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On Assignment of Local Government Tasks to the Private Sector in Estonia^{*1}

1. Introduction

The assignment of public tasks to the private sector has been topical in Estonia since the 1990s, and practical solutions to this question cluster have been sought actively at both state and local level over the years. Today, local government units — rural municipalities (numbering 194) and cities (33) — provide an estimated 70% of all public services rendered to people.^{*2} Although this topic has not been overlooked by representatives of research in any of several fields, we have to agree with the opinion of the Chancellor of Justice that, unlike other countries, where the topic has been featured in numerous publications and judicial practice has provided necessary guidelines, Estonia has, thus far, shown a dearth of relevant theoretical discussions.^{*3} At the same time, assignment of public tasks to the private sector prompts various questions that require opinions from jurists.

If we are to understand the situation that has developed and the issues arising from the assignment of public tasks to persons in private law, it is impossible to ignore the wider social context in which the performance of public tasks by local governments has taken, and is taking, place. Thus, the one-level local government system existing in Estonia can be criticised with keywords like ‘inadequate administrative capacity’ (weak planning of investments and development; shortcomings in the areas of waste management, budgeting and accountancy, and information technology; irregular and secondary local government supervision in their areas of activity; etc.)^{*4}, ‘weak and unevenly distributed revenue base’^{*5}, and ‘scant legal competence’.^{*6} The recently emerg-

¹ This article was published with support from ESF Grant No. 6464.

² Kohalik omavalitsus Eestis (Local Government in Estonia). Ministry of Internal Affairs 2008, p. 7. Available at http://www.siseministeerium.ee/public/Kohalik_omavalitsus_Eestis_2008.pdf (23.03.2009) (in Estonian).

³ Õiguskantsleri 2006. aasta tegevuse ülevaade (Overview of the Activities of the Chancellor of Justice in 2006), pp. 75–76. Available at http://www.õiguskantsler.ee/public/resources/editor/File/_levaade_2006_e_k_L_PLIK.pdf (23.03.2009) (in Estonian).

⁴ See, e.g., Auditor General Mihkel Oviir: Haldusreformiga ei saa oodata viimsepäeva laupäevani (Administrative Reform cannot Wait till Doomsday Eve). Press release of 2.03.2009. Available at <http://www.riigikontroll.ee/> (16.04.2009) (in Estonian).

⁵ See, e.g., E. Ulst. Eesti kohalike omavalitsuste tuludebaas Leping LMJRI 10699. EMFA komponent A-3 (Revenue Base of Estonian Local Governments Contract LMJRI 10699. EMFA component PA-3). Tartu: University of Tartu Faculty of Economics 2000, pp. 49–52. Available at <http://portaal.ell.ee/7942> (16.04.2009) (in Estonian); Analysis of the National Audit Office of the revenues and expenditure of local government budgets. Chief auditor’s decision of 18.01.2000, No. 70-13/008. Available at <http://www.portaal.ell.ee/1577> (16.04.2009) (in Estonian).

⁶ See, e.g., K. Paas. Interview with Chancellor of Justice Indrek Teder: The Chancellor is Missionary for Small Local Governments. – Äripäev, 27.03.2009 (in Estonian).

ing economic depression certainly fails to assist in the resolution of the problems that have accumulated over time. All of the above directly relates to the topic of this article.

The main objective of the authors of this article here is to provide a reasoned assessment of the legal and factual circumstances related to the performance of a group of local tasks by Estonian local governments. For this purpose, the sphere of public tasks performed by local government is firstly determined and constructed, proceeding from the requirements of the valid legal order. The legal limits of assigning public tasks to persons in private law and the different forms of such delegation are then discussed, and the substantive soundness (systematicity) of legal regulations established here by the legislator is examined. The focus of the analysis is then shifted to questions concerning competition procedures or public procurement procedures prior to delegation, for the performance of a public task under a contract in public law, and then to issues related to the performance of mandatory local tasks. The analysis thus makes use of the findings of a survey the authors conducted among local governments in the summer of 2008.⁷

2. The structure of public tasks performed by local governments

On the basis of the principles of the legal order of Estonia, public tasks may legally be determined to be tasks assigned to administrative institutions directly by law or pursuant to law and tasks that have been derived from the relevant legal norm by way of interpretation.⁸ Problems arising from the delegation of public tasks arise not only on the state level but also on the local government level. The situation that has arisen in Estonian legislation regarding the determination of public tasks is on the whole characterised as indefinable and unclear.⁹ The Constitution of Estonia distinguishes between local issues (§ 154 (1)) and state issues (“duties of the state”) (§ 154 (2)). In resolving and managing local issues, the local government has universal competence.¹⁰ Assigned competence (state issues) is formed pursuant to the law (reservation of law) or pursuant to an agreement between the state and the local government (contract under public law). The differentiation between issues that are essentially local and national is characteristic of the dualistic theory of classifying public tasks.

Local tasks that essentially belong to the competence of a local government can be classified in various ways.¹¹ Their classification into voluntary and compulsory local tasks is the most important.

Voluntary local tasks are those tasks that the local government is not obliged to fulfil but which it can undertake to fulfil at any time (the so-called right of discovering tasks). In the case of a voluntary local task, the local government has the right to decide whether, when, and how the performance should be carried out. Voluntary local tasks include co-operation with other local government units, establishment of sporting facilities, various cultural tasks, creation of recreation opportunities for residents, etc.

Mandatory local tasks are such local tasks as the state requires local governments to perform on account of heightened public interest. The obligation to perform a task may be unconditional (that is, the task must be performed in any case) or conditional (the task must be performed if necessary, or under certain conditions). In principle, with regard to local tasks, the local government is free to decide only on how to complete a certain task, not whether to perform it at all. Mandatory local tasks have been set out, e.g., in § 6 (1) and (2) of

⁷ We interviewed 92 local government units, i.e., 40.5% of their total amount. We more specifically addressed rural municipality and city secretaries as local government officials who daily engage in the preparation and implementation of legislation. Legally speaking, the issued questionnaire constituted a request for public information pursuant to the Public Information Act. Proceeding from calculated revenue per resident, we divided local government units into “the wealthy” and “the poor”; in order to achieve better representation, we added local government units with larger populations and proceeding from the specific goal-setting, we also added the rural municipalities and cities that have established parking charges. We received (on time and after additional reminders) a total of 76 responses, forming 83% of the questionnaires issued — a result, on the one hand, showing existing reserves in the proper performance of requests for public information by local governments, on the other hand, constituting a relatively foreseen result. The Public Information Act (avaliku teabe seadus) referred to has been published in RT I 2000, 92, 597; 2008, 35, 213 (in Estonian).

