requester. The release of the remaining logs was not considered possible, as it constituted information under access restrictions within the meaning of the Public Information Act, the release of which could pose a threat to the security of the systems or contain non-anonymisable personal data. The State Electoral Office explained that it is ready, if necessary, to repeat the processing of electronic votes and the act of ascertaining the results of electronic voting, so that the auditors appointed by EKRE could verify it.

6. On 10 March 2023, a meeting was held where the State Electoral Office explained the architecture of the electronic voting system to EKRE representatives.

7. On 13 March 2023, the head of the State Electoral Office sent the general architectural scheme for electronic voting to a representative of EKRE and explained the operations to be performed with the electronic ballot box at the State Electoral Office after the Information System Authority (RIA) hands over the ballot box to them. The auditor verifies all the evidence with the audit application they have created and with their own operating system. In addition, as already explained in the reply of 8 March 2023 to the request for information, it was reiterated that in the context of the 2023 Riigikogu elections, the system administrators of the Information System Authority (RIA) had access to the electronic voting collection service, while the State Electoral Office had access to the system for creating encryption keys for the electronic voting system (EHS) and the ballot opening system used by the EHS. It was also noted that the logs of audits of network devices, and the like, are not released as these constitute logs of RIA network devices whose release could compromise the systems (§ 35(1) clauses 9 and 10 Public Information Act).

### **EKRE's first complaint**

8. On 7 March 2023, Martin Helme, a member of the Board of the Estonian Conservative People's Party (EKRE), filed a **complaint** with the National Electoral Committee, at the end of which it was noted: "Martin Helme / Estonian Conservative People's Party". The complaint had been digitally signed by M. Helme.

9. The complaint challenged the results of electronic elections in the 2023 Riigikogu elections, on the grounds that the election software guidelines were violated in organising the voting. The complaint sought clarification as to whether the server used for the elections had been upgraded, why a computer running the Windows operating system was used, and questioned whether the server and the computer used to organise the elections had been audited. They also wanted to know which computer was used to decrypt the votes. In addition, it was pointed out that the electronic voting file had not been made public and it was not clear whether voters were offered the same voter application during the elections as was used in the trial run.

10. On 9 March 2023 at 5.09 p.m., the State Electoral Office sent a letter to M. Helme. It explained that if a complaint is filed on behalf of a political party, it should be filed with the signatures of the persons authorised to represent the party. The complaint had only M. Helme's signature, but according to the register of non-profit associations and foundations, the right to represent EKRE is held jointly by three members of the Board.

11. By e-mail sent on 10 March 2023 at 10.16 a.m., Mr Helme confirmed that he wished to file the complaint on his own behalf.

12. The National Electoral Committee discussed M. Helme's complaint at its meeting on 10 March 2023 and by **decision No 57 of 13 March 2023** (RT III, 15.03.2023, 2) declined to examine it because the complaint did not indicate a violation of the rights of M. Helme as a candidate seeking the Riigikogu mandate. In its decision, the National Electoral Committee ordered the State Electoral Office to answer the questions raised in M. Helme's complaint. The decision also explained that the State Electoral Office had in good time published the data on the voter application used for the trial run of electronic voting.

13. In e-mails sent on 10 March 2023 at 4:18 p.m. and 4:50 p.m., two members of the EKRE Board (Silver Kuusik and Siim Pohlak) submitted to the National Electoral Committee the same complaint that M. Helme had filed on 7 March 2023, with their signatures.

14. By **decision No 66 of 4 March 2023** (RT III, 16.03.2023, 2) the National Electoral Committee partially declined to examine EKRE's complaint because it had been filed in breach of the time-limit for appeal. EKRE's complaint could not be considered to have been filed on 7 March 2023. The party's intention to file a complaint became apparent only on 10 March 2023, when S. Kuusik and S. Pohlak confirmed that they agree with the complaint filed by M. Helme on 7 March 2023.

15. A complaint may be filed with the National Electoral Committee within three days of performance of the act contested (§ 72(1) REA). In the opinion of the Electoral Committee, EKRE contested the confirmation of the results of electronic voting, i.e. signing by the head of the State Electoral Office, after the integrity of the data of the electronic voting system had been checked in accordance with § 60<sup>1</sup>(10) of the REA. The integrity check took place on 6 March 2023 in public and in the presence of observers, at the end of which the head of the State Electoral Office confirmed the results of electronic voting with their signature. Thus, at the time of filing the EKRE's complaint (10 March 2023), the time-limit for appeal had passed.

16. The time-limit for appeal had also expired for contesting other acts concerning electronic voting and the results of voting, including the setting-up of the electronic voting system, the inadequacy of possibilities for prior verification, use of the electronic voting system during electronic voting, and ascertainment of the results of electronic voting (§ 60<sup>1</sup>(1) REA). Electronic voting ended on 4 March 2023 and the results of electronic voting were ascertained on 5 March 2023.

17. In order to enable prompt resolution of complaints and to avoid delays in convening the new composition of the Riigikogu, expiry of the time-limit for appeal has not been made dependent on becoming aware of the act complained of. In a situation where the results of electronic voting were signed in the presence of observers, no reason exists to suspect that the applicant would have been prevented from accessing this decision.

