COMPLIANCE OF THE RIGHT TO ISSUE REGULATIONS OF THE BANK OF ESTONIA WITH THE CONSTITUTION AND EU LAW

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I. Introduction

This article is concentrated on the question of whether the Bank of Estonia may issue regulations according to the constitution and on the interpretation of the constitution related to this question.

The assessment of the compliance of the right to issue regulations of the Bank of Estonia with the constitution requires theoretically and practically justified answers to the three following questions:

Which role does the Bank of Estonia play arising from the constitution and law?

Based on the principles and standards of the constitution, what kinds of remedies and legal acts need to be issued for its role (tasks)?

Can Riigikogu issue the right to also issue regulations to those bodies/persons that have no respective right according to the constitution (unless explicitly provided for by the constitution)?

II. Bases arising from the constitution and Bank of Estonia Act

Two §'s (§ 111 and 112) of the constitution of the Republic of Estonia concern the legal status of the Bank of Estonia. Estonia differs from many EU member states on the level of the legal status of the national central bank, including the fixation of the sole right of money emission on the level of the constitution (e.g. in the Federal Republic of Germany, the legal status of the national central bank is not regulated by the constitution but by a separate law - *Gesetz über die Deutsche Bundesbank*).

According to § 111 of the constitution, the Bank of Estonia has the sole right of emission of the Estonian currency. The Bank of Estonia organises the currency circulation and is responsible for the stability of the currency of the state. § 111 of the constitution provides the tasks to the emission of Estonian currency, organisation of currency circulation and ensuring the stability of the currency to the Bank of Estonia. § 111 of the constitution does not provide the competence of the Bank of Estonia to the full extent but only the tasks reflecting the purpose of the Bank of Estonia – ensuring the stability of the national currency. The Bank of Estonia is the constitutional institution performing the executive and organisational tasks (including realisation of the sole right of the emission of Estonian currency, organisation of the currency regulation and obligation of ensuring the stability of the national currency) characteristic to the executive power according to § 111 of the constitution. Pursuant to the provisions of § 112 the Bank of Estonia acts on the basis of the law and reports to Riigikogu. This provision provides the reporting to parliament – Riigikogu –, and the independence from the Government of the Republic.

The law providing the legal status of the Bank of Estonia, including the legal bases of the activity is the Bank of Estonia Act[1] (hereinafter referred to as BEA). The Bank of Estonia is the central bank of the Republic of Estonia and a member of the European System of Central Banks. The Bank of Estonia is the legal successor of the Bank of Estonia as the central bank of the Republic of Estonia founded in 1919 whereby it holds the immovables and movables that were owned by the Bank of Estonia as the central bank of the Republic of Estonia founded in 1919 and illegally transferred in 1940.

As a legal person the Bank of Estonia possesses, uses and disposes of its properties independently (section 2 of § 1 and section 2 of § 26 of BEA). It means that the property of the Bank of Estonia cannot be deemed state property because the property of a legal person or the legal person cannot be owned by other persons but the property of a legal person can be owned by itself (sentence 2 of section 2 of § 6 of Law of Property Act). The status of the Bank of Estonia as a legal person governed by public law is best characterised by the circumstance that the Bank of Estonia is not responsible for the proprietary obligations of the state and the state is not responsible for the proprietary obligations of the Bank of Estonia (section 2 of § 3). It can be concluded from the conjunction of the above mentioned provisions of the Bank of Estonia Act that the Bank of Estonia is an independent legal person governed by public law founded on the basis of §'s 111 and 112 of the constitution.

