

Inter-Municipal Cooperation: Possibility for Advancing Local Democracy and Subsidiarity in Estonia

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ABSTRACT

The local self-government system in Estonia is characterised by a notable fragmentation and low capability of smaller units to grant public services. Local-government reform has been a subject of discussion for two decades already, yet a meaningful consensus remains to be reached. The OECD report about the governance in Estonia has recommended developing cooperation between the local self-government entities, emphasising that successful cooperation will serve as a prerequisite for a successful administrative reform later on. The present article analyses the legal bases of local self-government cooperation and administration practices in different countries, outlining also the limits of cooperation models as well as the restrictive factors for cooperation deriving from the Estonian legal area. The authors look into the possibilities for implementing compulsory cooperation in the Estonian legal area and offer some possible solutions for constructing successful cooperation models.

Keywords: intermunicipal cooperation; local government reform; local democracy; Estonia

1. Introduction

The article focuses on the analysis of issues related to the local self-government responsibilities and management, and, in particular, on the points of conflicts in structuring the service-area management models for granting local democracy and subsidiarity in Estonia, as well as their possible solutions.

The size of the Estonian local authorities varies greatly. The average population of 4/5 of the local entities is less than 2,500, while only a quarter of the total population of the country resides there. The small size of Estonian local authorities and how this affects their administrative capacity is one of the hottest problems of local self-government in Estonia. Only 18 municipalities (8% of the total figure) have a population of more than 10,000 people and approximately 2/3 of the total population of the country lives in those places. (Mäeltsemees 2012, 159-160) Besides, a significant internal

migration has occurred during the last decade, resulting in the increasingly growing disparity between the larger and smaller municipalities. The biggest unit is the capital city, Tallinn, where 30% of the country's population lives. This figure is one of the highest percentages in Europe (after Iceland and Latvia). (Mäeltsemees et al. 2011, 112) Estonian local self-government is characterised by a remarkable fragmentation.

For the purpose of the state's local government organisation model, it is important to consider how much the municipalities vary in size. Major disproportions tend to bring along the need for various legal regulations. In principle the contemporary juridical area in Estonia regards all municipalities as having equal rights, obligations and responsibilities (OECD 2011, 296; Mäeltsemees 2012, 165-166). In a democratic country, the local government is in charge of resolving matters of local life. The definition of the responsibilities related to local life depends on the parameters of the state municipality units: the size of population and/or number of users of the service, the demographic and socio-economic indicators, as well as, depending on the nature of the given responsibility, also the territorial scope of the units, such as the size of the territory, population density, the structure of human settlement, etc. Consequently, several responsibilities, regardless of their local nature, can be considered to be ineffective when performed at the local level. Estonian practical analyses of different realms have indicated that these responsibilities include regional spatial planning, the planning and maintenance of the network of educational institutions (incl. secondary schools) and social services, public transport, as well as organising waste management etc. (Tallinn University of Technology 2011, Tallinn University of Technology&Geomedia Ltd. 2012, National Audit Office of Estonia 2008a, b, 2009a, b, c, 2011, 2012a,b, 2013) The incapability of Estonian local self-government units to manage the issues of local life and, on the other hand, the absence of any solutions¹ provide the central government with an opportunity to centralise such responsibilities and thereby to diminish the position of local self-government within the society.

In its report on the state administration in Estonia, OECD (2011) has pointed out that inter-municipal cooperation (hereinafter referred to as *IMC*) can be considered one of the key options for increasing the capability of local self-government; furthermore, a successful cooperation experience is one of the prerequisites for a potential successful amalgamation. At the same time, there has been a relatively modest cooperation in securing public services in Estonia; according to the OECD estimation, weak support on behalf of the central government for developing the cooperation has played a part in this. (OECD 2011, 50) Therefore, one of the key issues in the local self-government development in Estonia is to judicially furnish the legal basis, organisational principles, and economic grounds for IMC (OECD 2011, 52-53).

¹ The reforms and changes in the organisation of local self-government have been planned for years, but a political compromise remains to be reached. Since 1996, the local governments have been merging on a voluntary basis, and since 1997, each newly appointed Minister for Regional Affairs has proposed his/her own version of the plan for restructuring the local and regional governance (Avaliku halduse arendamise alused/*The basics of the public administration development* 1998; Haldusreform kohaliku omavalitsuse valdkonnas/*Administrative reform in local municipalities* 2001; Regionaalhalduse reformi kontseptsioon/*Concept Paper for the Reform of Regional Administration* 2003; Regionaalhalduse reformi korralduse korraldamise lähtealused/*Guiding principles for organising the administrative arrangement at regional level* 2007; Haldusterritoriaalse korralduse reformi seaduse eelnõu/*The Draft Act for the Reform of Administrative-Territorial Organisation* 2009).

The objective of the given article is to analyse the applicability of different IMC-based models of local self-government in the Estonian judicial area and to assess whether cooperation could serve as an alternative for the reform intents, which rely on the mergers of local self-governments. The article will propose some alternatives for service area management, including the implementation possibilities and limits, which are conformed and fitting for the given conditions.

The authors of the present article participated as members of a research team at Tallinn University of Technology in the survey “Increasing the cooperation and Administrative Capacity of the Capital Region” (Tallinn University of Technology 2011, hereinafter referred to as “Cooperation Survey 2011”), organised by the Harju County Local Government Association, and in the survey “Implementing Inter-Municipal Cooperation for an Improved Performance of Local Self-Government Functions and an Enhanced Quality and More Effective Providing of Public Services” (Tallinn University of Technology and Geomedia Ltd. 2012, hereinafter referred to as “Cooperation Survey 2012”) organised by the Estonian State Chancellery and the Estonian Ministry of Interior. The given article relies partly on the results obtained in the course of the surveys.

2. Motives for Establishing an IMC: Administrative Capacity and Local Democracy

Local self-government serves to promote the democratic values of society. This generally recognised principle is supported by the Charter. The principles of local democracy, decentralisation and efficiency – the latter, in its turn, carries the meaning of the principle of subsidiarity, binding together the social and economic efficiency – as well as the principle of local autonomy serving as their guarantee occur as central in the treatments of local self-government (Sharpe 1970; Norton 1994). The optimum size of a unit of local self-government and the administration of services with regional character is a universal topic of large-scale debates among the wider public as well as researchers (The Size ... 1995, Keating 1998, Allan 2003, Council of Europe 2001, Dollery et al. 2010, Swianiewicz 2010 and others). What is the “ideal” size of local government units so that it would facilitate a balance between democratic representation and administrative capacity – this has been a never-ending object of economic disputes.