⁸ K. Merusk. Assignment of Public Tasks to Private Legal Persons. Legal Basis and Limits. – *Juridica International* 2000 (5), p. 41.

⁹ SCebd, 19.04.2004, 3-3-1-46-03 (in the appeal of Avanduse Rural Municipality Government against a regulation of the Government of the Republic to be declared unlawful), pp. 22–23. – RT III 2004, 11, 128 (in Estonian).

¹⁰ CRCSD, 22.12.1998, 3-4-1-11-98 (Application of the Chancellor of Justice to repeal items 2, 6, 7 and 8 of the prohibition on entry and parking in Tallinn Old Town, approved by regulation No. 8 made by Tallinn City Council on 22.02.1996). – RT I 1998, 113/114, 1887 (in Estonian); 9.02.2000, 3-4-1-2-00 (Application of the Chancellor of Justice to repeal regulation No. 672 of 16.04.1999 of the Narva City Government, “Approval of the Rules of Using the Transit Transport Square” and the annex thereto of 21.04.1999, and regulation No. 1215 of 4.06.1999, “Additions to the Rules of Using the Transit Transport Square” and the annex thereto of 2.06.1999). – RT III 2000, 5, 45 (in Estonian).

¹¹ See V. Olle. Kohaliku omavalitsuse ülesannete struktuur ja liigitamiskriteeriumid (The Structure and Classification Criteria of Local Government Tasks). – *Juridica* 2002/8, pp. 524–531 (in Estonian).

the Local Government Organisation Act^{*12} (LGOA). It is thus provided in § 6 (1) of the LGOA that the functions of a local government include the organisation, in the rural municipality or city, of social assistance and services, welfare services for the elderly, youth work, handling of housing and utilities, the supply of water and sewerage, the provision of public services and amenities, waste management, physical planning, public transportation within the rural municipality or city, and the maintenance of rural municipality roads and city streets unless such functions are assigned by law to other persons. In addition to the above-mentioned functions, local governments also resolve, and organise response to, local issues assigned to them by other acts of law (LGOA § 6 (3)1)). These areas are also largely regulated by the relevant specific laws (the Social Welfare Act^{*13}, the Public Water Supply and Sewerage Act^{*14}, the Waste Act^{*15}, etc.), which have set out in greater detail how local governments should organise operations in a certain area.

Despite certain differences, both above-mentioned groups of local tasks belong to the scope of § 154 (1) of the Constitution, thus being subject to the provision of the said constitutional provision: “All local issues shall be resolved and managed by local governments, which shall operate independently pursuant to law.”

3. Legal limits and forms of the delegation of local government tasks

3.1. Local government guarantee and delegation

The guarantee of local governments as institutions of objective law, set out in § 154 (1) and § 158 of the Constitution, provides local governments with exclusive competence to resolve and manage all local issues. Local governments have thus been given room for decision — whether and how to manage local issues, and henceforth also the liberty to choose organisational-legal forms, insofar as doing so is not restricted with a reservation of law. The freedom to choose organisational-legal forms applies primarily in the case of fulfilment of voluntary local tasks. The local government can fulfil such tasks itself in an organisational form through a structural unit or municipal agency; establish a legal person in private law and assign to it the performance of the task concerned; or assign the task to a natural person or a legal person in private law, established by persons in private law. Here, the state cannot provide for a requirement of delegation of tasks or prohibition thereof. The choice of the organisational-legal forms for fulfilling a task, in turn, depends on several economic and social factors and also on the capability of the local government itself to fulfil the given task. Upon delegation of a task, the capabilities of local governments to influence the quality of completion of the task are reduced.

3.2. Mandatory local tasks and the legal limits of delegation

The legal limits of the delegation of tasks imposed on local governments by law, both local and state tasks, do not proceed solely from the associated provision delegating authority but are also related to constitutional limits. This is particularly relevant in the case of tasks related to authorised powers. In the case of constitutional limits, what must be considered are the nature of the task, the legal status of the person fulfilling the task, and the potential intensity of interference with a person's fundamental rights — the intensity of infringement of fundamental rights. The legislator cannot grant authority to a local government to assign such tasks to a person in private law as are among the core tasks of the authority of the state. The Supreme Court has thus assumed the position that the delegation of misdemeanour procedure and the related penal power of the state to a legal person in private law is in contravention of §§ 3, 10, 13, and 14 of the Constitution, in conjunction with them. These provisions together establish the principle that the authority of the state must only be exercised pursuant to the Constitution and that exercise of the authority of the state cannot be unconstitutional. In the decision, the Supreme Court analysed item 3 of § 9, which provides that in the cases provided by law, extra-judicial proceedings shall also be conducted by legal persons in private law on the basis of a contract under public law, and § 54¹¹ (3), which gives local governments the authority to delegate the conducting of misdemeanour procedure and punishment for travelling without a document certifying the right to use public transport and refusing to pay a taxi travel fare to a legal person in private law with a contract under public law. The court

¹² Kohaliku omavalitsuse korralduse seadus. – RT I 1993, 37, 558; 2008, 53, 293 (in Estonian).

¹³ Sotsiaalhoolekande seadus. – RT I 1995, 21, 323; 2008, 58, 329 (in Estonian).

¹⁴ Ühisveevärgi ja -kanalisatsiooni seadus. – RT I 1999, 25, 363; 2009, 3, 15 (in Estonian).