18. The results of the electronic voting signed by the head of the State Electoral Office were available on the valimised.ee website from the afternoon of 8 March 2023. The Electoral Committee reviewed the complaint and denied it insofar as it challenged the failure to disclose the results of electronic voting on the website valimised.ee on 8 March 2023, as the time-limit for appeal had not expired in that regard. It does not follow from the REA whether and when the State Electoral Office must disclose the results of electronic voting on the website valimised.ee.

19. In its decision, the National Electoral Committee also presented the explanations of the State Electoral Office regarding the issues contained in EKRE's complaint. According to the explanations,

the election server has been updated with the most recent security installations available. The computer has been configured according to guidelines created in 2021. The name of the computer is not relevant and no electronic votes are kept in it. What is important in the processing of electronic votes are the data that have gone into the computer and the data released from it, which can be independently verified. The procedures to be audited begin when the e-ballot box reaches the State Electoral Office. Auditors are not present at the installation of the computers and the computers have not been audited. Auditing computers is not necessary and is not prescribed. In the presence of auditors, the Information System Authority (RIA) hands over the e-ballot box to the State Electoral Office on a DVD in a security envelope. In the course of this, the authenticity of the e-ballot box is verified. The e-ballot box brought to the Electoral Office for counting votes is a DVD. Votes are not kept on the computer. The Ubuntu server is a processing machine. To decrypt electronic votes, another server running the Windows 10 operating system is used (the encryption keys for votes were created with the same server). The e-voting manager checks the authenticity and integrity of the election result with their own computer with the help of a signature file created during the counting of votes. Such a check can be carried out by anyone, and the instructions with the data to be checked are digitally signed by the head of the State Electoral Office and available on the valimised.ee website. The file of the electronic voting result was published on the website on 8 March 2023. The materials for checking the reliability of the voter application have been published on the website since 26 February 2023.

**20.** EKRE filed a complaint with the Supreme Court on **17 March 2023** (hereinafter also ‘complaint I’), seeking annulment of National Electoral Committee decision No 66 of 14 March 2023 and a declaration of unlawfulness of the act of the State Electoral Office by which the State Electoral Office ascertained the results of electronic voting in the 2023 Riigikogu elections. The applicant requests that the results of electronic voting in the 2023 Riigikogu elections be invalidated and that Chapter 7<sup>1</sup> of the REA be declared unconstitutional to the extent that it does not set out precise rules for the organisation of electronic voting and ascertainment of electronic voting results.

**21.** On 20 March 2023, the National Electoral Committee sent EKRE’s complaint I to the Supreme Court with its explanations.

### **EKRE’s second complaint**

**22.** On 16 March 2023, EKRE filed a **complaint** with the National Electoral Committee, requesting that the State Electoral Office act of 5 March 2023, which determined the results of electronic voting in the 2023 Riigikogu elections, be declared unlawful. In addition, the applicant sought invalidation of the result of electronic voting because electronic votes were cast in a system that does not ensure compliance with the general principles of elections.

**23.** The applicant also applied for restoration of the time-limit for appeal pursuant to the third sentence of § 71(3) of the REA, as the applicant only became aware of the facts on which the complaint is based on 13 March 2023, when the State Electoral Office partially responded to the applicant’s request for information submitted on 6 March 2023 and further elaborated on at the meeting on 10 March 2023. The applicant submitted the request for information on the day following the contested act and the complaint to the National Electoral Committee within three days after the State Electoral Office responded to the request for information. In the applicant’s opinion, the circumstances revealed in the reply of the State Electoral Office – i.e. part of the electronic voting system (the e-voting collection service) and the information related to its operation (logs of network devices) is accessible only to RIA – indicate that the electronic voting system and the results of electronic voting are not reliable. The circumstances also indicate that the State Electoral Office has unlawfully delegated its tasks to RIA.

**24.** The unreliability of the voting results violates the principle of freedom of election arising from § 60 of the Constitution and § 1(2) of the REA. The electronic voting system must be reliable and verifiable. Insofar as the electronic votes were cast in an unreliable system, the act of ascertaining the result of electronic voting was unlawful. The sole administrator of the electronic voting system should be the State Electoral Office, which is independent in performing its functions (§ 48<sup>2</sup>(1) and § 14(1) REA), and the law does not allow the possibility to delegate functions. The rules for ascertaining the results of electronic voting are not laid down clearly enough in the REA. The unreliable, unverifiable and unobservable system of electronic voting violates the applicant's rights since the applicant did not receive the number of mandates in the Riigikogu that corresponds to the actual will of the people. The applicant is of the opinion that violation of the law had a significant impact on the voting result, because the majority of the votes cast in the 2023 Riigikogu elections were cast electronically.

**25.** By **decision No 77 of 17 March 2023** (RT III, 21.03.2023, 8) the National Electoral Committee declined to examine the complaint since it had been filed in breach of the time-limit for appeal.

**26.** In the opinion of the National Electoral Committee, the contested act was the confirmation of the results of electronic voting (signing of the results by the head of the State Electoral Office), which took place after verification of the integrity of the electronic voting system on 6 March 2023. The complaint was also out of time for contesting other acts concerned with organising electronic voting (setting up the electronic voting system on 16 February 2023, the trial run on 17 February 2023, electronic voting from 27 February to 4 March 2023, ascertaining the results of electronic voting on 5 March 2023).