The processes of urbanisation taking place in the 20th century across Europe (after World War II in particular) on the one hand, and the emergence and development of welfare states on the other, posed some serious challenges to democratic countries, including the role of local government in a changing society, the relation of democracy and effectiveness, and the capacity of municipalities to perform the tasks connected with the development of a welfare state. (Brans 1992, 430-432 and others). The reforms conditioned by the development of a welfare state have been implemented in order to increase the capability of local government in guaranteeing the public services necessary for a well-functioning welfare state. (Aalbu et al. 2008) However, it must be noted that various IMC models are also used and developed in the countries in which the service-oriented local self-government model is practiced

(e.g. the PARAS reform and capital-area management in Finland, the public-transport model and special social services in Denmark etc.).²

It has been emphasised in various references that IMC and shared services are considered, first and foremost, a means to improve the administrative capacity and cost-effectiveness. (European Committee of Local and Regional Democracy 2007; Dollery and Akimov 2008, Dollery et al. 2009, 2011). At that, reducing costs and improving the quality and availability of services have been mentioned as the main objectives for IMC and shared services. Therefore, the primary objective of IMC is targeted at increasing the administrative capacity, which, in light of the aspects presented at the beginning of this subchapter, can be regarded as a problematic issue, and it is questionable whether it could be achieved. The studies carried out by Australian researchers have pointed to the fact that a certain degree of cost reduction as well as efficiency can be attained by means of a competent administrative practice, but any great expectations for a remarkable significant miracle to happen are not justified. (Dollery and Akimov 2008, 95-97) In addition, the efficiency of IMC will largely depend on the exact nature of the particular local responsibility, the performance which the IMC is targeted at and the degree to which the involved parties are interested in cooperating in an efficient manner.

The relationship of democracy and IMC deserves a separate discussion. On the one hand, IMC should function to support local democracy because the centralisation of responsibilities at the central government level can be avoided in that way. On the other hand, however, the main objectives of IMC are connected with administrative capacity and cost-efficiency, i.e. with such aspects that are at odds with the principle of local democracy. (see also Bache 2010; a similar problem, arisen from the partnership related to the implementation of EU funds, has been brought out by Olson 2003). With compulsory IMC, the notion of democracy becomes blurred because, as a rule, the steering body of IMC is not democratically elected (the principle of representative democracy!), but formed of the delegated representatives of the participating municipalities. On the one hand, it poses the question about the possibility for the elected representatives at the local level to influence the quality and availability of the service, but, on the other hand, about the rights of the service users. Hence the questions: who are the customers of that level and to whom is it responsible, and, in addition, in what way can the service users exercise their influence on the quality and availability of a given service? (e.g. see Moisio et al. 2010, 230-231 and Elinvoimainen kunta- ja palvelurakenne 2012, 102-103). Olson (2003) has brought up the question of democratic control as an important argument. In the framework of IMC, the right of decision will be entrusted to a cooperating institution, while democratic control remains in the old jurisdiction of popularly elected authorities at the local level. Thus, the right of decision “moves” and democratic control “stays”. (Olson 2003, 288-289) IMC bodies become co-ordinated and get better capacity, while democratic control stays fragmented. (Olson 2003, 288)

The aspects mentioned above should not lead to the conclusion that IMC and

² In the case of the Northern-European service-oriented local self-government system, the state has delegated the majority of public responsibilities to the local level. Such local governance tends to be based on the ordinary communication with the citizens and the service areas, rather than on community (settlement). (Norton 1994; Amnå and Montin 2000).

democracy could not be compatible; rather, it was aimed to identify the risks that are likely to occur upon constructing the models.

3. Legal Base of Inter-Municipal Cooperation: “Service Provision” and “Service Production”

Oakerson (1999) drew a fundamental distinction between “*service provision*” and “*service production*”. The term “*service provision*” refers to political decisions as to what extent, to whom and on what conditions the public services should be rendered, and in what way the rendering of a service should be managed and controlled. (Oakerson 1999, 7) Managing a public service does not necessarily entail the *service production* by the same public entity which is responsible for providing that service. Which services to provide internally and which services to be outsourced outside the entity, is to be decided by each entity itself, since it requires deliberation in view of local circumstances in each individual case. (Oakerson 1999, 7; Dollery et al. 2009., 211 etc.)

Across different countries there are no notable limitations arising from the theory of law with regard to service production, whereas the situation is quite different when it comes to service provision. The constitution and the judicial area of Estonia (as in many other countries) determine the so-called *core functions of the authority of the state*. The *core functions* refer to the duties deriving from the essence of the state as an institution, such as the duties connected with authorised public powers, application of enforcement powers of the state, as well as jurisdictional functions (offence procedure).³ Proceeding from the nature of local self-government as an institution of a democratic state based on the rule of law, it is also possible to define the concept of the *core functions of local self-government*. The fundamental nature of local core functions is derived from the guiding principles of the European Charter of Local Self-Government (hereinafter referred to as *Charter*), which emphasise the power of decision and the right to manage all the important issues in community life vested with the local self-government as a representative of local community and a guarantor of local democracy; at that, the state recognises the universal competence of local government as rooted in the principle of subsidiarity. (European Charter ...) The given values also set the foundation for the Constitution of Estonia as well as that of many other countries, recognising that resolving and managing the questions of local life belongs to the essential sphere of competence of local self-government. (Mäeltsemees 2012, 165)

In addition to the core functions of local life, the municipalities also perform the so-called public administration duties upon managing a service. According to the opinion articulated by the Chancellor of Justice⁴ of Estonia, conferral of a public-law

³ The Estonian Supreme Court en banc judgement No. 3-1-1-86-07 from 16 May 2008: on the punishment of I.E. pursuant to the Public Transport Act § 54⁷ Subsection 1, in which the full court concurred with the Chancellor of Justice that such tasks which, in accordance with the spirit of the Constitution, shall be performed by the authority of the state, and which therefore contribute to the core function of the authority of the state, cannot be assigned by the authority of the state to any legal person governed by private law.

