



REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, on 29 December 2022
Ref. no.:AGJ 2107/22

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JUDGMENT

in

Case no. KO173/21

Applicant

Municipality of Kamenica

**Constitutional review of
Articles 3, 4, 5, 6, 7 and 9 of
Administrative Instruction no. 104/2020 on “the Criteria and Procedures for
the Establishment and Termination of the Activity of Pre-University Education
Institutions” of the Ministry of Education and Science (MES)**

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Gresa Caka-Nimani, President
Bajram Ljatifi, Deputy President
Selvete Gërxhaliu-Krasniqi, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge, and
Nexhmi Rexhepi, Judge

Applicant

1. The Referral was submitted by the Municipality of Kamenica (hereinafter in the text: the Applicant), and was delivered by the previous Mayor of this municipality, Mr. Qëndron Kastrati.
2. In the local elections of 17 October 2021, respectively after the second round, on 14 November 2021, as a Mayor of Kamenica was elected Mr. Kadri Rahimaj, who took over his mandate as a Mayor of this municipality on 3 December 2021. Kadri Rahimaj is

represented before the Court with authorization by Mr. Alban Hashani, Legal Officer in the Municipality of Kamenica.

Challenged act

3. The Applicant challenges Articles 3 [Founder]; 4 [Conditions for establishing an educational institution and a separate parallel]; 5 [Proposal for the establishment of the educational institution or separate parallel]; 6 [Verification of conditions]; 7 [Decision] and 9 [Termination of the activity of the educational institution or the separate parallel] of the Administrative Instruction no. 104/2020 on “the Criteria and Procedures for the Establishment and Termination of the Activity of Pre-University Education Institutions” of the Ministry of Education and Science (hereinafter in the text: Ministry of Education), signed by the Minister of Education and Science on 14 September 2020, and published on 15 September 2020 (hereinafter in the text: Challenged Act).

Subject matter

4. The subject matter of this referral is the constitutional review of Articles 3, 4, 5, 6, 7 and 9 of the challenged Act, which the Applicant alleges to be incompatible with paragraph 2 of Article 12 [Local Government], paragraph 2 of Article 47 [Right to Education], Article 123 [General Principles] and Article 124 [Local Self-Government Organization and Operation] of the Constitution of the Republic of Kosovo (hereinafter in the text: the Constitution), as well as Articles 2 [Constitutional and legal foundation of local autonomy], 3 [Concept of local self-government], 4 [Scope of local self-government] and 9 [Financial resources of local authorities] of the European Charter of Local Self-Government.

Legal basis

5. The referral is based on paragraph 4 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution and on Articles 40 (Accuracy of the Referral) and 41 (Deadlines) of Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter in the text: the Law) and on Rule 32 [Filing of Referrals and Replies] and Rule 73 [Referral pursuant to Article 113.4 of the Constitution and Articles 40 and 41 of the Law] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo [hereinafter in the text: the Rules of Procedure].

Procedure before the Court

6. On 27 September 2021, the Constitutional Court of the Republic of Kosovo (hereinafter in the text: the Court) received the Applicant's referral, submitted by post on 21 September 2021.
7. On 4 October 2021, the President of the Court by decision KSH. KO173/21 appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel, composed of Judges: Selvete Gërxhaliu-Krasniqi (presiding), Safet Hoxha and Nexhmi Rexhepi, members.
8. On 12 October 2021, the Court notified the Applicant of the registration of the Referral and at the same time requested from him to submit the relevant proof of mail, which proves the date of submission of his Referral by mail to the Court. The same day, the Court notified the Government of the Republic of Kosovo (hereinafter in the text: Government), the Ministry of Education, Science, Technology and Innovation (hereinafter in the text: Ministry of Education), as well as the Ministry of Local Government Administration (hereinafter in the text: MLGA) giving them the possibility to send their comments, if any, in writing by 26 October 2021. The Court also requested

from the Ministry of Local Government Administration that the copy of Court's request be distributed to all mayors of the Republic of Kosovo, giving them the opportunity to send their comments, if any, in writing to the Court by 26 October 2021.