**27.** An act of the election organiser may be challenged within three days of its performance, not of becoming aware of it. The legislator has made such a choice on the basis that election complaints could be resolved quickly in order to avoid a delay in convening the new composition of the Riigikogu and a situation where the new composition of the Riigikogu would convene at a time when the legality of the election results remains in dispute. Someone who finds that the election organiser has violated their rights must actively ensure that they are informed of all acts and decisions in good time. Confirmation of the results of electronic voting took place in public in the presence of observers, so no reason exists to suspect that the applicant would have been prevented from accessing this decision.

**28.** The National Electoral Committee did not restore the time-limit for filing a complaint. The fact that the applicant is unaware of RIA's tasks and activities in organising electronic voting is not a compelling reason for restoring the time-limit for appeal. Restoration of the time-limit for appeal can only be justified by objective circumstances.

**29.** The National Electoral Committee explained that RIA fulfils the role of collector on the basis of clauses 2.3 and 10 of National Electoral Committee decision No 4 of 3 February 2021 on the "Description of the organisation of electronic voting". The content of the role of collector is determined in State Electoral Office order No 11 of 6 February 2023 on the "General framework for electronic voting and its use in Estonian national elections". The Supreme Court has held that it cannot be ruled out that the National Electoral Committee involves other bodies or persons in addition to the State Electoral Office in the organisation of electronic voting, and that this does not constitute transfer of the task of organising electronic voting to RIA within the meaning of § 19(1) clause 1 of the Municipal Council Election Act (Supreme Court Constitutional Review Chamber judgment of 24 October 2017 in case No 5-17-35/2). By analogy, this position is also applicable to Riigikogu elections. According to clause 18 of National Electoral Committee decision No 4 of 3 February 2021, the State Electoral Office forms an electronic voting task force for the organisation of electronic voting, including coordination of information security activities, which includes representatives of

both RIA and the State Electoral Office. The omission of electronic votes collected on the RIA server from the counting of electronic votes is ruled out by an integrity check.

**30.** The decision of the National Electoral Committee contains an explanation by the State Electoral Office that a distinction must be drawn with regard to the person with whom RIA shares the logs (the State Electoral Office or the information holder). The task force organises electronic voting and configuration of the system, and it includes members from the State Electoral Office, representatives of RIA and a representative of customer support. Once voting is complete, RIA signs the contents of the ballot box and it can no longer be changed. RIA has hosted the collection service since 2017.

**31.** On **20 March 2023**, EKRE lodged **a complaint with the Supreme Court** (complaint II) seeking annulment of National Electoral Committee decision No 77 of 17 March 2023 and a declaration of unlawfulness of the act of the State Electoral Office that ascertained the results of electronic voting in the 2023 Riigikogu elections. In addition, the applicant seeks invalidation of the result of electronic voting in the 2023 Riigikogu elections and a declaration of the unconstitutionality of Chapter 7<sup>1</sup> of the Riigikogu Election Act to the extent that it does not set out precise rules for the organisation of electronic voting and ascertainment of electronic voting results.

**32.** On 21 March 2023, the National Electoral Committee forwarded EKRE's complaint II to the Supreme Court with its explanations.

**33.** By order of 23 March 2023, the Supreme Court joined EKRE's complaints I and II into unified proceedings.

## **THE POSITION OF THE APPLICANT IN THE SUPREME COURT**

**34.** Complaint I asserts that by decision No 66 the National Electoral Committee unjustifiably declined to examine EKRE's complaint. EKRE filed the complaint on 7 March 2023 and did not violate the time-limit for appeal. The National Electoral Committee should have treated the complaint filed on 7 March 2023 as an EKRE complaint from the outset and not as a complaint by M. Helme. The Committee should not have taken into account M. Helme's declaration of intention submitted by e-mail on 10 March 2023 stating that the complaint should have been treated as his complaint, because such a declaration of intention led to the formation of the position of EKRE as the applicant. In order to decide whether the complaint was a complaint by EKRE or a personal complaint by M. Helme, a declaration of intention by EKRE would have been necessary, and this could have been expressed only by three members of the Board jointly, not by M. Helme alone. The Electoral Committee should have given a deadline for remedying deficiencies in the complaint and treated the complaint as a personal complaint by M. Helme only if the deficiencies were not remedied within the deadline. EKRE remedied the deficiency on 10 March 2023 at 4:50 p.m., i.e. within a reasonable time.

**35.** Complaint I asserts that by decision No 77 the National Electoral Committee unjustifiably declined to examine EKRE's complaint. The National Electoral Committee should have restored the time-limit for appeal, because the reason for missing the time-limit mentioned in the complaint was compelling.