⁴ Available at: <http://www.riigikogu.ee/>.

function is, as a rule, an exception, which shall require a *lex specialis* (i.e. a special law) that would determine the possibilities of a particular authorisation in question, such as which public-law function and on what conditions shall be conferred to an extra-administrative person, which measures are necessary for its fulfilment, what kind of supervision will be applied, and in what way the liability shall be secured.

Upon building a connection between the provision as well as the production of services and the IMC, the authors have relied on the classification provided by Oakerson (1999, 17-18). The first one of these is lacking the relevance for cooperation, while variants 7 and 8 are merely connected to service production. The joint-agency variant established by Oakerson has been, furthermore, divided into two sub-variants depending on the scope of possible autonomy of the given agency.

1. “*In-house provision or production*” is a situation in which local government itself manages the rendering of a service or renders the given service;
2. “*Coordinated provision or production*” occurs when the municipalities concert their activities upon managing the services or rendering a service; no separate joint institutions will be established;
3. “*Conferring a duty to another entity of local government*”, whereby one or more municipality(ies) is (are) authorising another municipality to provide a product or service. Essentially, it is another case of internal administrative authorisation;
4. “*Joint provision/production of a service by a partially autonomous institution*”, whereby two or more adjacent self-governmental entities manage a service partly by means of an semi-autonomous intra-administrative joint institution – the joint agency;
5. “*Private contracting*”, where a municipality outsources the service to an external private service provider.
6. “*Joint provision of a service by an autonomous legal person governed by public law*” is a variant in which a service is managed/a function performed by an independent public-law institution. Such an institution, as a rule, has the competence for performing some core function of local government, so it means an integrated and comprehensive decision-making and managing of a given local-life responsibility.
7. “*Franchising*”, where a municipality gives a commercial producer the right to produce a given service from which residents can purchase the service.
8. “*Vouchering*”, where a council sets standards and the level of provision by allowing households to select their own producer using a voucher.

In the given article, IMC has been analysed from the perspective of cooperation upon fulfilling state or local government’s core functions or public administration duties, i.e. in the cases whereby IMC may prove problematic due to state administrative reasons/national legislation and which essentially mean managing the performance of a local-life duty within the service area.

4. Organisational Models of Service-area Management and IMC

Service-area management and IMC come down to the local self-government organisation applied in the given country, including its legislative, administrative and economic aspects. Upon establishing both the judicial and economic area (incl. the relevant administrative structures), different countries have been guided by different considerations; thus, various legal and administrative models can be constructed on the basis of legal and administration practices of Western countries. (Cooperation Survey 2011, Cooperation Survey 2012)⁵

1. *Fragmented small municipalities model*;
2. *Regional or functional self-government model*;
3. *Compulsory cooperation (multilevel governance) model*;
4. *Unitary (amalgamated) model*.

In the case of the *fragmented model*, the service areas of local responsibilities are divided between one or several (or many) units of local government. The following aspects are characteristic of the given model:

1. All local self-government units in the region have similar rights, obligations and liability. If the units are too small in size/with low capability for performing certain local responsibilities or there is a notable difference in terms of size and capability of the units, it may lead to a point of conflict. The local-life responsibilities of a regional nature are either performed by each local-government unit independently, in the form of voluntary IMC, or the performance of a responsibility has been imposed on the central government by law because of a low capacity at the first level.⁶
2. IMC on a voluntary basis. A state's policy can favour and/or direct cooperation, but participation in the cooperation is a matter of required interest/power of decision of the representative body of each individual unit of local government.⁷ Thus, that kind of IMC cannot be regarded as legally safe; in many ways, it functions taking into account the political preferences of the entities and the possibilities provided by the legislative framework, and its background is rooted in the traditions and administrative culture. (Swianiewicz 2010, 195; Mäeltsemees et al. 2011) Of the ways of IMC, options 2-5 can be applied.

⁵ Australian researchers (e.g. Dollery et al. 2009, 214-215; 2010, 224-225) have differentiated between 7 distinct local-governance models, but in their core essence these can be regarded as coinciding with the ones presented here.

⁶ Dollery et al. (2009, 214; 2010, 224) has viewed the two latter variants as completely separate models ("voluntary agreements model" and "agency model" – service functions are run by state-government agencies with state-government funds and state-government employees)

⁷ For example, a very multifaceted network of forms of cooperation exists in France where there is a fragmented self-governance model. (European Committee of Local and Regional Democracy 2007, 19-21; Hertzog 2010, 287-295)

The above-mentioned aspects may give rise to a situation whereby the performance of duties and public administration fail to be efficient and effective due to the fragmentation of local self-government or other similar conditions, so it will exert pressure to reform the system or centralise the responsibilities.

The *unitary (amalgamated) model* can be viewed as a kind of “adversary” of the fragmented model. The unitary model stands for one first-level local self-government entity operating in the service area. The unitary model is characterised by the following principles:

1. The aim is to have all the duties of local life performed by the basic level. Among other things it has been substantiated by adhering to the principle of subsidiarity and advancing local democracy.⁸ As already mentioned, there is no uniform approach to the optimal size of a local self-government unit. Yet in the case of the unitary model, the risk in securing the principle of subsidiarity (excessive dimensioning) should not be overlooked; for example, different models of internal decentralisation of a local self-government entity are often applied at managing major cities. (Lõhmus 2008)
2. Deriving from the previous point, the need for IMC is merely a modest one, but it is being applied under certain circumstances, nonetheless. The practical experiences have shown that even in the case of the developed unitary model, there will remain certain local tasks of a specific nature or with a spatial scope, which need to be resolved either by means of cooperation or at the higher governance level.⁹

In addition to the two models above, there are alternatives available for achieving more favourable local governance and securing services in a more expedient service area.