9. On 14 October 2021, the Applicant sent by email to the Court the proof of delivery by mail of the Referral, which proves that his Referral was submitted to the post office on 21 September 2021.
10. On 26 October 2021, the Court received written comments from the Ministry of Education. While up to this date, the Ministry of Local Government Administration and other municipalities did not submit comments regarding the request.
11. On 26 October 2021, the Court sent the Applicant the request for additional information, namely it asked him to specify his referral, namely to specify which provisions of the challenged Act are incompatible with the constitutional provisions which he mentioned in his referral.
12. On 9 November 2021, the Court received the referral clarified by the Applicant.
13. On 5 January 2022, Mr. Alban Hashani, Legal Officer in the Municipality of Kamenica, on behalf of the new Mayor, Mr. Kadri Rahimaj, submitted a request for withdrawal of the referral.
14. On 18 January 2022, the Court requested the new Mayor, Mr. Kadri Rahimaj to complete the referral and to submit the authorization for representation on behalf of the Municipality of Kamenica.
15. On 21 January 2022, the Municipality of Kamenica by e-mail submitted the completed request for withdrawal of the referral, accompanied by the authorization for representation signed by Mr. Kadri Rahimaj, who filed the request through the mail and it was received by the Court on 21 January 2022. In the request for withdrawal of Referral KO173/21 to the Court, it is noted that the Municipality of Kamenica has no legal interest in assessing the constitutionality of the challenged act.
16. On 11 May 2022, the Court reviewed the report of the judge rapporteur and unanimously decided to postpone the review of the referral for a next session for additional supplements.
17. On 13 May 2022, the Court notified the Ministry of Education regarding the clarification of the referral by the Applicant, submitted to the Court on 9 November 2021, providing the opportunity to submit comments if any within fifteen (15) days from the day of receipt of the letter. The same day, the Court notified MLGA regarding the clarification of the referral by the Applicant, submitted to the Court on 9 November 2021, giving them the possibility to send their comments, if any, in writing within fifteen (15) days from the day of receipt of the letter. The Court also requested from MLGA that the copy of its request be distributed to all mayors of the Republic of Kosovo, giving them the opportunity to send their comments, if any, in writing to the Court within fifteen (15) days. Whereas, up to this date, the Ministry of Local Government Administration and other municipalities did not submit comments regarding the Applicant's referral.
18. On 24 May 2022, the representative of the Ministry of Education via email requested from the Court that the deadline for submission of comments be extended until 6 June 2022. The same day, the Court notified the representative of the Ministry of Education that the request of the Ministry of Education for postponement of the deadline for submission of comments on 3 June has been approved.

19. On 3 June 2022, the Ministry of Education submitted its comments regarding the Applicant's clarified referral of 9 November 2021.
20. On 22 June 2022, the Court reviewed the report of the judge rapporteur and unanimously decided to adjourn the review of the application for a next session after additional submissions.
21. On 29 September 2022, the Court reviewed the report of the judge rapporteur and decided to postpone the review of the application for a next session after additional submissions.
22. On 7 December 2022, the Review Panel reviewed the report of the judge rapporteur and unanimously recommended to the Court the admissibility of the referral. On the same day, the Court decided that: (i) the referral is admissible; (ii) to hold that Article 3; paragraphs 5, 6 and 7 of Article 6, paragraphs 2 and 3 of Article 7, and paragraphs 6, 7 and 8 of Article 9 of the Administrative Instruction no. 104/2020 on "the Criteria and Procedures for the Establishment and Termination of the Activity of Pre-University Education Institutions" of the Ministry of Education and Science are not in accordance with paragraph 2 of Article 12 [Local Government], paragraph 1 and 3 of Article 123 [General Principles] and paragraph 2 and 3 of Article 124 [Local Self-Government Organization and Operation] of the Constitution of the Republic of Kosovo; (iii) to abrogate Article 3, paragraphs 5, 6 and 7 of Article 6, paragraphs 2 and 3 of Article 7, and paragraphs 6,7 and 8 of Article 9 of the Administrative Instruction no. 104/2020 on "the Criteria and Procedures for the Establishment and Termination of the Activity of Pre-University Education Institutions" of the Ministry of Education and Science; and (iv) to reject the request for withdrawal of the referral.