**36.** As regards the contested act, complaint I states that this means ascertainment of the results of electronic voting (§ 60<sup>1</sup>(1) REA), which includes setting up the electronic voting system, the inadequacy of possibilities for prior verification of the electronic voting system, use of the electronic voting system during electronic voting, counting electronic votes after 8.00 p.m. on the election day, ascertaining the results of electronic voting, verifying the integrity of electronic votes, confirming the results of electronic voting, and failure to disclose the results of electronic voting on the website

valimised.ee before 8 March 2023. Complaint II notes that it contests the act of the State Electoral Office by which the State Electoral Office ascertained the result of electronic voting in the 2023 Riigikogu elections.

**37.** In both complaint I and complaint II, the applicant maintains all the positions presented in the complaints submitted to the National Electoral Committee (see paragraphs 8–9 and 22–24 above).

**38.** In summary, the applicant is of the opinion that the electronic voting system is not reliable and violates the principles of freedom and secrecy of elections laid down by § 60 of the Constitution and § 1(2) of the REA. As a result, the applicant has been deprived of the right to such a number of mandates as would correspond to the actual will of the people. As the violations significantly affected the voting result, since the majority of votes were cast electronically in the 2023 Riigikogu elections, there would be grounds for invalidating the result of electronic voting.

**39.** The applicant is of the opinion that electronic voting is not sufficiently verifiable and is unreliable due to several deficiencies in the electronic voting system and its architectural scheme, which are highlighted in the opinions of Kalevi Koplik as an expert with specialist knowledge. According to these observations, collection of votes and management of related hardware and databases are not under the control of the State Electoral Office and are not managed by the State Electoral Office. The State Electoral Office does not have the opportunity to supervise possible internal attacks during the voting and the vote collection phase. Internal attacks have been considered by experts to be the most likely threat. To the extent that the electronic voting system is managed by a third party, RIA is not able to answer questions or provide information about voting processes. The State Electoral Office does not verify and lacks the capacity to verify the authenticity and integrity of the information provided to them (for the counting of votes) and the work of RIA and Sertifitseerimiskeskus AS. The reliability of the system and organisation depends on the hope that the organiser of the elections or other persons with access do not intend to influence the voting results. Märt Põder, who also participated as an observer, has also expressed the opinion that the organisation of electronic voting does not ensure “end-to-end verifiability”, which is considered necessary for such systems in the professional literature.

**40.** At the 2023 Riigikogu elections, several anomalies and technical glitches occurred in the organisation of electronic voting, which were reported to the applicant and which call into question the operational reliability and credibility of the electronic voting infrastructure. Three voters failed to verify their electronic votes. One voter managed to vote electronically after they had already voted at the polling station. A care home required an ID card so that a person with dementia in the care home could vote electronically. One voter was unable to vote electronically, but at the time of the malfunction both their name and their mother’s name were on the ballot. One voter was unable to vote because the PIN2 of the ID-card did not work. The total number of people who voted electronically increased after the end of electronic voting. Problems with identifying a voter’s registered place of residence occurred at the polling station, although eventually this was successful. One voter was told at a polling station that they had already voted, but later it transpired that the ballot paper in their name had been associated with someone else’s signature in the system. These incidents preclude the certainty that everyone who wished to vote was able to vote and could be sure of the correctness of their electronically cast vote.

**41.** There is also no certainty that the devices of persons who cast their electronic votes are secure and working correctly (problems on the voter’s side) and that the electronic voting hardware and software are working correctly (problems on the side of the electronic voting system). The problems described would not occur if electronic voting did not take place. Electronic voting is not as reliable as paper voting.

**42.** Complaint II also notes that, in M. Põder's opinion, the electronic voting system does not guarantee secrecy of voting. The solution, which allows voters to verify whether their personal vote reaches the election server, allows a voter's vote to be downloaded by anyone, as long as they are able to read the code returned for verification.

**43.** The applicant is also of the opinion that regulation of electronic voting is formally unconstitutional. In line with § 60(5) of the Constitution, the procedure for electing the Riigikogu must be laid down by a law, and the rules for organising electronic voting and ascertaining the results must be laid down by a law and in legislation of general application issued on the basis of a law and in conformity therewith. The Supreme Court has pointed out that the rules for ascertaining the results of electronic voting should be laid down more clearly in legislative acts. In the case of electronic voting, secret and free voting must be ensured, which presumes sufficiently clear and precise rules at the level of a law. The electoral law is a constitutional law. The legislator may delegate resolution of issues concerning electoral rights to the executive in accordance with the principle of legality, i.e. on the basis of a delegation norm with a precise purpose, content, and scope.

**44.** The law lays down the requirement that electronic voting must be carried out, but the legislator has fully delegated regulation of the conduct of electronic voting to the National Electoral Committee and the State Electoral Office. This is in a situation where more electronic votes than paper votes were cast in the 2023 Riigikogu elections. The law does not create a secure environment for electronic voting nor does it regulate security requirements or set out requirements for persons responsible, or address the issue of the public nature of counting electronic votes. The public should be able to verify all information about technical procedures and the technical means used, audits and analyses carried out to ensure security, while the integrity of the procedure should be verifiable.

**45.** Since the law does not establish any requirements for electronic voting, the competence of the National Electoral Committee not to start electronic voting, to suspend or terminate it if the security or reliability of the system cannot be ensured in such a way that electronic voting could be carried out in accordance with the requirements of the law is meaningless. In practice, the requirements are established by the National Electoral Committee. The Supreme Court already drew attention to shortcomings in the regulation in 2019, but the situation has not improved. The State Electoral Office has delegated some of its tasks to RIA by an administrative contract, even though no relevant delegating norm exists in the REA.