Regional or functional self-government is in use in several countries (Norton 1994). Although the multi-level model of self-government makes it possible to ensure the democratic self-governing administration at different regional levels, it also triggers notable points of conflicts. Key questions include the division of functions (coordination) between two autonomous levels, such as a rigidly determined service area, predominance of larger centres (in situations in which there is a dominant centre in the given region), formation of the revenue base, in a small country also scattered competence. (Barlow 1994; Mäeltsemees 2004) When observing the latest trends in European countries, particularly in the smaller ones, a tendency can be evidenced to reduce the role of regional self-government, and either to strengthen the first level (unitary model!) or to implement the compul-

⁸ The core of the Danish municipality reform was effectively a transfer of tasks and responsibilities from the regional level to the state level as well as to the municipalities. This was marketed as a local democracy reform as more responsibilities were transferred to organisations closer to the people. (Aalbu et al. 2008, 62, Blom-Hansen et al. 2010, 63-88)

⁹ For example, in the case of the unitary model in Denmark, the health services are administered at the regional level of self-government (the regions), whereas public transport and certain social services are administered in the framework of compulsory cooperation of local municipalities and regions. (“Lov om trafiksselskaber” and “Lov om forpligtende kommunale samarbejder”).

sory IMC model at its expense, instead.¹⁰ *Functional self-government features mainly outside Europe – in the United States of America, Canada, Australia and elsewhere (special-purpose districts, special district government and school districts).* The provision of legal grounds for that kind of entities belongs, on the example of the USA, to the constitutional competence of the states and, therefore, a very significant number of solutions are being used. As a general practice, they have a directly elected (by either all the population residing in the service area or by the users of the service) representative body, an independent revenue base, as well as the right to impose taxes on the residents of the service area or on the users of a service.

5. Compulsory IMC (Multilevel Governance) Model

The aim of compulsory cooperation is to ensure the minimal requirements and equal state-scale access to the performed tasks (services) bearing an importance from the perspective of state policy and general public interest, while the existing system of local self-government entities fails to facilitate the attainment of these objectives.

The need for compulsory cooperation does not necessarily stem from the fact that the overall number or economic capacity of the residents within the entities is low. As we could observe on the basis of the Danish experience, the service areas of certain responsibilities of a local-life nature are indeed usually regional rather than local (public transport, for instance) affairs; in addition, the compulsory cooperation is also essential in order to perform certain functions requiring some specific expert know-how. In the case of compulsory cooperation, mainly three different options can be implemented for defining the local-government entities covered by compulsory cooperation:

1. Compulsory cooperation is defined on the basis of a given function (i.e. the number of potential users of the service). This model has been used in the context of the Finnish PARAS reform, by which the service district of health services should be populated by at least 20,000 people, and the service area of vocational education by at least 50,000 people. If the number of residents in the entity of the local self-government complies with the mentioned requirements and there is no public interest on the regional level to involve their neighbouring entities with a smaller number of residents and failing to comply with the requirements for the service area, then compulsory coope-

¹⁰ For example, the existing county level was reorganised during the administrative reform in Denmark as of 1 January 2007, whereby the former 14 counties were replaced by 5 newly established regions. Although the regions have directly elected representative bodies, they lack open competence (only the duties prescribed by law are performed and the range of duties is limited) and an independent revenue base. (Blom-Hansen et al. 2012, 77-78) Hence it can be considered a submodel of multi-level governance, rather than an independent self-governance level. Also there is an ongoing discussion in Denmark whether regions in the given form are at all necessary (e.g. Blom-Hansen et al. 2010, 63-88 and others) In Norway, the duties of the regional level (counties) were reduced notably (Blom-Hansen et al. 2012, 75-77), and heated discussions are held about the reform of regional management in Sweden, as well (Blom Hansen et al. 2010, 122-146). In Finland, there is no regional municipality level, with the exception of the Kainuu pilot region. (Moisio et al. 2010, 221-236)

ration will not be imposed on that kind of local-government entity. In Finland, the entities of local self-government themselves may agree on the scope of the service area relying on the aforementioned criteria; similarly, they may also decide on the institutional form of the cooperation (i.e. either as a joint administrative agency or authorising another local self-government entity). (Laki kunta- ja palvelurakenneuudistuksesta, § 5) Only if the entities of the local government themselves do not establish/initiate a cooperation area on a voluntary basis, the power of decision regarding the scope and institutional form of the cooperation area will transfer to the Government of Finland. (Laki kunta- ja palvelurakenneuudistuksesta, § 5A)

2. Another option is the case whereby a given area of compulsory cooperation has been foreseen by legislation. As an example of this variant, the legislative act regulating the cooperation within the Finnish capital area and stating clearly which of the local self-governments should cooperate in certain fields of activities, can be mentioned. (Laki pääkaupunkiseudun kuntien jätehuoltoa ja joukkoliikennettä koskevasta yhteistoiminnasta)
3. The third possibility can be seen in a situation in which the compulsory cooperation area is determined on the national level on the basis of some specified territorial qualities, but cooperation is a compulsory affair on the given territory. One of the examples of such cooperation is Regional Councils in Finland (Laki alueiden kehittämisestä) and the Joint Transport Centres in Denmark (Lov om trafikselskaber)

Alongside the advantages of compulsory IMC, its argued criticism and implementation limitations can be found in literature as well, most importantly concerning the issues of local autonomy, coordination and democratic responsibility.

Compulsory IMC certainly means a significant infringement of local autonomy, as it curbs the right of the local government to take decisions and administer/manage the local-life questions independently. The principles of local autonomy would be considered contradicted in a case when a predominant share of the local-life responsibilities would be permitted to be conferred to a cooperation institution and one's functions would be allowed or requested to be transferred to such an extensive degree that the local self-government itself would become virtually unable to function. (see Elinvoimainen kunta- ja palvelurakenne 2012, 102-103)

The controversial aspects of the relationship between IMC and democracy were elaborated on in a previous chapter.

The *coordination issue*: Getting a full picture would become complicated for the public authorities – and even more so for the electorate – in differently run service areas in which a variety of duties and various regions are operated. It requires a systematic and more purposeful approach to build up an IMC. (e.g. see Swianiewicz 2010, for a Finnish model see Moisio et al. 2010, 230-231 and Elinvoimainen kunta- ja palvelurakenne 2012, 101-103) It will get even more complicated if the multi-level governance model or voluntary cooperation is applied simultaneously with the multilevel self-governance model in the country.