¹⁵ Jäätmeseadus. – RT I 2004, 9, 52; 2009, 3, 15 (in Estonian).

found that penal power, including the conducting of misdemeanour procedure, belongs among the core functions of the state, which cannot be delegated to persons in private law pursuant to the Constitution.^{*16}

The core tasks of the state should also include the right to exercise power in the name of the state, which cannot be delegated to persons in private law.^{*17}

Upon granting of authority for the delegation of other tasks with authorised powers, the content and scope of the task and the intensity of the potential infringement of fundamental rights must be considered. Pursuant to §§ 13 and 14 of the Constitution, everyone has the right to management and procedure that includes a right to the normative and factual activity of the state in order to guarantee the protection of rights of a person.^{*18} This requires that the legislator guarantee the relevant legal regulations. In this regard, the conformity of § 50¹ (3) of the Traffic Act^{*19} with the Constitution is questionable. Pursuant to said provision, the local government may transfer, on the basis of a public-law contract, the monitoring of parking and of payment of parking charges, and imposition of fines for delay upon failure to pay the parking charges or if the parking time paid for is exceeded, to a legal person in private law. Pursuant to § 5 (10) of the Local Taxes Act^{*20}, parking charges are one of the local taxes. Pursuant to the provision of the Traffic Act considered here, a legal person in private law shall participate in the procedure through its employees to whom the provisions concerning officials that are provided by said act extend. At the same time, the act does not contain additional provisions concerning such employees. The legal person in private law has acquired the status of an administrative authority and its employees the status of public servants. The Public Service Act has established service requirements for public servants, which guarantee the quality of performance of administrative duties, and therefore also the protection of persons' rights. In addition, the public authority is responsible for the training and in-service training of officials. None of this is guaranteed in the given case.

There is also lack of regulation of supervision. Delegation of tasks imposed on local governments by law presupposes the existence of a provision delegating authority, established by law. Pursuant to § 3 (2) of the Administrative Co-operation Act^{*21}, a local government may grant the authority to perform an administrative duty assigned thereto by law or pursuant to the law to a legal or natural person by means of an administrative act issued on the basis of law or via a contract under public law entered into under the conditions of, and pursuant to the procedure provided for in, said act on the basis of law. According to the act, performance of administrative duties may be delegated only if this is economically justified, in consideration of the expenses involved in delegation, any funding, and supervision, and also only if delegation does not reduce the quality of performance of such duties or damage public interests or the rights of persons subject to performance of these administrative duties.

3.3. Delegation and reservation of law: Discretion or imperative

Upon granting authority for the delegation of mandatory local tasks, the legislator has either directly prescribed the delegation requirement — in many cases, determining whom the performance of the task may be assigned to — or has given the local government the right of discretion, the freedom to choose whether or not to delegate.

The Public Water Supply and Sewerage Act, for instance, sets out that if a public water supply and sewerage system is in local government ownership, a water undertaking shall be appointed by way of a public competition by a decision of the local government council on the basis of the provisions of subsection 14 (2) of the Competition Act (§ 7 (2)). According to this act, a water undertaking can be a legal person in private law (§ 7 (1)). Such a legal person in private law can be established on private initiative or as a company the sole partner or shareholder of which is the relevant local government, or as a company in which the latter has majority interest, or as a foundation whose sole founder is the rural municipality or city.

Pursuant to § 67 (1) of the Waste Act, for granting a special or exclusive right for waste transport, a local government shall organise, independently or in co-operation with other local governments, a competition pursuant to the procedure provided for by the Competition Act. That act refers to the waste transport operator with the term 'undertaking' (§ 68 (1)). The Waste Act does not define the concept of undertaking; it is, however, laid

¹⁶ SCEbd, 16.05.2008, 3-1-1-86-07 (Punishment of Indrek Eiche pursuant to § 54⁷ (1) of the Public Transport Act). – RT III 2008, 24, 159 (in Estonian).

¹⁷ K. Merusk, T. Annus, M. Ernits, H. Lindpere, L. Madise. I Chapter. General Provisions. – Constitution of the Republic of Estonia. Commented edition. 2nd updated edition. Tallinn: Juura 2008, p. 49 (in Estonian).

¹⁸ See SCEbd, 28.10.2002, 3-4-1-5-02 (Application of Tallinn Administrative Court to validate the conformity of § 7 (3) of the Republic of Estonia Principles of Ownership Reform Act with the Constitution). – RT III 2002, 28, 308 (in Estonian).

¹⁹ Liiklusseadus. – RT I 2001, 3, 6; 2008, 54, 304 (in Estonian).

²⁰ Kohalike maksude seadus. – RT I 1994, 68, 1169; 2005, 57, 451 (in Estonian).

²¹ Halduskoostöö seadus. – RT I 2003, 20, 117; 2008, 58, 329 (in Estonian).

down in the Commercial Code^{*22} (§ 1), which provides that an undertaking is a natural person who offers goods or services for charge in his or her own name where the sale of goods or provision of services is his or her permanent activity, or is a company provided for by law. The Waste Act generally establishes mandatory delegation by way of a public competition, and the relevant task may also be assigned to a company (which may be a municipal company) or to a sole proprietorship. Pursuant to § 67 (1) of the Waste Act, a local government may authorise a not-for-profit association of which the local government is a member and that, pursuant to its statutes, can have only local governments or local government associations as its members to perform the functions related to a public competition for choice of a waste transport operator. For the purpose of delegating this task, the local government has the right of discretion.

The Public Transport Act^{*23} also generally anticipates the obligation to delegate the provision of public transport services by way of a public competition. According to § 2 (2) of the act, a carrier providing public transport services can be an undertaking that holds a relevant licence and is entered in the commercial register, a sole proprietorship, or a legal person entered in another register pursuant to the law. In comparison with the Waste Act, this act also allows provision of the service (public transport) by, in addition to a company and a sole proprietorship, other legal persons in private law, who own a relevant licence and have been entered in a relevant register, on assignment. Local government units can transfer the task of specific management of public transport on the basis of the right of discretion to a company or not-for-profit association established by a local government and the state where the state and the local government have a majority interest (§ 7 (1)). Here, the law prescribes freedom of choice regarding delegation and at the same time specifies the subjects to whom the task may be assigned.