In addition to § 111, § 2 of the Bank of Estonia Act provides the purposes and tasks of the Bank of Estonia. The primary purpose therein is to ensure the stability of the fixed prices. The Bank of Estonia organises the currency circulation in Estonia and in cooperation with foreign countries and is responsible for the stability of the national currency. The Bank of Estonia holds the sole right of the emission of Estonian currency. Emission and removal of the Estonian currency shall be carried out on the basis of the law.[2] The task of the Bank of Estonia is to hold the precious metals and foreign currency reserves of the state and to organise their use. The constitution, in conjunction with the Bank of Estonia Act, gives the performance of the national currency and banking policy and directs the credit policy to the competence of the central bank whereby no governmental institution may determine how the central bank must act in the performance of these policies. Regulation of the Bank of Estonia Act in this section is in compliance with the practice developed countries have applied for decades already. In order to ensure the implementation of the financial policy, the performance of it is imposed on the independent central bank in the European legal system. This international practice is based on the ineluctable contradiction between the short-term and long-term purposes of the economy. Influencing the financial political environment for the short-term increase of economic activeness, which often interests the government for political reasons, can only give very limited results. In the long run, it may lead to the instability of the money that is in contradiction with

[1] RT I 1993, 28, 498; …; RT I, 09.05.2014, 2.
[2] This law is the Republic of Estonia Money Act (RT 1992, 21, 299; RT I 2002, 63, 387).

the long-term interests of the state. For this reason, it has become necessary to give the performance of financial policy to an institution independent of the executive power.[3]

III. Independence of the Bank of Estonia

§ 3 of the Bank of Estonia Act provides the independence of the Bank of Estonia. The Bank of Estonia acts independently from the other national institutions. It reports its activities to Riigikogu, it is not subject to the Government of the Republic or any other institution of executive power or third parties. As a member of the European System of Central Banks, the Bank of Estonia and the members of its management bodies may apply for and receive instructions only from the European Central Bank (connection with the provisions of article 130 of the Treaty of Functioning of the European Union).

Independence of the Bank of Estonia is characterised by the circumstance that the Bank of Estonia supports the economic policy of the Government of the Republic within its authorisations according to section 4 of § 4 of the BEA if it is not in contradiction with the purposes and tasks of the Bank of Estonia provided by § 2 of the law and does not prevent performing them. In practice, the Bank of Estonia cooperates with the Government of the Republic and gives advice on economic political issues to the Government of the Republic. Generally, the Government of the Republic takes no important economic political decisions without hearing the opinion of the Bank of Estonia. In addition, the Bank of Estonia represents the state at the authorisation of the Government of the Republic in the international financial organisations of which the Republic of Estonia is a member. Following the principle of the independent central bank separated from the executive power recognised in the international and European legal system, the central bank participates in national economic policy through the performance of independent financial, credit and banking policy and organisation of the currency circulation without damaging the specific, legal and constitutional purposes and tasks of the Bank of Estonia.

The institutional independence of the Bank of Estonia as the national central bank and the personal independence of the member of its management body arise from the conceptual provisions of the constitution and the Bank of Estonia Act. One of the constitutional guarantees of the independence of the Bank of Estonia is also the circumstance that the legal status of the Bank of Estonia can only be modified by amendments to the Bank of Estonia Act Amendment Act (section 1 of § 1 of BEA). Hereby the Bank of Estonia Act is a law registered in the catalogue of the constitutional laws that can only be passed and amended by majority vote of Riigikogu according to clause 12 of section 2 of § 104.

Requirement of the independence of the national central bank arises from the Treaty on Functioning of the European Union[4] (former Treaty establishing the

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[3] A. Tupits. Euroopa Liidu riikide keskpankade õigusliku seisundi võrdlus. – Juridica, 2000, No. 1, p. 59.

[4] **Consolidated versions of the European Union and Treaty on Functioning of the European Union** (in the redaction of Lisbon Treaty) - ELT C 83, 30.03.2010.

European Community) according to which the European System of Central Banks consists of the European Central Bank and national central banks. The European Central Bank is a legal person. The main task of the European Central Bank is the development and implementation of financial policy through the national central banks within the European System of Central Banks. Article 127 of the Treaty on Functioning of the European Union (former section 2 of article 105 of the Treaty establishing the European Community) provides the tasks of the European System of Central Banks as follows: determine the financial policy of the union and apply it; perform the foreign currency transactions according to the provisions of article 219; keep and administer the official foreign currency reserves of the member states; promote the fluent operation of the tax systems.