6. The Inter-Municipal Cooperation (IMC) in the Estonian Juridical Area

In Estonia, a voluntary IMC is a right guaranteed by the Constitution to the local government. According to the Constitution § 159, a local self-government has the right to form unions and joint agencies with other local governments. The right granted by the Constitution serves to provide the content to Local Government Organisation Act § 12, § 62 and § 63, which determine the following forms of cooperation for expressing, representing and protecting joint interests and performing joint responsibilities (based on the classification provided in Chapter 2)

1. *Coordinated service provision or production;*
2. *Joint agencies;*
3. *One entity of local government acting in the name of another;*
4. *Legal person in private law, incl. county's union of local governments.*

Based on the Cooperation Surveys (2011, 2012), the following legal factors inhibiting the cooperation can be pointed out:

6.1 The Bases of IMC Have Been Provided by Law Only in General Terms

As regards determination of the forms of IMC, the judicial area has been laconic in Estonia and it primarily concerns the cooperation in the form of a joint agency. In the surveys, a joint agency has been primarily treated as an entity formed on a contractual basis and rendering a service (Cooperation Survey 2011, Cooperation Survey 2012), whereas in the practices of other countries a joint agency also refers to institutions acting as a joint agency – administrative agencies¹¹ – with the functions of organising public service and exercising official authority. In the cases of joint agencies, at least the conditions for participation in and departure from joint agencies, the terms and requirements for their Statutes and its amendments, the right of representation of the members and the legal capacity of a joint agency should be regulated by legislation.¹² As we know, there has been just one joint agency in Estonia; it operated under the name *The Joint Agency Environmental Centre of the Valga Region/Ühisasutus Valga Piirkonna Keskkonnakeskus*. This joint agency was closed in 2005, and a foundation acting in the same field was

¹¹ Administrative agencies have been defined by the Public Service Act § 2 as follows: An administrative agency is an agency which is financed from the state budget or a local-government budget and the function of which is to exercise public authority. Among the categories of administrative agencies listed in the Act, joint agencies have not been mentioned.

¹² Also Estonian professional and academic publications and viewpoints lack the unanimity as to whether a joint agency would primarily be a renderer of a service in a specified field (joint school, joint library, or similar) or whether a joint agency can also refer to the so-called joint administrative agency. The Ministry of Justice expressed their opinion in 2005, stating that although a joint agency shall be established by a contract under public law, it will not involve any delegating to an extra-administrative person; therefore, such a joint agency will basically enact/perform the competence of all the local governments which formed it. In its audit report (2012a), the National Audit Office has recommended to make use of a joint agency for the purpose of engaging joint officials.

established, instead. The reason was the legal status of the joint agency, which remained ambiguous, giving rise to frequent misunderstandings and misinterpretations in records management.

Conferring duties to another local government entity is a common practice in local government rights in many countries (e.g. Finnish “Kuntalaki” § 76, Denmark “Lov om forpligtende kommunale samarbejder” and others). The main problem with the Estonian judicial area is that our legislation leaves undefined how such cooperation should exactly work, and, furthermore, how the required interest and control over the service will be ensured to the local self-government entity conferring the duty. One actual case has been connected with the Law Enforcement Agency of Vaivara Municipality/Vaivara valla menetlusteenistus – an administrative agency responsible for administering the procedures of surveillance and misdemeanours – which was established as a cooperation institution by five municipalities in the Ida-Virumaa County. Since the currently valid act does not allow the surveillance and procedures of misdemeanours to become conferred to an official at another local self-government unit, the officials of the administrative agency acting as the cooperation institution are simultaneously also the part-time employees at their own local municipality unit – a situation that creates complicated problems that are related both to management as well as legislation. (Cooperation Survey 2012)

6.2 IMC Is Not Favoured by the Forms of Cooperation

The forms of cooperation which are based on the legal person governed by private law, take no notice of the specific character of local government as a public institution, so the most important weaknesses stem from its private legal nature and the specifics of its management model.

- The Estonian judicial area regards an association of the entities of local self-governments as a legal person governed by private law. The bestowal of public-administration functions upon a legal person governed by private law is limited, while the conferment of certain responsibilities is not allowed at all (exercising the punishing function, certain functions of exercising official authority, etc.). For that reason, the use of this form of cooperation is limited upon organising a function/duty.
- Another noteworthy bottleneck derives from the inappropriateness of the decision-making process. The Non-profit Associations Act relies on the presumption that it is a voluntary association of private persons; the Act does not prescribe any specific voting rights arising from the specifics of an individual member. For example, all members have one vote at the general meeting, including in the case of local self-government – regardless of the population of the given entity or how much the entity must contribute to the cooperation. This bottleneck occurred instantly when the construction of the possible management model for the IMC of the self-government units in Tallinn and the capital region began (Cooperation Survey 2011).

6.3 Legal Certainty

Laws and regulations allow the municipalities involved in IMC to renounce their participation at any point in time; for this reason, the currently existing voluntary-based IMC models cannot be regarded as having a legal certainty. The legislation in Finland, Denmark as well as Norway provides a specified term of advance notice for terminating cooperation, whereas in certain cases the central administration has been vested with the right to impose additional restrictions with regard to the term of terminating the cooperation.

The current Estonian judicial area does not envisage an IMC in the form of a legal person governed by public law. As stated in the General Part of the Civil Code Act § 25 Subsection 2, a legal person governed by public law is an independent institution which has been founded in the public interest and pursuant to an Act concerning such legal persons in public law. Theoretically, a legal person governed by public law is the only form of IMC which can be conferred the right to issue legislation of general application. Since a legal person in public law shall be formed by law, it is not expedient to use it in the framework of voluntary IMC; this form of cooperation should rather be applied upon implementing various forms of compulsory cooperation.

7. The Perspective of Implementing the Compulsory IMC Model in The Estonian Judicial Area

The OECD report (2011) gives rise to the question whether it would be possible to implement the compulsory cooperation of local government in Estonia, as well. As seen from the experiences in other countries, compulsory cooperation *per se* has not been regarded as contrary to the principle of voluntary cooperation established in the Charter, and the legal problems may derive merely from national legislation. The authors define the conditions as the extent to which the principles of a balanced democracy and administrative capacity are in the framework of the compulsory IMC.

Pursuant to Constitution § 154, all local-life issues shall be resolved and managed by local governments, which shall operate independently pursuant to law (the so-called right for self-management). In addition, as stipulated in § 160, the local-government organisation and supervision of their activities is prescribed by law. The Supreme Court of Estonia has defined and delimited the questions of local life as follows:

Local life issues are, pursuant to the criterion of essence, such issues which stem from the local community, concern the local community, and are not, according to a formal criterion, involved or given by the Constitution to the competence of some national authority. The regulator has the right to make the performance of a local life responsibility mandatory for a local government entity, provided that it is a proportional tool considering the right for self-management and directed at achieving an aim endorsed by the Constitution.¹³

¹³ Estonian Supreme Court en banc judgement No. 3-4-1-8-09 from 16 March 2010.