## **OPINION OF THE NATIONAL ELECTORAL COMMITTEE**

**46.** The National Electoral Committee objects to EKRE's complaint I, maintains its positions set out in its decision No 66 of 14 March 2023, and asks that the complaint be denied.

**47.** The Electoral Committee explains that since the complaint was filed by M. Helme on 7 March 2023, the State Electoral Office asked him on whose behalf the complaint was to be filed. In a situation where M. Helme had signed the complaint of 7 March 2023 and later confirmed that he wished to file it on his own behalf, it would have been unreasonable to think that EKRE's intention to file the complaint was nevertheless evident from the procedural document submitted on 7 March 2023. EKRE was also informed of the time and place of the National Electoral Committee meeting of 10 March 2023. The meeting was attended by EKRE representative S. Kuusik, who did not wish to take the floor during the hearing of M. Helme's complaint and did not claim that M. Helme had acted contrary to the will of the party by sending an e-mail at 10.16 a.m. on the same day.



**48.** The National Electoral Committee pointed out that EKRE has also failed within the time-limit to contest the acts of the State Electoral Office in introducing the electronic voting system. Electronic voting began on 27 February 2023.

**49.** The National Electoral Committee also objects to EKRE's complaint II, maintains its positions set out in its decision No 77 of 17 March 2023, and asks that the complaint be denied. In addition, the Electoral Committee notes that evidence not submitted to the National Electoral Committee is not relevant and should be excluded from the case file.

## **OPINION OF THE CHAMBER**

**50.** In complaints I and II lodged with the Supreme Court, the applicant seeks annulment of decisions No 66 and 77 of the National Electoral Committee. Thus, the main question in the case is whether by its aforementioned decisions the National Electoral Committee correctly declined to examine and partially denied EKRE's complaints.

### **I**

**51.** By decision No 66, the National Electoral Committee partially denied EKRE's complaint and partially declined to examine it. The latter was due to the fact that, in the view of the National Electoral Committee, it had been submitted in violation of the time-limit for appeal.

**52.** According to the first sentence of § 71(3) of the REA, the National Electoral Committee may decline to examine a complaint if it has been filed in violation of the procedure laid down by § 72(1) of the REA. According to § 72(1) clause 1 of the REA, a complaint against an act of the election organiser must be filed within three days of the contested act. Therefore, in order to assess the timeliness of the complaint, the National Electoral Committee first had to find out which act of the election organiser EKRE was contesting. This issue is also important in the present case because in the Supreme Court the applicant can seek a declaration of unlawfulness of the same act that they already contested in the National Electoral Committee (the mandatory pre-judicial procedure has been completed). Only with regard to that act can the applicant apply to the Supreme Court for annulment of a decision of the National Electoral Committee.

**53.** The text of EKRE's complaint filed with the National Electoral Committee indicates that it contested "the results of electronic elections in the 2023 Riigikogu elections" and raised several questions about the technological side of organising electronic voting. The complaint also expressed the grievance that, at the time of filing the complaint, the file of the results of electronic voting had not been made public, even though it had been signed.

**54.** In the opinion of the National Electoral Committee, the applicant had contested, in particular, the act of the State Electoral Office – the signing of the results of electronic voting by the head of the Electoral Office on 6 March 2023 (§ 60<sup>1</sup>(10)), for which the Electoral Committee used the term "confirmation of the results of electronic voting". This was the interpretation most favourable to the applicant from the point of view of the time-limit for appeal, as the other acts concerning electronic voting whose contestation could have been inferred from the complaint preceded confirmation of the results of electronic voting. The National Electoral Committee considered that the second act contested in EKRE's complaint was failure to publish the results of electronic voting on the website before 8 March 2023. Since, in the opinion of the National Electoral Committee, the complaint was filed on 10 March 2023, the complaint for contesting the first act (confirmation of the results of electronic voting) was filed in violation of the time-limit, but the complaint for contesting the second act (failure to publish the results file before 8 March 2023) was within the time-limit.

**55.** In complaint I lodged with the Supreme Court, the applicant has not claimed that the National Electoral Committee misunderstood their complaint as to the act that the applicant contested. The applicant's arguments are primarily aimed at the fact that EKRE's complaint was filed on 7 March 2023 and it was within the time-limit, but the question is which act was contested.

**56.** Complaint I seeks a declaration of unlawfulness of the act of the State Electoral Office which ascertained the results of electronic voting. Usually, this means the act specified in § 60<sup>1</sup>(1) of the REA, which was performed on 5 March 2023 in the current Riigikogu elections. However, the applicant interprets ascertainment of the results of electronic voting differently from the law, asserting that it covers most of the acts related to organisation of electronic voting before and after 5 March 2023 (starting from setting up the electronic voting system; also including signing the results of electronic voting on 6 March 2023, and failure to disclose the file before 8 March 2023, see paragraph 36 above).