The Roads Act^{*24} differentiates among road management works according to whether or not an activity licence is requisite for the performance of them. The performance of those kinds of road management work that require an activity licence must be delegated by the local government unit by way of a public competition (§ 25 (1)). Such work types include the design, repair, and maintenance of roads; the design, construction, and repair of bridges; and others. Pursuant to this act, the relevant activity licence can be applied for by natural or legal persons in compliance with the requirements for the performance of the corresponding road management works, whereas only certain road management work can be assigned to natural persons (design and assessment of the relevant design documentation, etc.). The Roads Act does not specify to which subjects more specifically the performance of road maintenance work can be assigned, and general concepts are used here — referring to a legal person who has fulfilled the relevant requirements. In the case of certain road maintenance work types that do not require an activity licence (installation and maintenance of traffic signs, maintenance of passenger shelters and road service facilities, etc.), the local government has been given the freedom to decide whether to fulfil the relevant task in the organisational form of the local government — i.e., through its structural unit or municipal institution — or instead to assign it to a municipal company or a legal person established under private initiative, or to a natural person. If a local government council decides to assign the task to a company of which the local government is the sole shareholder, or in which the relevant local government has the majority interest, or to a foundation with the relevant local government as its sole founder, then, upon conclusion of a contract under public law, the procedure for negotiated procurement without prior publication of a tender notification established in the Public Procurement Act is implemented, proceeding from the terms of the Administrative Co-operation Act (§ 14 (3)).

In the provision of social services, the local government has, pursuant to the Social Welfare Act, the right of discretion to decide whether to provide the relevant service in its organisational form or to assign it to a person in private law, including to a municipal company. The act does not specify the subjects of law to whom the relevant task may be assigned. The requirement under the Administrative Co-operation Act that the delegation of a task must proceed from the Public Procurement Act generally applies also here.^{*25} Said Act does not apply if a task is assigned to a not-for-profit organisation whose members may be, pursuant to statutes, only local government units.^{*26}

With regard to the performance of maintenance tasks, the local government also has the right of discretion in deciding whether to fulfil the task itself through its structural unit or to assign the performance thereof to a person in private law. Delegation generally also requires a public competition.

The analysis of legal regulations gives reason to claim that the legislator has imperatively prescribed that delegation of the more important mandatory local tasks must be made to only local government units with the purpose of protection related to competition proceeding from the interests of free enterprise and its effects on the provision of the relevant services. In certain cases, specific subjects of law are specified, to whom the

²² *Äriseadustik*. – RT I 1995, 26–28, 355; 2009, 12, 71 (in Estonian).

²³ *Ühistranspordiseadus*. – RT I 2000, 10, 58; 2009, 3, 14 (in Estonian).

²⁴ *Teeseadus*. – RT I 1999, 26, 377; 2009, 15, 93 (in Estonian).

²⁵ *Riigihangete seadus*. – RT I 2007, 15, 76; 2008, 14, 92 (in Estonian).

²⁶ Clause 13 (1¹) of the Administrative Co-operation Act.

relevant tasks may be assigned. The determination (differentiation thereof) often lacks a unified conceptual basis, substantive justification, and terminological unity.

The right of discretion is primarily a basis for delegation in the case of tasks belonging to the social and maintenance arenas and also for the preparation of detailed plans and with regard to public roads on the basis of a detailed plan, and to public green zones, etc.

Upon delegation of mandatory local tasks, the respective task nevertheless remains within the sphere of responsibility of the local government unit.

4. Issues related to the procedure applied before entry into a contract under public law

Decisions on the grant of authority to perform an administrative duty of a local government shall be taken by the council, which shall authorise a rural municipality or city government to enter into a contract under public law.^{*27} Entry into a contract under public law with a person to grant that person authority to perform an administrative duty shall be based on the conditions for entry into procurement contracts for contracting for services and on the procedure for organisation of the tendering procedure provided for in the Public Procurement Act, taking into consideration the specifications set forth in § 13 of the Administrative Co-operation Act.^{*28} In a number of cases already mentioned in this article, a public competition procedure^{*29} must be completed instead of a public procurement procedure, pursuant to the Competition Act.^{*30} It is established in § 14 (2) of the latter act that the procedure for the organisation of public competitions for granting special or exclusive rights shall be established by the Government of the Republic. If legislation on the basis of which special or exclusive rights are granted does not provide the procedure for the granting of a special or exclusive right, a public competition for the granting of said right shall be organised in keeping with the procedure established by the Government of the Republic. The Government of the Republic has established the relevant procedure in its regulation 303 of 25 September 2001.^{*31} If the authority to perform an administrative duty shall be granted by a decision of a local government council to a company the sole partner or shareholder of which is the corresponding local government, a company in which the corresponding local government has a majority interest, or a foundation the sole founder of which the corresponding local government is, a negotiated tendering procedure without prior publication of a tender notice, as provided for in the Public Procurement Act, shall be applied.^{*32} This constitutes the so-called formal privatisation model for public tasks. Despite the peculiarity of one or another procedure, the issues arising upon their implementation in local governments can be considered similar and discussed together.

It must be said that in Estonia, as a small country with a rapidly developing legal system, the assignment of public tasks on the local government level to persons in private law was commenced in the 1990s in a legal situation considerably different from that of today, with the former situation lacking several necessary legal regulations that are in force now. When the Commercial Code entered into force, on 1 September 1995, providing in § 507 that municipal enterprises were to be transformed in two years into private limited companies, become local government agencies, or be dissolved, the country saw what was on the one hand a very significant legal political decision while, on the other hand, the local governments proceeded in their choices not so much from the content of the functions performed by the municipal enterprise but from logic — a sustainable enterprise would be transformed into a company, and a non-sustainable enterprise would be dissolved. As a rule, transformation did not entail relevant analyses or major substantive discussions. Now, the legal situation has changed, and, pursuant to the Administrative Co-operation Act, a legal or natural person may be granted the authority to perform an administrative duty if

- 1) performance of the administrative duty by the legal or natural person is economically justified, in consideration of, *inter alia*, the costs incurred by the state or a local government for the grant of authority to perform the administrative duty for possible financing and for supervision;
- 2) the grant of authority to perform the administrative duty will not impair the quality of the performance thereof; and

²⁷ Section 9 of the Administrative Co-operation Act.

²⁸ Subsection 13 (1) of the Administrative Co-operation Act.

²⁹ See § 13 (1¹) of the Administrative Co-operation Act.

³⁰ Konkurentsiseadus. – RT I 2001, 56, 332; 2007, 66, 408 (in Estonian).