Summary of facts

23. On an unspecified date, the Ministry of Education had started drafting the challenged act, which during the period 25 February 2020 to 17 March 2020 was published on the official website of this ministry for public consultation.
24. On 14 September 2020, the Minister of Education signed the challenged act. The issuance of the challenged act according to the preamble of this act is based on paragraph 16 of Article 5 of the Law on Pre-University Education and sub-paragraph 1.4 of Article 8 of the Government Regulation no. 02/2011 on Areas of Administrative Responsibility of the Office of the Prime Minister and Ministries. This act is accompanied by a notification letter from the Department for European Integration, Policy Coordination and Legal Affairs to the Ministry of Education addressed to the Minister of Education, notifying that the draft of the challenged act has passed the preliminary consultation phase and the public discussion.
25. On 15 September 2020, the challenged act was published on the website of the Ministry of Education. Through the challenged act were repealed: Administrative Instruction no. 9/2008 on "Establishment of Educational Institutions", of 15 May 2008; Administrative Instruction no. 29/2012 on "Establishment of separate parallels", of 31 October 2012; and Administrative Instruction no. 8/2015 on "Establishment of educational institutions", of 10 August 2015.
26. On an unspecified date, the Applicant requested from the Ministry of Education the annulment of the challenged act.
27. On 3 December 2020, the Legal Office at the Office of the Prime Minister (hereinafter in the text: the Legal Office at the OPM) forwarded the Applicant's referral for review to the

Secretary General at the Ministry of Education. Also, the Legal Office at the OPM requested the Secretary General of the Ministry of Education, in addition to providing clarification to the Applicant, to take further actions based on the competencies of the institution concerned and the legislation in force and to notify the OPM of the steps taken in this regard.

28. On 9 December 2020, the Applicant submitted by e-mail questions to the Head of the Collegium of Municipal Directorates for Education, namely requested to be informed whether the latter was consulted on behalf of the Municipal Directorates for Education before the entry into force of the challenged act.
29. On 9 December 2020, the Applicant requested from the Government of the Republic of Kosovo the annulment of the challenged act and the suspension of the decisions for reorganization of education in the Municipality of Kamenica.
30. On 10 December 2020, the Chair of the Collegium in his response to the Applicant's question stressed that he had not been consulted regarding the draft of the challenged act before its adoption.
31. On 14 February 2021, early elections were held for the Assembly of the Republic of Kosovo.
32. On 24 February 2021, the Legal Office at the OPM by an official letter notified the Acting Prime Minister of the Republic of Kosovo (hereinafter in the text: the Prime Minister) regarding the challenged act. This letter states that: *"The Legal Office is of the opinion that: Ministry of Education and Science, on the occasion of issuing the Administrative Instruction no. 104/2020 [Challenged act] had no sufficient legal basis for assuming the competence for the establishment of pre-university educational institutions, but only for setting the criteria on the basis of which municipalities, in the exercise of their own competencies, would establish these institutions. This is because the establishment and termination of the activity of pre-university education institutions is not expressly or implicitly defined as an area of responsibility or as a duty of MES [Ministry of Education], either by Regulation (GRK) – No. 07/2020 on Amending and Supplementing the Regulation (GRK) – No. 06/2020 on the Areas of Administrative Responsibility of the Office of the Prime Minister and Ministries, or with the laws in force"*. The Legal Office at the OPM recommended to the Prime Minister the following alternatives: (i) to request the annulment of the challenged act based on Article 27 of the Rules of Procedure of the Government of the Republic of Kosovo No. 09/2011 (hereinafter in the text: the Rules of Procedure of the Government) and consequently to request the drafting of a new administrative instruction by the Ministry of Education that would respect the municipalities' own competencies based on the legal acts in force; or (ii) the Municipality of Kamenica [Applicant], in accordance with paragraph 4 of Article 113 of the Constitution, submit a referral to the Constitutional Court.
33. On 16 April 2021, the Applicant again submitted a request to the Ministry of Education for the annulment of the challenged act, which based on the case files appears not to have been approved.
34. On 17 October 2021, local elections were held, respectively elections for Municipal Assemblies and Mayors in the Republic of Kosovo. As a result of the second round, held on 14 November 2021, the Mayor of Kamenica was elected Mr. Kadri Rahimaj.
35. On 3 December 2021, the Mayor-elect, Mr. Kadri Rahimaj, took over the mandate of the new Mayor of Kamenica Municipality.