Article 130 (former article 108 of the Treaty establishing the European Community) provides that using the authorisations and performing the tasks and obligations imposed on them by the founding treaties and statutes of the European System of Central Banks and the European Central Bank, the European Central bank or any other national central bank or any member of their decisive body does not apply for and does not receive any instructions from any institutions, bodies or authorities, government of any member state or any other body. Institutions, bodies and authorities and governments of member states shall be obliged to respect this principle and shall not try to influence the members of the decisive bodies of the European Central Bank or national central banks in the performance of their tasks. Thus, none of the third parties or bodies, including the government of a member state, may influence the national central bank in the financial, credit and banking decisions taken in the performance of their tasks, nor the administration of the foreign currency reserve by the national central bank, nor foreign currency transactions by the central bank, nor the fluent operation of the payment systems because it may restrict the principle of the independence of the central bank provided by the foundation agreement.

Prohibition on the accreditation of the public institutions, authorities and bodies arising from article 123 of the Treaty of Functioning of the European Union (former article 101 of the foundation contract of the EU) shall apply to the Bank of Estonia. It is also prohibited for the European Central Banks or central banks of member states (hereinafter referred to as national central banks) to issue an overdraft facility or other types of loan facilities for the union's institutions, bodies or authorities, central governments of the member states, regional, local or other public bodies, other persons governed by public law or companies with a holding of the state. It is also prohibited for the European Central Bank or national central banks to buy the debt obligations directly from them. The analogous prohibition is also included in § 16 of the Bank of Estonia Act.

Arising from the above mentioned, the independence and distance of the Bank of Estonia from the Government of the Republic and executive power and its legal status as a legal person governed by public law arise from the principles and standards of the

law of the European Union and are in compliance with the international practice that has been applied by European countries in the last decades.

IV. Right of the Bank of Estonia to issue general legal acts to third parties

In the constitutional practice of Estonia, the Electronic Money Institutions Act arising from EU law and proceeded in Riigikogu a conceptual question has risen about the right of the Bank of Estonia to issue mandatory general legal acts to third parties, i.e. the question is generally about the right to issue regulations of the Bank of Estonia, its content and extent and compliance with the constitution of the Republic of Estonia and law of the European Union.[5]

The law detailing the competence of the Bank of Estonia in the form of the tasks fixed in the constitution and issuing the means to the Bank of Estonia to perform the tasks is the Bank of Estonia Act.

The referred law authorises the management bodies of the Bank of Estonia to issue the general and single legal acts. Section 5 of § 1 of the Bank of Estonia Act provides that the Council of the Bank of Estonia issues the decisions for the performance of the task of the Bank of Estonia and the President of the Bank of Estonia issues the regulations and directives. However, § 11 provides the competence of the President of the Bank of Estonia. The President of the Bank of Estonia issues the regulations and directives. Regulations of the President of the Bank of Estonia as legal acts of a regulatory (legislative) nature shall be published in Riigi Teataja (sections 5 and 6).

Thus, the Bank of Estonia Act provides that for the performance of the tasks of the Bank of Estonia, the Council of the Bank of Estonia and President of the Bank of Estonia issue the legal acts that comprehend the legislative acts in the form of regulation and the single legal acts in the form of decision or directive. Solutions to the questions concerning the activity of the Bank of Estonia in practice are formalised as decisions of the Council of the Bank of Estonia, and the solutions of the questions beyond the Bank of Estonia are formalised in the form of a regulation of the President of the Bank of Estonia.

The 3rd chapter of the Bank of Estonia Act provides the competence (rights and obligations) of the Bank of Estonia in the area of financial policy and organising the currency circulation. Pursuant to § 14 of the BEA, the Bank of Estonia has a right to use the following means for the regulation of the currency circulation: including the enforcement of the rules regulating the money market (clause 3); enforcement of the compulsory reserves and other standards for the credit institutions acting in Estonia

[5] On 16.06.2004, the Government of the Republic initiated draft legislation for the Electronic Money Institutions Act (415 SE I) that provided the authorisation for the Minister of finance to issue the implementing regulations of the law in several authorisation standards. Issuing the implementing regulations of the law in several issues on the basis of the Electronic Money Institutions Act differed considerably from the previous constitutional and administrative practice where the regulation of analogous issues was in the competence of the Bank of Estonia on the basis of the law. Notice: draft legislation withdrawn. See http://web.riigikogu.ee/ems/plsql/motions.show?assembly=10&id=415&t=E

(clause 4); enforcement of the interest rates of the Bank of Estonia (clause 6); enforcement of the limits of loans issued by the credit institutions (clause 7).