The said aspects are directly deducible from Articles 4.2, 4.3 and 4.4 in the Charter. A general list of the compulsory duties of a local government has been presented in the Local Government Organisation Act § 6 in Subsections 1 and 2, as well as in Subsection 3 Clause 1.

- The authors have repeatedly emphasised in the given article that deeming a public function a local issue not only depends on the nature and scope of the given responsibility, but also on the capacity and capability of the given local government. In the case of the so-called obligatory local-life functions mentioned above, the state has been reserved the right to prescribe how and under what conditions the function shall be performed, and among other things to set the minimum requirements for the duty.
- In case of the fragmented model, it is likely that not all the entities of local government have a similar capacity level; hence the minimum level of the responsibilities/functions serving public interests may not be secured across all regions. Also the Estonian National Audit Office has called attention to this aspect (Estonian National Audit Office 2008a, b, 2009a, b, c 2011, 2012a, b, 2013). The Supreme Court has emphasised that the state cannot allow a situation to occur whereby the availability of vital public services will depend extensively on the economic capacity of the local government unit in the person's location or place of residence.¹⁴
- As regards certain vitally important public services, the essential public interest has already been established by the Constitution – these include the duties of the social welfare state provided in § 28¹⁵ as well as the requirements for the organisation of an education system provided in § 35.¹⁶ In the given spheres of life, the public interest demands that a nationally homogeneous minimal requirement should be ensured and the regulator has a freedom of decision upon defining/delimiting the local governmental and national responsibilities within the limits provided by the Constitution.
- Consequently, when referring to the lack of capacity of a local government, the central government has been provided the opportunity to nationalise certain local issues of a regional nature or, as an alternative, to initiate reforms targeted to increasing the capacity of local government units (the results of which will include a merger of entities).

When we draw a comparison between the alternative options for performing a problematic function – as compulsory cooperation or as nationalisation of the given

¹⁴ Estonian Supreme Court en banc judgement No. 3-4-1-8-09 from 16 March 2010.

¹⁵ ... An Estonian citizen has the right to state assistance in the case of old age, incapacity for work, loss of a provider, or need. The categories and extent of assistance, and the conditions and procedure for the receipt of assistance shall be provided by law. ... The state shall promote voluntary and local government welfare services. Families with many children and persons with disabilities shall be under the special care of the state and local governments.

¹⁶ ... Education is compulsory for school-age children to the extent specified by law, and shall be free of charge in state and local government general education schools. In order to make education accessible, the state and local governments shall maintain the requisite number of educational institutions. ...

responsibility – it is beyond doubt that nationalisation will infringe the local autonomy more seriously.

Therefore, it has not been ruled out by the general principles of the Constitution that the state could not establish minimum requirements (such as the service area) and prescribe compulsory IMC to ensure a service in the cases of certain functions/tasks/duties, provided that it will serve the public interest and that the principle of legality and proportionality has been respected. At the same time, the Charter and the Constitutions set their limits to that kind of compulsory IMC, which are as follows:

- It can only be the so-called compulsory local-life function with significant public interest. In all cases of compulsory IMC duties, the optimal service area necessary for performing the given responsibility should be previously found out, the existence of public interest substantiated, as well as verified that a voluntary cooperation in the given field is not working. Preferably, the units of local self-government should be given the opportunity to establish a cooperation institution in the previously determined optimal service area on a voluntary basis; if it fails to work, it is justified that the service area is to be specified by the central government.
- The cooperation institution can only have the competence delimited by law, i.e., only the functions/responsibilities that have been imposed on it by law. Such interpretation is in accordance with *Charter* Article 4 Cl. 2, which stipulates that the local authority shall, within the limits set by legislation, have full discretion to implement its initiative in any matter which is not beyond their competence nor imposed on any other body of power; it also accords with the concept of the Constitution § 154.
- The management model of an IMC institution must be structured and the decision process devised in such a manner that none of the participating entities of a local government would be granted the power of sole decision in the cooperation body. Such a situation would also be conflicting with the Constitution § 154 (an entity would be left without the possibility to be included in discussions about its local issue). The solution can be both setting a limit at 50% to the right of decision of the largest partner and providing the largest partner the power of veto in certain questions.
- The most intensive infringement of local autonomy occurs when the cooperation organisation has been given the right to issue legislation of general application or to make other significant discretion-based final decisions (e.g. in legislative proceedings of plans). Compulsory cooperation is possible also in such fields that are anchored in preparing decisions based on expert knowledge, making routine decisions (e.g. issuing building permits) and exercising surveillance function, whereas the infringement of local autonomy is essentially absent or merely exists to an insignificant extent.
- Should an entity of local government have the doubt that upon establishing an institution of cooperation its autonomy will be infringed disproportionately, it has been reserved the right to file a corresponding appeal to the court. The given right is contained in the Charter Article 11 and also endorsed by the Constitutional Review Court Procedure Act § 7, currently valid in Estonia.

8. Discussion: Practical Recommendations for the Development of IMC in Estonia

In the article, those local-life functions/responsibilities were outlined which have given rise to doubts regarding their management efficiency in the service areas determined by the current local-government system. Several fields have been pointed out in the various audits by the Estonian National Audit Office, such as spatial planning and construction supervision¹⁷, waste management¹⁸, and various social services¹⁹. Other burning issues in the current judicial area in Estonia today include the planning and organisation of upper secondary education²⁰ as well as public transport.²¹ The authors claim that a question of a local-life nature should be organised by making use of different forms of IMC and by involving the local population in the decision-making process.

When speaking of the IMC upon organising (incl. on compulsory basis) a local-life responsibility the authors differentiate between two principal options:

1. IMC which is directed at preparing decisions on the grounds of expert know-how, carrying out proceedings and making the decisions not entailing the discretion of principle, rather than rely, above all, on the check of factual prerequisites (so called *official-centred services*). In addition, exercising supervision and misdemeanours capacity can also be included in this category. (Alternative 1)
2. IMC which has been targeted to comprehensive planning of a field of life and organising the given field relying on common interests of the service area.