**57.** The Chamber does not agree with the applicant's position. In organising electronic voting, the State Electoral Office performs a number of acts that are successive in time and are related to each other to a greater or lesser extent (e.g. registration in the electronic voting system, which is later used for voting and through which the votes cast are finally counted). However, this is not a reason to consider all those acts as a single comprehensive act of 'electronic voting', since the latter would lead to an excessive and essentially unlimited extension of the time-limit for contestation. In particular, the activities in organising electronic voting that are expressly mentioned in the law – e.g. ascertaining the results of electronic voting (§ 60<sup>1</sup>(1) REA) – must be regarded as separate and contestable acts.

**58.** When organising elections (including paper voting), it is customary and inevitable that the acts follow each other and are interrelated. However, this does not mean that a later act can be contested on the grounds that the earlier act was unlawful in the applicant's opinion. Thus, for example, the Supreme Court has held that registration of members and alternate members of the Riigikogu cannot be contested on the grounds of alleged deficiencies in electronic voting that ended several weeks earlier (see Supreme Court judgment of 31 March 2011 in case No 3-4-1-10-11, paras 8–12).

**59.** In the election appeal procedure (Chapter 12 of the Riigikogu Election Act and Chapter 6 of the Constitutional Review Court Procedure Act), the time-limits for appeals and time-limits for proceedings before the National Electoral Committee and the Supreme Court are extremely short. The legislator established a special procedure for resolving disputes concerning elections before the Constitutional Review Chamber of the Supreme Court in order to ensure that disputes over an issue of constitutional importance would be resolved quickly and would not pose a threat to the stability of the state (see the explanatory memorandum to the Draft Constitutional Review Court Procedure Act (SE 985, IX Riigikogu), page 13). Members of the Riigikogu cannot be registered and the election results deemed to have been announced before disputes have been resolved (see § 74(1) and (3) of the REA).

**60.** From complaint I filed with the National Electoral Committee and the Supreme Court, it can be concluded that the applicant wishes to contest in particular some acts concerning the results of electronic voting, i.e. the act of 5 March 2023 (ascertainment of the results of electronic voting, § 60<sup>1</sup>(1) REA) or the act of 6 March 2023 (confirmation of the results of electronic voting, § 60<sup>1</sup>(10) REA). However, this lack of clarity as to the contested act does not prevent the Chamber from adjudicating the current case, since the main issue in dispute is the date on which EKRE's complaint was filed with the National Electoral Committee. If the complaint was filed with the National Electoral Committee on 7 March 2023, it would have been within the time-limit for contesting both acts;

however, if the complaint was filed on 10 March 2023, it would not be within the time-limit to contest either of the acts.

**61.** The Chamber notes that the complaint filed with the National Electoral Committee on 7 March 2023 was ambiguous, since both the name of the candidate for the Riigikogu elections (M. Helme) and the name of the political party on whose list he stood as a candidate (EKRE) were written at the end of the complaint. M. Helme is also EKRE chairman. The complaint had been digitally signed only by M. Helme. There is no dispute that the right of representation of EKRE is held jointly by three members of the party's Board.

**62.** Section 71(1) and (2) of the REA sets out the requirements for a complaint, and in case of non-compliance with these requirements the National Electoral Committee may decline to examine the complaint (first sentence of § 71(3) REA).

**63.** In the opinion of the Chamber, the purpose of the letter sent by the State Electoral Office to M. Helme on the evening of 9 March 2023 was to identify the applicant (political party or candidate) and, if the complaint was filed on behalf of the political party, to enable remedying deficiencies in the complaint (in line with § 71(2) of the REA, a complaint by a political party must be signed by the party's authorised representative). The letter shows that the State Electoral Office initially indeed considered the complaint to be a complaint by EKRE. At the same time, M. Helme was not given a deadline for replying, so that it is justified to assume that he had to respond within a reasonable time. This is what M. Helme undoubtedly did, responding on the morning of 10 March 2023.

**64.** The applicant is of the opinion that EKRE Board members S. Kuusik and M. Pohlak also submitted their signatures to the complaint of 7 March 2023 (i.e. remedied the deficiencies in the complaint) within a reasonable time (in the afternoon of 10 March 2023). In the opinion of the Chamber, the issue of a reasonable time for remedying the deficiencies is no longer relevant after M. Helme had clearly acknowledged the complaint of 7 March 2023 as a complaint solely by himself as an individual on the morning of 10 March 2023, thereby precluding it from being treated as a complaint by the political party. After that, it could no longer be a matter of remedying deficiencies in the party's complaint, and there is no reason to assess whether the signatures of Mr Kuusik and Mr Pohlak were submitted within a reasonable time. Moreover, a meeting of the National Electoral Committee was held on 10 March 2023, where the complaint of 7 March 2023 was dealt with as a complaint by M. Helme.

**65.** Nor can the Electoral Committee be criticised for the fact that the State Electoral Office asked for clarification of the complaint of 7 March 2023 from M. Helme. As noted above, he is the EKRE chairman who had signed the complaint. In a situation where the complaint of 7 March 2023 could be understood as a complaint by M. Helme or by EKRE, or both, it would have been unjustified to turn to someone else to identify the applicant. There is also no reason to doubt that M. Helme was able to ascertain the party's will – whether the party wanted to file a complaint on 7 March 2023 or not. The National Electoral Committee has also drawn attention to the fact that EKRE was informed of the time and place of the National Electoral Committee meeting of 10 March 2023 and was advised of the possibility to attend it. S. Kuusik also attended the meeting as a representative of the party but without raising any objections to the treatment of the complaint of 7 March 2023 as M. Helme's complaint.