The Bank of Estonia enforces the rules for the import and export of foreign currency and for the formation and use of foreign currency reserves on the basis of the law. The Bank of Estonia also enforces the terms and conditions and rules of the banking foreign transactions to credit institutions and other legal persons (sections 2 and 3 of § 15 of the BEA). Thus, for the performance of efficient financial policy, the Bank of Estonia enforces several rules in the form of general legal acts for the regulation of the above mentioned questions (including the regulation of non-cash settlements carried out through credit institutions, foreign currency transactions, payments, etc.).

In addition to the Bank of Estonia Act, the specific provisions delegating authority (special delegations) for issuing general legal acts to the President of the Bank of Estonia are contained in the Credit Institutions Act[6] (section 7 of § 48, section 4 of § 49, section 7 of § 71, section 5 of § 80, section 9 of § 85, section 3 of § 86, section 2 and section 4 of § 87, section 1 of § 91, section 2 of § 92, section 8 of § 921, section 7 of § 113) and in the Electronic Money Institutions Act[7] (section 8 of § 37, section 4 of § 39, section 4 of § 44, section 2 of § 45, section 2 of § 46).

Arising from the above presented, the Bank of Estonia Act as a constitutional law provides the national central bank's right to issue mandatory general legal acts – **right to issue regulations** provided for the performance of the tasks of financial policy, organisation of the currency circulation and ensuring the stability of the currency to third parties arising from § 111 of the constitution. Hereby §'s 111 and 112 of the Estonian constitution do not provide the right to issue regulations as general legal acts *expressis verbis* and yet the constitution does not provide the respective prohibition or restriction either.

In the Estonian legal literature opinions have been published according to which the delegation of the right of standardisation to the Bank of Estonia does not arise from the constitution. Referring to the possible contradiction of the provisions of the Bank of Estonia Act, including the right to issue regulations with the constitution, the commission of the legal expertise on the constitution gives the following opinion:

"The Bank of Estonia has legal rights and functions that are considerably wider than those specified in § 111 of the constitution. These rights concern primarily the legislative drafting and supervision. Namely, the Bank of Estonia has been delegated the functions of the executive power that are within the competence of the Government of the Republic according to the constitution. Such functions are, for example, the performance of the national currency and banking policy (section 4 of § 2 and § 4 of the Bank of Estonia Act), supervision over the activity of credit institutions, issuing and cancellation of licences, imposing sanctions, enforcement of moratorium, compulsory liquidation, etc. (section 5 of § 5 and §'s 17-24 of the Bank

[6] RT I 1999, 23, 349; …; 2009, 39, 262.
[7] RT I 2005, 61, 473; 2007, 65, 405.

of Estonia Act), enforcement of the rules regulating the money market and imposing sanctions to those persons breaching these rules, enforcement of compulsory reserves and other standards to credit institutions (clauses 3, 4, 8 of § 14 of the Bank of Estonia Act), issuing licences for foreign currency transactions (section 4 of § 15 of the Bank of Estonia Act). Supervision over credit institutions and issuing legislation of general application regulating their activity is not directly related to the functions of the Bank of Estonia as the central bank provided by the constitution and revoking such rights shall not damage the independence of the Bank of Estonia and the stability of the Estonian crown. Based on the present redaction of the constitution, the Bank of Estonia should only be left the tasks concerning the emission and organisation of the currency circulation and all functions related to legislative drafting and administrative checks should be given to the Government of the Republic, i.e. Ministry of Finance and the bank inspection created in its administrative area."[8]

Lawyers K. Merusk and R. Narits have also expressed the opinion that "giving the above mentioned right to the Bank of Estonia by legislative power is problematic as it does not arise directly or indirectly from the constitution and the addressees of the regulations in relation to the bank are so-called third parties."[9]