³¹ Eri- või ainuõiguse andmiseks avaliku konkursi korraldamise kord (The Procedure for the Organisation of Public Competitions for Granting Special or Exclusive Rights). – RT I 2001, 78, 469; 2006, 13, 103 (in Estonian).

³² Subsections 14 (2) and (3) of the Administrative Co-operation Act.

- 3) the grant of authority to perform the administrative duty will not harm public interests or the rights of persons in respect of whom the administrative duty is to be performed.^{*33}

Also, before a decision on granting of authority to perform an administrative duty is made, an official or body (council) entitled to grant the authority to perform the administrative duty shall organise the preparation of an analysis including economic estimations related to the conditions for the grant of authority, the accompanying costs to be incurred by the local government, and the legal and factual effect arising from the grant of authority to perform the administrative duty on persons in respect of whom the administrative duty is to be performed.^{*34} A substantive analysis, together with arrangement of a public procurement/competition prior to entry into a contract under public law, should guarantee the protection of public interests. Regrettably, it appears that often either conducting of relevant analyses prior to decision on the delegation of an administrative duty is omitted by the local government (e.g., it appeared from a survey that two out of five local governments that transferred the monitoring of parking and of payment of parking charges and/or imposition of fines for delay specified in § 50 of the Traffic Act to a legal person in private law had not performed such analysis) or the preparation of the analyses has been approached in a manner that merely meets formal requirements.^{*35} The reasons for such an approach may be related to insufficient competence of those conducting the analysis and the fact that, actually, the decision in the favour of delegation of a public task has politically already been made and the analysis is only expected to provide confirmation of it.

A local government should not assign the performance of an administrative duty to a subject of law that is objectively unable to perform that duty suitably (to a so-called shell company). It proceeds from the Administrative Co-operation Act that if a natural person or a legal person in private law is granted the authority to perform an administrative duty, that person must be reliable (§ 12 (1)) and the body (council) that is entitled to take the decision on the grant of authority shall verify the facts that prove reliability (§ 12 (2)).^{*36} In this respect, local governments face certain issues of how to present these criteria in procurement documents as objective requirements, such as that of how to combine the existence of experience proving a person's reliability with the prohibition contained in § 39 (5) of the Public Procurement Act, to leave the tenderer or applicant disqualified on account of absence of previous contracts under public law. Undertakings and their unions have repeatedly expressed their discontent with the terms of procurement and competition (describing them as unclear, contradictory, disposed, etc.) established by local governments, and also with how the local governments observe them.^{*37} Leaving it undisputed that in several cases the local governments have established procurement or competition conditions with different forfeitures, there is reason to claim that these conditions have in certain cases been contested for the purpose of continuing provision of the service during judicial proceedings (which

³³ Subsection 5 (1) of the Administrative Co-operation Act.

³⁴ Subsection 5 (2) of the Administrative Co-operation Act.

³⁵ Thus, the Chancellor of Justice notes in his overview of 2006 that unfortunately the obligation of preparing an analysis is in practice often viewed as a formality, trying to make do in a generalised fashion, without any actual substantive analysis. See *Õiguskantsleri 2006. aasta tegevuse ülevaade* (Overview of the Chancellor of Justice of 2006), p. 109. Available at http://www.oiguskantsler.ee/public/resources/editor/File/_levaade_2006_e_k_L_PLIK.pdf (17.04.2009) (in Estonian). The city secretary of Tartu — the city with second-largest population in Estonia — has described the existing situation as follows: "From my practice I remember preparing an analysis in the form established by law only once, when the city decided on granting authority for the performance of tasks related to organising paid parking. Interestingly, this is among a few administrative duties which the city has currently no problems with and in the case of which the activity of the performer of the duty has proved their ability to perform the said task significantly better than the city." See J. Mölder. *Kohalikes omavalitsustes haldusülesannete üleandmisel tõusetunud probleemid* (Problems Arising in Local Governments upon the Transfer of Administrative Duties). Presentation at the XXX Estonian Jurists' Days in the third public law section "Avalike ülesannete erasektorile üleandmise põhimõtted ja kogemused" (Principles and Experience of the Transfer of Public Tasks to the Private Sector), p. 4.

³⁶ Pursuant to § 12 (2) of the Administrative Co-operation Act, the reliability of a person is proved by the following facts:

1) the person has the possibility of using technical means necessary for the performance of the administrative duty, and the person has employees with the required knowledge and skills as well as other prerequisites and experience to perform the administrative duty which the person is authorised to perform;

2) liquidation or bankruptcy proceedings have not been initiated with respect to the person;

3) no circumstances exist which may cause the permanent insolvency or termination of the activities of the person;

4) there is no information in the punishment register concerning the punishment of the person;

5) the person has not materially violated any contracts under public law or public procurement contracts entered into with the person;

6) the person does not have tax arrears, including tax arrears to be paid in instalments, or arrears regarding fees, fines or compulsory insurance payments.

³⁷ The CEO of the Estonian Waste Management Association recently expressed the following opinion: "The [competition] conditions are often such that it is impossible to understand what the local government wishes to receive in the course of the competition or how the submitted applications will be assessed at all. It is not infrequent that one condition is exclusively contradictory to another condition. There are also situations where conditions are neatly written down, but are for some reason later ignored when it comes to making a decision." The CEO also brings an illustrative example: "The competition conditions of the city of Pärnu included clause establishing that if justified complaints were submitted regarding waste transport, the waste transport operator would be obliged to reduce the sum of all invoices issued in these regions by 10%. [...]. Such a condition does not proceed from any law or good practice and is clearly too much of a burden for an enterprise." See Margit Rütelmann: *Ajame kõik prügifirmade kaela* (Margit Rütelmann: Let's Blame it on the Waste Transporters). – *Postimees*, 13.04.2009 (in Estonian).

is a relatively lengthy process) at the previously applicable higher prices.^{*38} It has also been said that the types of procurement procedure and the grounds for their usage, established by law, are insufficiently flexible for entering into a contract under public law and fail to enable holding negotiations through which it would be possible to achieve a lower cost for the service than through a public tendering procedure.^{*39} This statement is questionable, and it is also impossible to ignore the increasing risk of corruption.