¹⁷ The problem is related to the competence and know-how of local governments upon compiling plans, legislative proceedings of plans, and managing construction supervision, incl. lack of competent officials, ability to see a regional picture, etc. (National Audit Office 2008b, 2009a, b, 2011, 2012a, b)

¹⁸ Primarily, the problem is with the competence of smaller municipalities and the formation of optimum-sized areas for organised waste transport, as well as the capacity for administering the organised waste transport. (National Audit Office 2008a)

¹⁹ Usually there are no minimum requirements determined for social services, although, for example, recommendations may have been provided in some development plan (e.g. number of children per child protection official). The National Audit Office has emphasised in several of its audits that the availability of social services has not been ensured across all regions and that there is a deficit of competent officials. (National Audit Office 2009c, 2012, 2013)

²⁰ The new Basic Schools and Upper Secondary Schools Act prescribes certain requirements for upper secondary schools (three parallel fields of study, etc.); as a result of the demographic trends, many of the upper secondary schools – especially in rural areas – will not be able to fulfil these conditions. Today it is being discussed which secondary schools will stay and which will be closed down; however, it also needs to be decided shortly in what way the secondary school network is to be administered and whether it will be the state or the local self-government that will become the administrator.

²¹ Public transport is a service of a regional nature. In Estonia, pursuant to the Public Transport Act, it is organised by very different institutions: the local government organises its internal transport and school transport, the county government (state) is responsible for organising the transport on the county level, whereas rail transport is managed by the Ministry of Economic Affairs. At the same time, the commuting exceeds the boundaries of both individual local governments as well as county boundaries, in particular within the impact areal of major cities, the coordination and cooperation of different institutions is insufficient. The state has planned to establish national public transport centres at the state authority called Road Administration, but the complexity of this task has stalled the idea from becoming a reality. The authors support the development of public transport with the participation from local-government entities.

This option may require some decisions and arrangements pertaining to the issues that fall into the category of core functions of local self-government. (Alternative 2)

According to the estimations of the authors of this article, the IMC in the framework of Alternative 1 would be a preferable option. This judgement relies on the arguments presented in the chapter “The perspective of implementing the compulsory IMC model in the Estonian judicial area.”

Cooperation Survey 2012 also included an analysis of IMC in terms of its cost-efficiency as well as the economic rationalisation upon administrating the social welfare (welfare of the elderly people) and waste management. The research results demonstrated that in the field of waste management, IMC can be regarded as a justified solution in the case of managing the so-called official-centred services; it is a service related to an evident economy-of-scale effect and cost efficiency. To begin with, it is necessary to highlight an Estonia-specific problem, which was referred to at the beginning of this chapter already as it had been outlined in the audits by the National Audit Office – in the present day, the mentioned services are not staffed with specialists, and neither the quality nor the availability of these services have been guaranteed. Therefore, implementing IMC will mean actual costs from the perspective of a local self-government. The possible expenditure upon implementing an IMC model would remain lower than the potential cost arising from employing an individual official at each self-government entity.

As analyses demonstrate, in waste management, there is an apparent scale efficiency in such activities whereby a general framework is being created for the purpose of administering waste management: drawing up waste-management plans and waste-management regulations, following the procurement procedures, also surveillance and control functions in the field of waste management. The economies of scale stemming from the specialisation of the officials will become apparent starting from 20,000 or more residents. To conclude with, the optimal size of a service area for waste management would be a minimum of 20-30,000 residents. The same survey yielded the conclusion that in the realm of social welfare, the cost-efficiency can be striven for only within certain limits, because it is more reasonable to organise the social services as closely to the problem and/or the service user as possible. Administrative economies of scale and/or scope can be achieved in the case of such positions which require some specific expertise, for example in the field of protection of children or social counselling.

8.1 Conferring a Duty to another Entity of Local Government vs. Administrative Agency

In the authors' view, it can be stated that the performance of the so-called service provision and IMC in the given sphere is not significantly affected by any legal impediment; the problematic issues are primarily a matter of subjectivity, and all possibilities for the organisation of either voluntary or compulsory cooperation are already at hand. The question of joint agencies requires more precise provisions than currently available. Conferring a duty to another entity can be applicable upon building the cooperation models both on the basis of Alternative 1 as well as Alter-

native 2, and also upon organising the compulsory cooperation. It makes sense to implement this alternative when joint officials are applied, or in a situation whereby one major entity of local self-government has the predominance in the region, so its capacity enables it to act also in the name of the neighbouring self-governments. A joint administrative agency is formed on the basis of a contract under public law concluded by the involved parties and, unlike the previous option, it will function as an independent organisation; a joint administrative agency can be considered reasonable in the regions without an entity notably dominant over the other local self governments.

In the authors' opinion, it is reasonable to use both the conferral of a responsibility to another local government entity as well as the option of joint administrative agency (depending on the situation) upon the organisation of environmental services (waste management), spatial planning, construction supervision, procedures of surveillance and misdemeanours if based on Alternative 1. Making discretionary decisions in planning-related questions (initiation or adoption of a plan) would mean a significant infringement of the autonomy of local government and would be, therefore, a problematic matter. However, a joint committee of local government could participate in making discretionary decisions in the cases of plans with a cross-boundary impact.

In addition, this form of cooperation is suitable for employing different joint officials and administering some specific social services. The state must reach the decision whether the application of compulsory IMC in those spheres is necessary, and the legal bases for such cooperation needs to be laid down in law, incl. the basis for the formation of a joint decision-making and controlling body.

8.2 A Legal Person in Public Law

The authors maintain that establishing a legal person in public law can be regarded as justified in such fields in which it is necessary both to plan as well as administer a service in the service area, issuing thereby the legislation of general application, administering surveillance and penalty functions, if needed. At that, a comprehensive approach to the development of the region is important (incl. both in high-density and low-density areas).

The authors suggest that the formation of a public cooperation institution for administering public transport or secondary education can be considered justified; there it would be an intriguing idea if regional local governmental institutions as public self-government institutions would administer both the network of secondary schools as well as public transport. Public transport is a crucial prerequisite for a working secondary school network; in that case, also vocational schools might be included in the system. Such institutions are established by an act also determining all organisational issues.