Lasse Lehis has the opinion that "the function given to the Bank of Estonia by the constitution – organisation of the currency circulation and ensuring the stability of the currency of the Estonian crown – is also possible to practice without the right to issue general legal acts. … Thus, it can be stated that the right of the Bank of Estonia to issue general legal acts addressed to third parties does not arise from the constitution. By giving such a right, the legislative power has extended the competence of the Bank of Estonia beyond the authorised limits without authorisation."[10]

In the commented issue of the Constitution of the Republic of Estonia (chapter VIII "Finance and state budget") the opinion has been published that "…**Many rules can still be regarded as general rules and they should be replaced by the rules of the Government of the Republic or of the Minister of Finance"** (Constitution of the Republic of Estonia 2002, 499; 2008, 565; 2012, 667).[11]

V. Constitutional principles of the right to issue regulations

The basis of the constitutional and democratic implementation of the public authority is its basing on the law (preamble of the constitution) and the principles of the separation of powers and balance of powers (§ 4), democratic state based on the rule of law (§ 10) and lawfulness (section 1 of § 3).

In order to follow these principles and to protect everyone's constitutional rights and liberties, the legislative and executive and organisational functions must be separated and exactly determined and their performance must be in compliance with

[8]Available in the computer network: http://www.just.ee/10736.
[9]K. Merusk, R. Narits. Eesti konstitutsiooniõigusest. Tallinn: Juura, 1998, p 48.
[10]L. Lehis. Eesti Panga staatus ja pädevus tulenevalt põhiseaduse §-dest 11 ja 112. – Juridica, 1999, No. 10, pp 480-486.
[11]EV Põhiseadus. Kommenteeritud väljaanne (2002). Tallinn: Juura, p 499; 2008, p 565; 2012, p 667.

the constitution and principles recognised by legal theory. Interpreting the term of lawfulness, the European Court of Human Rights stated *in the case of Malone v. the United Kingdom (1984)* that "it would be in contradiction with lawfulness if the executive power implemented the legal authorisation as an unlimited power. Consequently, the law must determine the extent and manner of the implementation of the right of the decision delegated to the competent bodies having regard to the purpose of the discussed measure to give the necessary protection to the individual from arbitrary intervention."[12]

The right to issue regulations means the right of the executive power to accept the general legal acts issued to it by the legislative power.[13] The regulation is the general act of the administration issued by the executive body for the regulation of an unlimited number of cases and the rule is binding to third parties as the Parliament Act. According to the theory of administrative legislation, the rule is a *secundum legem* general act that must be in compliance with the constitution and law.

Issuing the regulations as the general acts of the executive power by the administration is practically the performance of the legislative function delegated to the administration by the regulator (parliament). The right of the executive power to issue regulations also considerably influences the principle of the separation of powers according to which the legislative power is held by Riigikogu (§ 59 of the constitution). In the legal literature it is noted that: "However, it does not mean a breach of this principle as the executive power may perform the legislative function not on its own initiative but on the basis of the formal legal authorisation, i.e. authorisation of the parliament. Section 1 of § 80 of the constitution requires that the legal authorisation must specify the content, purpose and extent of the authorisation."[14] It depends on the regulator which executive body is authorised to issue regulations in which relevant issues, and to what extent or legal limits. For the issue of the regulation as the general act of administration there must be a respective delegation or authorisation standard provided by law. This standard should specify the administrative body competent for the issue of the regulation and the clear purpose, content and extent of the authorisation. In addition, the delegation provision of the law may also enforce the other standards for the obligations of the executive power or for the restriction of its legislative function. Provision of the purpose, content and extent of the authorisation is necessary in order to make everyone understand which general act of administration may be issued.

In legal theory the opinion has been taken that "For its content and extent, the right of regulation is organised *intra, praeter* and *contra legem*. For their effects, all regulations, including so-called *contra legem* cases are subject to common laws."[15] Three kinds of regulations can be distinguished according to the extent of the right to issue regulations: 1) *intra legem*; 2) *praeter legem* and 3) *contra legem*.[16]

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[12]RKPSJKo 20.12.1996 No 3-4-1-3-96.
[13]See more T. Annus. Riigiõigus. Tallinn: Juura, 2006, pp 80-81.
[14]See more H. Maurer. Haldusõigus. Üldosa. Tallinn: Juura, 2004, pp 42-43.
[15]See more A.-T. Kliimann. Administratiivakti teooria. Tartu, 1932, pp. 181-182.
[16]See K. Merusk, I. Koolmeister. Haldusõigus. Tallinn: Juura, 1995, pp. 96.