Estonia with its low population (1.34 million people) is inevitably a rather limited market, and this often also applies to the circle of competitors who are persons in private law and who compete for provision of one or another public service (in the case of mandatory local tasks, the competition occurs partly in the market and partly regarding entering the market (e.g., for waste transport)). It is relatively commonplace for the local government to be (at least in the short term), because of absence of a suitable alternative, forced to commission a public service under unfavourable conditions; this is particularly common where the local government itself lacks sufficient competence and resources for the provision of a certain public service. For instance, the city of Tartu has faced this situation upon granting authority for performance of both utilities-related and social tasks.^{*40} Although only five competition offences were registered in 2008, it can still be pointed out that, according to a survey conducted by the University of Tartu and the Ministry of Justice, about nine per cent of Estonian undertakings consider market agreements (i.e., cartels) rather commonplace in their area of activity.^{*41} In 2008, for instance, a case reached the press where cartel agreements between two waste transporters were suspected in Tallinn, as the two companies' tenders in waste transport competitions coincided fully^{*42} and the city, in fear of a cartel agreement, decided to cancel the waste transport competitions.

5. Performance of mandatory local tasks: Factology, problems, and some solutions

Prescription of the fulfilment of a local government task by law should legally exclude the question of whether the task should be fulfilled, for the local government. Within the law it can then be decided how the task may be performed. Unfortunately, it is evident that, in practice, problems exist. For instance, in the summer of 2008, approximately 43% of local governments had failed to fulfil the obligation of organised waste transport pursuant to the Waste Act, approximately 30% had failed to fulfil the obligation of preparing a waste management plan, and five per cent had failed to fulfil the obligation of establishing waste management rules.^{*43}

Upon assignment of public tasks to the private sector, financial issues certainly occupy a core position. The funding of public tasks can basically be divided among three possibilities:

- 1) 100% public funding (as in maintenance of roads/streets);
- 2) combination of public and private funding (as for sports schools and nursery schools);
- 3) 100% private funding (for monopolistic public utilities, such as water supply and sewerage, or waste transport).^{*44}

³⁸ K. Blumberg. Kohtuvaidlused on osa prügifirma äriplaani (Summations are Part of Waste Company's Business Plan). – Äripäev, 14.01.2009 (in Estonian).

³⁹ J. Mölder (Note 35), p. 5.

⁴⁰ *Ibid.*

⁴¹ A. Ahven, A. Rämmer, K. Rootalu, R. Murakas. Ettevõtete kokkupuuted kuritegevusega (Contacts of Companies with Crime). A Survey of Company Executives and Employees. 2007. Tallinn 2008, p. 36. Available at <http://www.just.ee/orb.aw/class=file/action=preview/id=35804/Ettev%F5tete+kokkupuuted+kuritegevusega.pdf> (18.04.2009) (in Estonian).

⁴² For instance, the nationwide Estonian daily Newspaper *Eesti Päevaleht* has discussed the event in the following articles: Tallinna prügivedajate kokkulepped haisevad kokkumängu järele (The Agreements between Waste Transport Operators of Tallinn Smell of Foul Play) (15.04.2008); V. Toomet. Ragn-Sells ja Cleanaway – kartellikokkulepe Tallinnas (Ragn-Sells and Cleanaway – Cartel Agreement in Tallinn) (15.04.2008); Prügiraha jääb perekonda (Waste Money Stays in the Family) (15.04.2008); A. Eilart. Argo Lunde: pakkumiste sarnasus on juhus (Argo Lunde: Similarity of Tenders Coincidental) (15.04.2008); J. Jõgis-Laats. Rimmelg: eesmärk on konkurendid prügiärist välja süüa (Rimmelg: The Goal is to Crowd Competitors out of Waste Business) (15.04.2008); J. Jõgis-Laats. Päevalehe paljastus toob prügikartelli uurimise kahtluse (Revelations of the *Päevaleht* Brings Investigation of Suspicion of Waste Cartel) (16.04.2008); J. Jõgis-Laats. Tallinn tühistas Mustamäe ja Lasnamäe prügikonkursid (Tallinn Cancels Waste Management Tenders of Mustamäe and Lasnamäe Districts) (16.04.2008); Rimmelg: kolme pakkumise eesmärk on konkurendid välja süüa (Rimmelg: The Purpose of Three Tenders is to Crowd Competitors out of the Market) (15.04.2008); J. Jõgis-Laats. Uurijad otsisid prügikartelli kahtlusega Ragn-Selli läbi (Investigators Searched Ragn-Sells with Suspicions of a Waste Cartel) (30.04.2008); M. Kruuse. Päevalehe artikkel viis prügihanke tühistamiseni (Article in the *Päevaleht* Leads to Cancelling of a Waste Management Tender) (12.06.2008); Prügiäri haisu peletades (Getting Rid of the Stink of the Waste Business) (12.06.2008); M. Kodres. Kartellileppes kahtlustatud prügihiid taas vastakuti (Cartel-suspected Waste Giants in Opposition Again) (31.12.2008).

⁴³ National Audit Office: Several Local Governments Ignore the Obligation of Organising Waste Management. Press release of 7.08.2008. Available at <http://www.riigikontroll.ee/pressiteade.php?nr=421&lang=et> (20.04.2009) (in Estonian).

⁴⁴ R. Altnurme. Avalike teenuste lepinguline delegerimine kolmandale sektorile. Käsiraamat (Contractual Assignment of Public Tasks to Third Sector. Handbook). Tallinn: Baltic-American Partnership Program 2002, p. 26 (in Estonian).