**66.** In view of the foregoing, the Chamber finds that the National Electoral Committee was correct in its opinion that EKRE's intention to file a complaint only became apparent on 10 March 2023. The National Electoral Committee followed the rules established by law for filing and examining complaints. It does not appear from the materials of the case that the Electoral Committee or the State

Electoral Office would have attempted to prevent filing of the complaint, mislead the applicant or distort the applicant's will. Since EKRE's complaint to the National Electoral Committee had primarily raised a number of questions about the organisation of electronic voting, the decision of the National Electoral Committee also included answers by the State Electoral Office to the questions asked (see paragraph 19 of the judgment above).

**67.** The applicant has contested decision No 66 of the National Electoral Committee in its entirety, i.e. including the part by which the Electoral Committee examined their complaint but denied it. This concerned failure to disclose the file of the result of electronic voting on the website valimised.ee before 8 March 2023, which the National Electoral Committee did not consider unlawful (see paragraph 18 of the judgment above). However, complaint I filed with the Supreme Court does not provide any reasoning as to why the applicant considers this part of decision No 66 of the National Electoral Committee to be unlawful and why the decision should be annulled in that regard.

**68.** Based on the foregoing, the Chamber is of the opinion that decision No 66 of the National Electoral Committee did not violate the applicant's rights and no basis exists for annulling it.

## II

**69.** By decision No 77, on the ground of exceeding the time-limit for appeal, the National Electoral Committee also declined to examine the complaint filed by EKRE on 16 March 2023 requesting that the act of 5 March 2023 – ascertainment of the results of electronic voting – be declared unlawful.

**70.** There is no dispute that the complaint in question was filed with the National Electoral Committee after expiry of the three-day time-limit for appeal. In this case, too, the National Electoral Committee considered the contested act to be confirmation of the results of electronic voting on 6 March 2023. In complaint II filed with the Supreme Court, the applicant has not alleged that the National Electoral Committee had misunderstood which act the applicant had contested in the complaint submitted to the Electoral Committee. At the same time, in the complaint filed with the Supreme Court, the applicant contests ascertainment of the results of electronic voting (without specifying the date of the act) (see the last sentence of paragraph 36 of the judgment above). Some ambiguity as to the contested act does not preclude adjudication of the present case, since in complaint II filed with the Supreme Court, the applicant reproaches the National Electoral Committee in particular for failing to restore the time-limit for filing a complaint, even though the applicant requested it by citing a good reason.

**71.** In accordance with the third sentence of § 71(3) of the REA, the National Electoral Committee restores the time-limit for filing a complaint on the basis of a reasoned request if the applicant has missed the time-limit for good reason. Thus, in the case of the applicant's petition to restore the time-limit, the National Electoral Committee had to assess whether the reason for failure to comply with the time-limit was compelling or not, and the Chamber must take a position on whether the National Electoral Committee correctly assessed the reason.

**72.** In the applicant's opinion, a good reason for failing to comply with the time-limit for appeal was that they became aware of the facts on which the complaint was based on 13 March 2023, when the State Electoral Office responded to their request for information of 6 March 2023 (a summary of the applicant's request for information and the response to it can be found in paragraphs 4–7 of the judgment above). These facts were that only RIA has access to a part of the electronic voting system (electronic voting collection service) and the information operated therein (logs of network devices). On this fact, the applicant based their conclusion that the electronic voting system and the results of voting are unreliable and the contested act should therefore be declared unlawful.

**73.** In the opinion of the National Electoral Committee, becoming aware of the tasks and activities of RIA in conducting electronic voting was not a good reason for restoring the time-limit for appeal, as the role of RIA is defined in the legal acts of the National Electoral Committee and the State Electoral Office.

**74.** The Chamber agrees with the position of the National Electoral Committee that the legislator has linked the beginning of the time-limit for filing a complaint against an act of the election organiser to performance of the act, not to becoming aware of it (§ 72(1)1) REA). At the same time, the statutory time-limit for appeal is very short (three days). As stated above (see paragraph 59 of the judgment), these legislative choices reflect the fact that the aim is to carry out the electoral appeal procedure as quickly and efficiently as possible in order to avoid instability of state power. If it were possible to file a complaint when the applicant becomes aware of the facts which they believe to indicate unlawfulness, the electoral appeal procedure would not fulfil its purpose, the announcement of the election results could be delayed indefinitely, and the legitimacy of the elections could be called into question even after the announcement of the election results.

**75.** However, in order to ensure the fairness of the procedure, the legislature has provided for the possibility of restoring the time-limit for filing a complaint. However, the reasons for doing so must be sufficiently compelling, since the announcement of the election results will be delayed due to prolongation of the appeal procedure. As a rule, the applicant becoming aware of the existence or content of a publicly available legal act or other similar information cannot be considered a good reason.