Arising from the concurrence of the provisions of the constitution (clause 6 of § 87 and section 2 of § 94) and principles of the separation of powers (§ 4) and legality (section 1 of § 3), the executive power is only generally authorised to issue *intra legem* regulations, i.e. regulations detailing the law. In addition, the Supreme Court has referred to the need of following this principle: "In the case of an *intra legem* regulation there must be a standard in the law explicitly providing that the administrative body may issue an administrative act on the basis of it. This principle has also been expressed by section 2 of § 27 of the Government of the Republic Act. In the case of an *intra legem* regulation, the purpose, content and extent of the authorisation may also be derivable by the interpretation of the law. When being introduced to the law, the subject of the law must be able to reach a certain understanding that the executive power may issue the general act of administration in the issues regulated by law. However, a regulation issued *intra legem* may not exceed the frames of the regulation object of the law containing the authorisation standard.

Arising from the principle of separation of powers according to which the performance of the legislative function is within the competence of the regulator, a general act of administration exceeding the frame of the regulation object of the law is a *praeter legem* or *contra legem* regulation. The right of the regulator to legally authorise the administrative body to issue a *praeter legem* regulation may arise from the constitution of the state. The authorisation standard of the regulation regulating the domains not provided by Acts, i.e. authorisation standard of a *praeter legem* regulation must contain an explicit permit that the executive power may issue such regulations on the basis of this provision. When acting *praeter legem*, the government shall transpose a part of the competence of the regulator and it can only do it in the case that the regulator has *expressis verbis* authorised it to do so. In addition to the explicit permit, the authorisation standard of a *praeter legem* regulation must also contain the name of the administrative body competent to issue the regulation and the details of the purpose, content and extent of this regulation.

The laws are amended and annulled by *contra legem* regulations. Arising from the principle of the separation of powers, the *contra legem* regulations are excluded in Estonia by the constitution."[17]

In the legal literature an opinion has been published that "Based on the general principles of the state based on the rule of law, primarily on the principle of the separation of powers provided by the constitution of Estonia, the *praeter legem* regulations should be treated as exceptional cases. These can only be the so-called procedure regulations by which certain rules are enforced."[18]

According to clause 6 of § 87 of the constitution, the Government of the Republic issues the regulations and orders on the basis of the law. The same principle for the regulation of the minister arises from section 2 of § 94 of the constitution. Thus, the constitution provides *expressis verbis* the regulations and orders of the Government of

[17]RKPSJKo 20.12.1996 No. 3-4-1-3-96.
[18]See K. Merusk, I. Koolmeister. Haldusõigus. Tallinn: Juura, 1995, pp. 97-98.

the Republic and the orders and directives of the minister (section 2 of § 94 of the constitution) as the legal acts of the bodies performing the executive power (clause 6 of § 87 of the constitution). In the legal literature and in practice it has often been disputed whether the regulations can be issued by other bodies not explicitly specified in the constitution.

The Bank of Estonia Act as a constitutional law provides the national central bank's right to issue mandatory general legal acts – **right to issue regulations** provided for the performance of the tasks of financial policy, organisation of the currency circulation and ensuring the stability of the currency to third parties arising from § 111 of the constitution.