A good example of the contradictions existing in the field are the problems arising in connection with organisation of public transport in Tartu, where the city government decided in December 2007 to terminate the contract, for reason of breach of contract, with the public limited company that had won the city bus lines procurement contract in 2005 and had entered into a five-year contract for passenger transport, and to collect a contractual penalty of 10 million kroons from the company. The most serious of the infringements was failure to submit a new letter of guarantee of 10 million kroons (639,116 euros), on the basis of which the city could have collected money from the issuing bank or insurance company if the undertaking had encountered a situation wherein continuation of regular bus services would have been impossible. This created a situation in which one scenario threatened the city with no public service at all, in view of the fact that there was little time to find a new company for the urban lines. The public limited company was interested in receiving extra money from the city, on the one hand (the company notified the city of its considerable losses with regard to the rise of the fuel excise duty; inflation; and other, unforeseeable factors), and in economising, on the other hand (e.g., through reorganisation of the urban route network). As the public limited company submitted the requisite letter of guarantee to the city government at the last minute, it cancelled the termination of the contract. At the end of September 2008, the public limited company, which by then had become a company, submitted an application for withdrawal from the regular service contract to the city government (on 1 January 2009) with the justification that the city had been insufficiently engaged in the inspection of documents certifying the right to ride the bus and in co-operation regarding covering the company's loss (27 million kroons^{*45}, according to the company, mainly due to an unexpectedly rapid rise in fuel prices). The company also expressed readiness to hold negotiations with the city regarding the provision of the public transport service. The mayor saw no possibilities for commencing negotiations (as the public limited company had failed to submit the letter of guarantee on time) and expressed readiness on the part of the city to soon declare a public procurement in order to find new transport partners. In the situation that emerged, the city had the following possible solutions:

- 1) the company submits the letter of guarantee, the city finds a way to pay them extra money, and everything continues as before;
- 2) the company ceases its activity in Tartu, and the city arranges a new procurement, dividing the lines into three, in order to create competition;
- 3) the city creates a municipal company, which shares the market with private companies.^{*46}

The situation was resolved (this time) with a decision^{*47} of the Tartu City Council, giving the city government permission to alter the route transport contract with the company and paying a larger subsidy to the enterprise in order to cover the appreciation of route transport costs to a justified extent and not increase the price of bus tickets. The council did not approve the draft proposal for preparation to establish a 100% municipal company in order to serve the city bus lines. By way of justification, a study by the city government was pointed out that proved that the price per line kilometre payable to the municipal company would have been significantly higher than the price paid to the company that had served the bus lines thus far.

The above-mentioned case reflects several problems that emerge upon assignment of public tasks to the private sector, whether these be related to the legal quality of the contracts concluded under public law, excessively low tenders of enterprises together with the possibility to pressurise the local government if need be, limited resources of the local government for finding alternatives for the company that has already won the contract once, reduced influence of the local government on the provision of a public task, or other factors. In the above-mentioned analogous situations, the position of the local government naturally depends on the legal nature of the contract between the parties — such as on which indicators (consumer price index, etc.) are used and what the influence of one or another indicator should be with regard to the subsidy allocated by the local government, how the contract under public law establishes control over performance of the administrative duty, and whether the local government has sufficient human resources and competence for the utilisation thereof.

Responding to the problems arising from the delegation of public tasks, some local governments have considered the solution to lie in the formation of municipal companies — i.e., companies in regard of which the local government exerts a governing influence. As mentioned before, it is legally permissible to assign all mandatory local tasks to such companies. It is irrational to give an abstract response to the question of whether it is purposeful to use such a model in relation to the delegation of public tasks — the choice of model to use should primarily depend on economic purposefulness. While in Tartu the forming of such a company in the area of public transport was rejected, in Tallinn two municipal companies are active in this area — Tallinna Autobussikoondise AS (Tallinn bus lines) and Tallinna Trammi- ja Trollibussikoondise AS (Tallinn tram and trolley-bus lines). The debate over the necessity of forming municipal companies has recently become more

⁴⁵ I.e., 1,725,614 euros.

⁴⁶ J. Saar. GoBus vallandas uue bussikriisi (GoBus Starts a New Bus Crisis). – Tartu Postimees, 2.10.2008 (in Estonian).

⁴⁷ Decision No. 461 of Tartu City Council of 18.12.2008 “Avaliku bussiliiniveo teostamiseks sõlmitud töövõtulepingu L-163 muutmine” (“Alteration of the contract for services L-163 entered into for the operation of public bus lines transport”). Available at <http://info.raad.tartu.ee/webaktid.nsf/web/viited/VOLO2008121800461> (18.04.2009) (in Estonian).

lively: The Tallinn City Council has considered the possibility of establishing a municipal company for waste transport management^{*48} and the performance of road maintenance work.^{*49} When we take a broader view, however, of the extent to which mandatory local tasks actually are assigned to municipal companies by local governments, it appears from our survey that the representation of municipal companies in the performance of mandatory local tasks on the whole is marginal or scant:

- waste transport (two cases);
- tasks related to road maintenance work (eight cases);
- social assistance and services — domestic services (one case), substitute-home services (one case), and social welfare services provided to disabled persons and the elderly (three and six cases, respectively);
- maintenance-related tasks pursuant to the property maintenance rules^{*50} (nine cases);
- the capture, keeping, and killing of stray animals and the destruction of animal carcasses^{*51} (two cases);
- the building of public roads, public green areas, exterior lighting, and rainwater pipes on the basis of a detailed plan, up to the boundary of a land unit specified in a building permit^{*52} (six cases).

The role of municipal companies as water undertakings is important (there are 35 such companies, representing 44% of respondents), and it is worth mentioning that quite often (in 20 cases) local governments have not yet appointed a water undertaking and established the licensed territory thereof and the undertaking that has provided the services of supplying water and leading off wastewater via the public water supply and sewerage system thus far is required to continue its activities until the date specified in the associated contract.^{*53}

In economics literature, the differences between the business sector and the third sector as providers of public functions have been described through focusing on the different values of these organisations: while the purpose of a business undertaking is only to increase the profits of shareholders and the specific activity is only the means to achieve this purpose, the purpose of a not-for-profit organisation is the achievement of statutory purposes — i.e., the activity itself.^{*54} Pursuant to § 35 (1) of the Local Government Organisation Act, a rural municipality or city may establish foundations and be a member of a not-for-profit association; the relevant decision will be made by the council (§ 22 (1) 25)). Such not-for-profit organisations cannot be treated as expressions of citizens' initiative. If one assesses the extent to which the performance of mandatory local government tasks has been assigned to the third sector by local governments (see section 3.3 above), it appears from our survey that rural municipalities and cities make little use of (that is, exercise in 10 cases) the possibility of granting authority in relation to performance of administrative tasks related to waste transport competition to a not-for-profit organisation that has as a member the relevant local government unit and has a membership that, pursuant to the relevant statutes, consists of only local government units in an association thereof. The role of not-for-profit organisations is modest with regard to performance of maintenance tasks (seen in three cases) under the property maintenance rules and provision of social assistance and services (such as domestic services, seen in three cases). Their role is somewhat greater in the case of provision of substitute-home service (14 cases) and that of social welfare services provided to disabled persons and the elderly (14 and 19 cases, respectively). Provision of the relevant public services through local government agencies predominates here. The role of not-for-profit organisations is more noticeable with regard to tasks related to stray animals (24 cases). As a rule, local governments are not members of such organisations.