**76.** The participation and role of the Information System Authority (RIA) in the organisation of electronic voting is evident from National Electoral Committee decision No 4 of 3 February 2021 on the “Description of the organisation of electronic voting” (RT III, 05.02.2021, 1; amended by National Electoral Committee decision No 9 of 10 October 2022 – RT III, 12.10.2022, 2). The decision defines the collector component of the electronic voting system (clause 2.3) and the collection service provider RIA using that component (clause 10). The role of the collector has also been explained in the general framework for electronic voting (approved by State Electoral Office order No 11 of 6 February 2023). Although the new versions of the legal acts cited are currently in force, RIA has been providing the collection service since 2017 (see National Electoral Committee decision No 28 of 8 June 2017 on the “Description of the organisation of the electronic voting system” (RT III, 10.06.2017, 4), clause 2.2).

**77.** In the opinion of the Chamber, the fact of finding out about RIA’s participation in the organisation of electronic voting (as provider of the collection service) cannot be considered a good reason for missing the time-limit for appeal. Nor is the reason rendered compelling by the fact that the applicant allegedly only understood from the explanations of the State Electoral Office on 13 March 2023 how RIA fulfils the role of collector. The applicant was aware that electronic voting would most likely be used in the 2023 Riigikogu elections, and it would have been possible to submit a request for information on the technical side of electronic voting and its departmental organisation earlier. In addition, the role of RIA was already explained to the applicant by the State Electoral Office in its response to the request for information on 8 March 2023 and at the meeting with the State Electoral Office on 10 March 2023. The fact that the applicant would not have access to the logs of network devices (connections and administration) was also explained to them in the response of 8 March 2023. Although the applicant, as a person requesting information, cannot access these logs due to the access restrictions established on the basis of § 35(1) clauses 9 and 10 of the Public Information Act, this does not mean that RIA is the only one with access to this information (see § 38 Public Information Act).

**78.** In the light of the foregoing, the National Electoral Committee rightly refused to restore the time-limit for filing a complaint. Decision No 77 of the National Electoral Committee did not violate the applicant's rights and no grounds exist for annulling it.

**79.** Since the Chamber will not annul decisions No 66 and 77 of the National Electoral Committee, no grounds exist for forming a position on the remaining claims in the applicant's application. Relying on § 46(1) clause 2 of the Constitutional Review Court Procedure Act, the Chamber denies EKRE's complaints for annulment of National Electoral Committee decisions No 66 and 77.

### III

**80.** In addition to the above, the Chamber notes the following.

**81.** Parliamentary elections are an act of central importance in a democracy, by which the people, as bearer of supreme state power (§ 1(1) Constitution), confer powers on the parliament for the next four years. To ensure the legitimacy of state power, the electoral principles laid down in the Constitution must be followed in organising elections. Arising from the third and fourth sentence of § 60(1) of the Constitution, elections must be general, uniform, and direct, and voting must be secret. In order to ensure the democratic nature of elections, these constitutional principles must also be respected in electronic voting, which has been used in Estonia since 2005 (five times for election of the Riigikogu and municipal councils, three times for election of the European Parliament). Due to constant technological development and growing expectations of society, the organisation of electronic voting requires consistent attention from the legislator and the executive, especially in a situation where this method of voting is already preferred by more than half of voters.

**82.** Prior to the first use of electronic voting in the 2005 municipal council elections, the President of the Republic turned to the Supreme Court to check whether electronic voting complied with the Constitution. At the time, the Supreme Court deemed the voting method in question to be constitutional, especially with regard to the aspects that were in dispute – the uniformity, generality, and secrecy of voting (see Supreme Court Constitutional Review Chamber judgment of 1 September 2005 in case No 3-4-1-13-05). Since the 2011 Riigikogu elections, the reliability and constitutionality of electronic voting have been repeatedly questioned by voters, observers, candidates, and political parties. The electronic voting system has been so protected against possible external attacks that the National Electoral Committee has not had to use its competence not to start electronic voting, or to suspend or terminate electronic voting (§ 9(2) clause 4 REA). The reliability of electronic voting has been questioned by those who have turned to the Supreme Court rather because of technical glitches in voting or human error in organising voting, as well as because of the difficulty in understanding the organisational and technical side of electronic voting, which has caused some mistrust.

**83.** The Constitution obliges the legislator to decide on all important issues (§ 3(1) Constitution) without delegating their resolution to subordinate bodies. The fact that the Riigikogu Election Act is a constitutional law (§ 104(2) clause 2 Constitution) emphasises this in particular. The rules governing electronic voting derive from the REA, acts of the National Electoral Committee and the State Electoral Office in conjunction with one another. The set of rules is strongly biased towards legal acts that are subordinate to a law, and obtaining an overview of them can be difficult even for persons with good legal knowledge. It is understandable that, in the context of rapid technological development, it can be difficult to find the optimal balance between the inevitable rigidity caused by the process of amending a law and the changes and needs of real life. However, this does not detract from the legislator's duty to provide for sufficiently tight regulation in electoral laws on all important matters concerning elections in order to ensure the legislator's control and the public's trust in elections by means of organisational, procedural and substantive legal requirements.

(signed digitally)