In the Bank of Estonia Act (section 5 of § 1 and section 5 of § 11) the regulator **has practically equalised** the competence of the President of the Bank of Estonia in issuing regulations **with the competence of the minister in issuing regulations** in the section of the types of legal acts arising from the constitution. **The basis for this in the constitutional practice in Estonia was the proposal of the Chancellor of Justice on 06.01.1994 to Riigikogu to bring the Bank of Estonia Act (in the redaction RT I 1993, 28, 498) into conformity with the constitution and law of the Republic of Estonia.**[19]

The requirements confirmed in the legal theory, constitution and laws and practice of the Supreme Court shall also apply to the regulations of the President of the Bank of Estonia. In the practice of the constitutional review, the Chancellor of Justice has estimated the regulations of the President of the Bank of Estonia as legal acts containing the legal standards applied to third parties. If the constitution, provisions of the Bank of Estonia Act and provisions of the Credit Institutions Act and the requirements of the authorisation standard have not been adhered to while issuing the regulation and the regulation has been issued without legal basis, the Chancellor of Justice has instituted a procedure of constitutional review and contested the regulation of the President of the Bank of Estonia as legislation of general application.[20]

VI. Conformity of the right to issue regulations of the Bank of Estonia with the constitution

Regarding financial policy as a relevant part of the economic policy of the state that § 111 of the constitution specifies through the organisational tasks of the currency circulation and ensuring the stability of the national currency imposed on the Bank of

[19]The initial redaction of section 5 of § 1 of the Bank of Estonia Act provided that the Council of the Bank of Estonia and the President of the Bank of Estonia shall issue **legal acts** on the basis of the law for the performance of the tasks of the Bank of Estonia. The Bank of Estonia Act (in the redaction of 18.05.1993) provided for the issuing of legislation of general application differing (diverging) from the constitution for the realisation of the rights and obligations arising from the constitution. The constitution has been interpreted in an extended manner, i.e. amended by this legislation of general application.

[20]Proposal No. 35 on 07.09.1999 by the Chancellor of Justice to bring regulation No. 6 on 24.03.1999 by the President of the Bank of Estonia (Checking the solvency and guarantees of local governments in issuing loans and in the acquisition of financial claims; RTL 1999, 54, 731) into conformity with the provisions of § 112 of the constitution.

Estonia that in themselves are related to the performance of the executive power, one can express an opinion that the regulator is also decisive in the issue of the means of legislative drafting (regulative acts) necessary for the performance of these tasks according to clause 12 of section 2 of § 104 of the constitution.

One possible legal remedy for the Bank of Estonia for the performance of the tasks arising from § 111 of the Bank of Estonia Act is the right of the Bank of Estonia to issue mandatory general legal acts to third parties, i.e. the right to issue regulations of the Bank of Estonia. If the Bank of Estonia were a bank subject to the Government of the Republic or a central bank subject to it, then there would probably be no question about the conformity of the right to issue regulations of the Bank of Estonia with the constitution. As the national central banking in Estonia has been built since 18.06.1993 (after the enforcement of the Bank of Estonia Act) independently and separated from the Government of the Republic according to the conceptual principle recognised in the European Union, then one legal remedy for the performance of the purposes and tasks of the Bank of Estonia as an independent central bank would definitely be the right of the Bank of Estonia to issue mandatory general legal acts to third parties. Being institutionally completely separated from the Government of the Republic, the national central bank cannot perform its tasks through the government or be under the control of it or under the control of the Minister of Finance. To compare, in the European Union, the European Central Bank constitutes a vertical banking system - management body of the European System of Central Banks with independent and specific competence and clearly distanced from the governments of member states. For the performance of the tasks of the European System of Central Banks and in compliance with the provisions of the memorandum of association and by the terms and conditions in the statutes of the European System of Central Banks, the European Central Bank also issues mandatory general legal acts - regulations to third parties, takes decisions, submits recommendations and gives opinions. In addition, the European Central Bank has a right to impose fines for non-performance of the regulations and decisions of the European Central Banks to companies. (article 132 of the Treaty of Functioning of the European Union, former section 1 of article 110 of the foundation contract of the EU). Thus, the European Central Bank is competent to issue binding general legal acts – regulations in conformity with the provisions of the Treaty of Functioning of the European Union and the conditions presented in its statutes.