As for the possible link between the relative wealth or poverty of a local government, on the one hand (judged in terms of calculation of income per resident), and the assignment or non-assignment of a certain public task to the private sector, on the other, it is impossible to posit from our survey the existence of a single-valued link along these lines: a wealthy rural municipality/city performs the task itself while a poor one assigns it to the private sector. For instance, the option of agreement between the local government and a person requesting the preparation of a detailed plan or an applicant for a building permit for the purpose of building roads,

⁴⁸ U. Tooming. Tallinn tahab prügiveo oma hoole alla võtta (Tallinn Wants to Take Charge of Waste Transport). – Postimees, 20.03.2009 (in Estonian).

⁴⁹ Savisaar: linn võib lumekoristust ise korraldama hakata (Savisaar: The City May Start Organising Snow Clearing Itself). – Ärileht, supplement to the Eesti Päevaleht, 4.12.2008. Available at <http://www.arileht.ee/artikkel/450999> (19.04.2009) (in Estonian); Tallinn otsib võimalusi teehooldustööde munitipaliseerimiseks (Tallinn Seeks Opportunities for Municipalisation of Road Maintenance Works). – Eesti Päevaleht, 4.02.2008. Available at <http://www.epl.ee/artikkel/457550> (19.04.2009) (in Estonian).

⁵⁰ For the purpose of ensuring the task of property maintenance, § 22 (1) 36¹) of the Local Government Organisation Act foresees the establishment of property maintenance rules as belonging to the sole competence of the Council.

⁵¹ These maintenance-related tasks are imposed on local governments pursuant to the Animal Protection Act (loomakaitseadus). – RT I 2001, 3, 4; 2009, 3, 15 (in Estonian).

⁵² Section 13 of the Building Act (ehitusseadus). – RT I 2002, 47, 297; 2008, 8, 59 (in Estonian).

⁵³ Subsection 7 (4) of the Public Water Supply and Sewerage Act.

⁵⁴ R. Altnurme (Note 44), p. 25.

utility networks, and utility works, laid down in § 13 of the Building Act, was exercised roughly equally by 'wealthy' and 'poor' local governments (23 and 15, respectively).

6. Conclusions

In view of the institutional guarantee of local governments pursuant to § 154 (1) and § 158 of the Constitution, the local government has the liberty of choice regarding the performance of local government tasks, in terms of whether to perform the tasks itself or to assign them to private persons insofar as this is not limited with a reservation of law. The freedom to choose organisational-legal forms applies primarily in the case of performance of voluntary local tasks.

Upon delegation of tasks imposed on local governments by law, whether local tasks or state tasks, both the constitutional and legal limits of the provision of granting authority must be taken into consideration.

It is unconstitutional to grant authority for the delegation of tasks that are among the core functions of the state. The Supreme Court has thus found that penal power (punishment for misdemeanours) and the handling of offences belong among the core functions of the state, which cannot be assigned to persons in private law pursuant to the Constitution.

Upon granting of authority for the delegation of other tasks with authorised powers, the content of the task and the extent of the potential infringement of fundamental rights must be considered. Such granting of authority for delegation requires legal regulation from the legislator, which should set out requirements for those persons to whom the tasks are assigned, terms for supervision, and guarantees of legal protection to the persons affected. In the Estonian legal order, with respect to mandatory local tasks, the legislator either has directly prescribed the delegation requirement, in many cases determining to whom the performance of the task can be assigned, or has given the local government the freedom to choose whether or not to delegate. The analysis of legal regulations gives reason to claim that the legislator has imperatively prescribed the rules for delegation of the more important mandatory local tasks to local government units with the purpose of protection related to competition proceeding from the interests of free enterprise. On the basis of the right of discretion, delegation of tasks primarily takes place in relation to those tasks belonging to the social and property maintenance areas. Specific subjects of the law to whom a task may be assigned are often specified differently in the law on various matters, often lacking a unified conceptual basis, also substantive justification and terminological unity. Imperative delegation and delegation on the basis of the right of discretion must generally be preceded by a public competition that is also open for participation under general circumstances for municipal companies.

Several problems arise from the performance of mandatory local tasks by local governments. In certain cases (e.g., that of the obligation of waste transport management), rural municipalities and cities have not begun timely and proper performance of the assigned tasks. In the conduction of competition and procurement procedures, the issues of concern include the proper preparation of competition and procurement conditions and the preparation of documents that would ensure fair proceedings and reduce the possibilities for the results being contested later. The legal obligation of preparing a substantive analysis prior to the delegation of a task is often fulfilled merely formally, and inadequately. Local governments also lack sufficient capability for exertion of effective control over the performance of a public task by a person in private law. Weak market competition in regard of public tasks means the absence or limitedness of alternative solutions for the local government, and it enables a person in private law engaged in improper performance of a public task to put pressure on the local government. The legal quality of the contract under public law entered into for the performance of a task is thus very significant in the context of the resolution of legal disputes between the parties, and reserves are provided here for local governments for ensuring better protection of public interests. Seeking solutions for legal-economic conflicts that have developed with the partners to the contract upon the delegation of public tasks, certain local governments have started to analyse the possibilities for commencing performance of certain public tasks (waste transport and road maintenance work) by so-called self-controlled municipal companies. As a whole, the performance of mandatory local tasks through municipal companies is relatively modest in Estonia (with the exception of their role as water undertakings). Social welfare services, wherein it is legally possible to include not-for-profit organisations, are generally provided by rural municipalities and cities through their structural units/agencies.

With regard to the delegation of mandatory local tasks, it is impossible to point to a correlation with the rural municipality or city belonging to the group of the so-called wealthy or poor: insofar as the legislator has provided the local government with the right of discretion for deciding on the delegation, local governments belonging to the two above-mentioned groups have applied that possibility to a relatively equal extent (e.g., with regard to the obligation to build roads, utility networks, and utility works).