Challenged provisions of the challenged act

Article 3 Founder

- 1. The Ministry, at the request of the municipality, establishes all types of ISCED level 1-3 educational institutions, as well as their separate classes outside the territory of the municipality where the parent institution is located.*
- 2. Part of educational institutions by level 1 ISCED paragraph 1 of this Article may be even pre-school classes of level 0 according to ISCED.*
- 3. The municipality, with the consent of the Ministry, establishes pre-school institutions and separate parallels of educational institutions of level 1-3 according to ISCED within its territory.*

Article 4 Conditions for establishing an educational institution and a separate parallel

- 1. The educational institution or the separate parallel may be established if these general conditions are met:*
 - 1.1. The teacher-student ratio is in accordance with the standards set by the Ministry with the relevant sub-legal act;*
 - 1.2. A qualified teaching staff can be provided according to the relevant normative of the Ministry;*
 - 1.3. The infrastructure meets the standards set by the Ministry with the relevant sub-legal act;*
 - 1.4. The curriculum with which it works are in line with the core curricula for the respective levels;*
 - 1.5. Means for financing the activity have been provided until the opportunity for funding from the specific education grant has been created;*
 - 1.6. There is economic justification for establishing an institution or a separate parallel, with at least 5-year perspective of possibility of its normal functioning.*
- 2. The educational institution can be established if these special conditions are fulfilled besides the general conditions referred to in paragraph 1 of this Article:*
 - 2.1. Specialized educational institution of level 0 according to ISCED has:*
 - 2.1.1. At least two educational groups;*
 - 2.1.2. At least 40 children, respectively 20 children in the institution where service is offered for minority communities and in mountain and border areas.*
 - 2.2. Educational institution of level 1 according to ISCED has:*
 - 2.2.1. At least one parallel per grades 1-5 and at least one parallel for pre-primary grade;*
 - 2.2.2. Minimum 60 students, respectively 30 students in the institution learning in minority community languages and in mountain and border areas.*
 - 2.3. Educational institution of level 2 according to ISCED has:*
 - 2.3.1. At least two parallels per grades 6-9;*
 - 2.3.2. Minimum 160 students.*
 - 2.4. Educational institution of level 1 and 2 according to ISCED has:*
 - 2.4.1. At least one parallel per grades 1-9 and at least one parallel for pre-primary grade;*
 - 2.4.2. Minimum 100 students, respectively 50 students in the institution learning in minority community languages and in mountain and border areas.*
 - 2.5. Educational institution of level 3 according to ISCED has:*
 - 2.5.1. At least three parallels per grades 10-12;*
 - 2.5.2. Minimum 180 students, respectively 90 students in the institution learning in minority community languages.*

3. A separate parallel may be established if, in addition to the general conditions referred to in paragraph 1 of this Article, these special conditions are also met:

3.1. Distance from the parent institution is not less than 4 km;

3.2. It has at least two parallels of level 1 and 2 according to ISCED;

3.3. It has at least 20 students, respectively 10 students in the institution learning in minority community languages.

4. Exceptionally, a separate parallel may be established even if the special conditions referred to in paragraph 3 of this Article are not met, if the transport of children from the covered area of the separate parallel to the nearest school is considered dangerous or lasts more than 45 minutes in one direction.

Article 5

Proposal for the establishment of the educational institution or separate parallel

1. The proposal for the establishment of the educational institution or separate parallel is done by municipality.

2. The proposal from paragraph 1 of this Article shall be accompanied by these documents:

2.1. Arguing the necessity of opening a public education institution or a separate classroom, including demographic data for the community living within the institution's coverage area;

2.2. Arguing fulfilment of general and special conditions from Article 4 of this Article;

2.3. Cadastral document for the ownership of the educational facility parcel;

2.4. The educational facility plan;

2.5. Construction permit or technical acceptance decision of the facility;

2.6. Proposed code of educational institution;

2.7. Other documents supporting the proposal.

3. The proposal must be submitted to the Ministry at least 3 months prior to the commencement of the work of the educational institution or separate parallel.