9. Conclusion

The opportunities for intra-municipal cooperation in Estonia targeted at performing a duty or managing a service coincide more or less with those cooperation models applied in Northern Europe (Finland, Sweden, Denmark, Norway). One of the common traits shared by the Nordic cooperation models is that the core functions, as a rule, are not assigned onwards. The IMC institutions are formed on the basis of the service area; they are semi-autonomous in their nature, dealing with the provision of a service (including performing the functions of public administration) as well as making use of the advantage stemming from the scale effect or from the optimal spatial scope of a service, or ensuring the availability of the specialists with expert knowledge. The principal forms of cooperation for managing a service/performing a task are as follows:

- *A Coordinated management of a service;*
- *Assigning it to another local government entity;*
- *A joint managing of a service/performing of a responsibility partially by/ together with an autonomous institution (a joint agency);*
- *Conferral of the managing of a service/performing of a responsibility to a legal person governed by private law.*

The authors emphasise once more that different forms of cooperation between the entities of local government, including compulsory IMC, must be organised in such a manner that the users of public services and the residents of the region would have a full awareness of who is performing the given duty, who is the decision-maker and who is in charge of the performed task. A multiplicity of various service areas ought not to lead to coordination problems, and the scope of cooperation should not reach the point where the local authorities will lose their ability to decide the majority of local-life functions.

The performance of a local-life responsibility by the local government should remain the rule, an exception justified primarily in the fields of a specific nature or which cannot be resolved with sufficient efficiency and effectiveness on the individual level of each local government due to the size of service area. The authors of the article consider the determination of minimal requirements for the *local self-government responsibilities with significant public interest* by the state as the first step towards the advancement of local governance in Estonia. At that, these minimum requirements may be based either on the number of users of the service, the territorial scope of the service area, or any other measureable criteria. Only then will it become practical to decide in which fields it is necessary to construct the possible cooperation models, incl. to apply compulsory IMC models, if necessary. The latter is not regarded by the authors as conflicting, neither with the Charter nor with the Constitution, but the underlying principles outlined/devised/proposed in this article must be taken into account.

A crucial prerequisite for developing the IMC is reviewing the provisional/pre-requisite bases for IMC; in that respect, the authors support the conclusions provided in the OECD review. First and foremost, it is necessary to define the legislative basis of IMC more clearly, offering thereby legal models that are real and workable.

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²² All National Audit Office audits are available at <http://www.riigikontroll.ee/tabid/206/OtherArea/1/language/en-US/Default.aspx>.

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Legal acts:

Estonia.²³

1. Avaliku teenistuse seadus (Public Service Act).
2. Eesti Vabariigi Põhiseadus (Constitution of Estonia).
3. Halduskoostöö seadus (Administrative Co-operation Act).
4. Haldusmenetluse seadus (Administrative Procedure Act).

²³ The English translation of the texts of the Estonian legal acts are available at the website of the Ministry of Justice at www.legaltext.ee.

5. Jäätmeseadus (Waste Act).
6. Kohaliku omavalitsuse korralduse seadus (Local Government Organization Act).
7. Kohaliku omavalitsuse liitude seadus (Local Government Associations Act).
8. Mittetulundusühingute Seadus (Non-profit Association Act).
9. Põhikooli ja Gümnaasiumiseadus (Basic Schools and Upper Secondary Schools Act).
10. Põhiseaduslikkuse järelevalve kohtumenetluse seadus (Constitutional Review Court Procedure Act).
11. Planeerimisseadus (Planning Act).
12. Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act).
13. Äriseadustik (Commercial Code).
14. Ühistranspordiseadus (Public Transport Act).

Finland

1. Laki kunta- ja palvelurakennemuutuksesta (Act on Restructuring Local Government and Services).
2. Kuntalaki (Local Government Act).
3. Laki pääkaupunkiseudun kuntien jätehuoltoa ja joukkoliikennettä koskevasta yhteistoiminnasta (Act for Local Government Entities in the Capital Region Regarding Waste Management and Public Transport Cooperation).
4. Laki alueiden kehittämisestä (Regional Development Act).

Denmark

1. Lov om forpligtende kommunale samarbejder (The Act for Compulsory Intra-Municipal Cooperation).
2. Lov om trafiksselskaber (Joint Public Transport Centres Act).

Norway

1. Lov om kommuner og fylkeskommuner (kommuneloven) (Local Government Act).

Appendix 1

Opportunities and limitations for imc in estonia

Form of cooperation	Legal basis of the form of cooperation	Output of the cooperation	Comments/Remarks
<i>Coordinated service provision</i>	Local Government Organization Act § 37(5) Waste Act § 42 (1), Planning Act § 8 (2) etc.	Joint development plan, joint waste-management plan, spatial planning, or other legislation	It presumes legislation based on consensus among the councils, as well as consensus upon amendments. Therefore, this form of cooperation has a low legal certainty; should there be many partners, the process of making amendments can be time-consuming.
<i>Joint agencies</i>	Local Government Organization Act § 62(2) Basic Schools and Upper Secondary Schools Act § 61(3) Contract under public law which has been approved by Council and whereby the conditions for performing a function/duty, funding, etc. aspects have been established.	The service is provided or produced by institutions, such as schools, nursery schools, libraries, community centres, hobby centres, centres for young people, etc.)	Rarely applied in Estonia, because the legal basis is too general and vague (conditions for performing the function/responsibility, funding, management model, incl. representation, legal certainty, have not been provided). Legislation makes no allowance for establishing a joint administrative agency.
<i>Grant authority to another municipality</i>	Local Government Organization Act § 62(1) Contract under public law which has been approved by Council and whereby the conditions for performing a function/duty, funding, etc. aspects have been established.	Performing a public function, function management, common officials	Rare in Estonia, because the legal basis is too general and vague (conditions for performing the function/responsibility, funding, management model, incl. in what way the authorising local-government entity can influence and control the quality of a service/responsibility, and legal certainty of the cooperation have not been provided)
<i>County association of local governments</i>	Local Government Organization Act § 62 (1) Local Government Associations Act § 2 Its founding or participation will be decided by the Council; representatives are nominated by the Council.	Representing joint interests on the county level. Common officials. Service management if provision delegating authority has been provided by law.	As it is a matter of a rigid service area (county) and the representation of regional joint interest is the core function of the institution, the organisation of the rendering of the service and fulfilling public functions can be problematic
<i>Legal person in private law</i>	Local Government Organization Act § 35 Non-profit Association Act Commercial Code; Foundations Act, Establishment of participation is decided by the Council, other rights are enacted by the government.	Organisation of services, if provision-delegating authority has been provided by law; rendering a specified service in different fields of life (water undertakers, hospitals, etc.)	The management model of a non-profit association leaves the specifics of a local government out of account. Conferring all public functions to a non-profit association is not possible. In the case of companies, only production of a service is possible.

Source: Analysis performed by the authors

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