The right of the Bank of Estonia to issue mandatory general legal acts to third parties or the right to issue regulations is an issue not discussed in the constitution of Estonia. The circumstance that the constitution specifies only the Government of the Republic and the ministers and the right of the Bank of Estonia to issue the regulations has not been specified or discussed separately, does not yet mean a contradiction of the right to issue regulations of the Bank of Estonia with the constitution or the law of the European Union. Herewith it cannot be concluded that the parliament as a regulator cannot or may not delegate the right to issue regulations to the Bank of Estonia. The right to issue regulations of the Bank of Estonia is

derivable from the principle of independence of the Bank of Estonia fixed in § 112 of the constitution, but also from the conceptual basic principle of the independence of the central bank of the member state of the European Union. The real independence of the Bank of Estonia cannot be achieved without the right to issue mandatory general legal acts to third parties, i.e. without the right to issue regulations. Should the Bank of Estonia apply for the issuing of the regulations necessary for the performance of its tasks from the Government of the Republic or Minister of Finance representing the executive power, then it would not be in conformity with the European basic principle of the independence of the central bank of the member state and the Bank of Estonia would become dependent on the government or Minister of Finance at issuing the regulations. For this reason, the opinion must be formed that the regulator deciding the need for the delegation of the right of the issue of the regulation to the Bank of Estonia means a question about the purposefulness of the law with the purpose of ensuring the independence of the Bank of Estonia analogously to the European Central Bank. As the Bank of Estonia acts on the basis of the law and reports to Riigikogu according to § 112 of the constitution, the decision competence of the parliament (Riigikogu) comprehends the decision of the question of the delegation of the right to issue regulations to the Bank of Estonia. Hereby the parliament/regulator is not completely free in the decision of the extent or legal limits of the right to issue regulations of the Bank of Estonia but is bound to the tasks specified in § 111 of the constitution and these tasks are the organisation of the currency circulation and ensuring the stability of the currency. In addition, the regulator must ensure that the delegation of the right to issue regulations to the Bank of Estonia would not result in the breach of the fundamental rights and liberties and values protected by the constitution (guarantees). Should the regulator in the delegation of the right to issue regulations exceed the legal limits provided by the constitution, e.g. issue the right of enforcing the restrictions on issuing loans to the local government and on taking financial obligations to the Bank of Estonia, then it would practically mean an amendment to § 111 of the constitution as the constitutional guarantees of the local government (protected area of the local government law) provided by §'s 154 and 157 of the constitution must be taken into account in providing the control over the financial activity of local governments.

To sum it up, the opinion must be formed that the right of the Bank of Estonia to issue mandatory general legal acts to third parties or the right to issue regulations is not in contradiction with the constitution or the law of the European Union. I add that in the constitutional practice in Estonia, the Chancellor of Justice in the function of the constitutional review has treated the Bank of Estonia as a constitutional institution whose performance of the tasks specified in § 111 of the constitution through the right to issue regulations does not issue but rather assumes the application of the legality principle specified in section 1 of § 3 of the constitution and adheres to it in issuing the regulation. If the Bank of Estonia has not adhered to the provisions of section 1 of § 3, then the Chancellor of Justice has also contested the respective regulation of the President of the Bank of Estonia as legislation of general application.

VII. Conclusion

The article discusses whether, according to the Constitution of the Republic of Estonia, Eesti Pank may issue legislation of general application mandatory to third persons, that is, the right of Eesti Pank to issue Regulations. The author finds that, although the right of Eesti Pank to issue Regulations is not discussed separately in the Constitution, that in itself does not mean a conflict of the right of Eesti Pank to issue Regulations with the Constitution and European Union law. The right of Eesti Pank to issue Regulations can be derived from the principle of independence of Eesti Pank fixed in the Constitution, as well as from the conceptual basic principle of the independence of the central bank of a European Union Member State. The real independence and sovereignty of the central bank was not achieved without the right to issue legislation of general application mandatory to third persons. If Eesti Pank had to request the issuing of Regulations necessary for the performance of its functions from the Government of the Republic or the Minister of Finance who represent the executive power, then that would not be in compliance with the European fundamental principle of independence of the central bank of a Member State. At the same time, certainly, the legislator is not totally free in deciding on the scope or legal limits of the right of Eesti Pank to issue Regulations. It is bound with the functions of the central bank specified in the Constitution which include the organisation of currency circulation and the objective of ensuring the stability of the national currency.