Article 6

Verification of conditions

1. The verification of the conditions for the development of the educational activity on the basis of a proposal from the municipality is done by the commission of the Ministry. The Commission has 3 or 5 members and is appointed by the General Secretary of the Ministry for a four-year term.

2. The Commission shall carry out the verification within 60 days from the day of receipt of the proposal.

3. The Commission analyses the documentation, makes field visits, consults specialists within the Ministry and, where appropriate, requests additional documents and information from the municipality.

4. The Commission compiles a comprehensive report with a clear conclusion on the acceptability of the municipality's proposal. The report shall be submitted to the General Secretary of the Ministry.

5. The decision on the proposal of the municipality is taken by the General Secretary of the Ministry.

6. The decision from paragraph 5 of this Article may be:

6.1. Decision on the establishment of an educational institution or a separate parallel based on the competencies of the Ministry from Article 3, paragraph 1;

6.2. Decision for granting consent to the municipality to issue a decision on the establishment of an educational institution or a separate parallel based on the competencies of the municipality for Article 3, paragraph 3.

6.3. Decision for rejecting the proposal of the municipality, which is accompanied by a justification.

7. The municipality may appeal the decision to the Appeals Commission of the Ministry within 30 days of its receipt.

Article 7

Decision

1. The decision to establish an educational institution or a separate parallel contains:

1.1. Name of the founder;

1.2. Municipality and location of educational institution;

1.3. Name of the institution (if any);

1.4. Type of educational institution;

1.5. Code of the educational institution;

1.6. Level of educational activity;

1.7. Teaching languages.

2. For educational institutions and separated parallels from Article 3, paragraph 1, the General Secretary of the Ministry takes the decision as described in Article 6, paragraph 6, sub-paragraph 6.1.

3. For educational institutions and separated parallels from Article 3, paragraph 3, the decision is taken by the mayor, on the basis of the consent of the General Secretary of the Ministry.

Article 9

Termination of the activity of the educational institution or the separated parallel

1. Termination of the activity of the educational institution or the separated parallel can be initiated by the Ministry or the respective municipality in these cases:

1.1. If the institution or the separate parallel does not meet the conditions regarding Article 4 of this Instruction;

1.2. If there is no justification for continuing the activity;

1.3. If with continuation of the activity is endangered the health and safety of children / students;

1.4. Upon the recommendation of the responsible body of the inspectorate following a comprehensive inspection of the institution or the separate parallel.

2. The initiative for termination of the activity of the educational institution or a separate parallel contains detailed arguments for the reasons for termination of the activity, referring to the legal conditions, namely the objective circumstances justifying such a step. In particular, it should contain a plan for:

2.1. Concrete opportunities for transferring children / students of the institution / parallel that will cease the activity in another public educational institution;

2.2. Procedures for transferring children / students of the institution / parallel that will cease operating in another institution / other public educational institution;

2.3. Determining the destination of the furniture's inventory, teaching means etc., of the institution;

2.4. Determination of employment opportunities for the staff of the educational institution / parallel that ceases to operate.

3. During preparation of the initiative from paragraph 2 of this Article, the Ministry takes all necessary steps to obtain data and prepare action plans such as: site visits, consultation with the municipality and the school, consultations with competent specialists within the Ministry, etc. Members of the Ministry

Commission established in accordance with Article 6, paragraph 1 of this Instruction, cannot be involved in the process of preparing the initiative.

4. The initiative is reviewed by the Commission of the Ministry established in accordance with Article 6, paragraph 1 of this Instruction. The Commission acts in accordance with the procedure set out in Article 6, paragraph 3.

5. The Commission compiles a comprehensive report with a clear conclusion on the acceptability of the initiative to cease the activity of the institution or separate parallel.

6. The decision on the initiative is taken by the General Secretary of the Ministry.

7. The decision can be:

7.1. The decision on termination of the activity of an educational institution or a separate parallel based on the competencies of the Ministry from Article 3, paragraph 1;

7.2. Recommendation to the municipality to issue a decision on termination of the activity of the educational institution or a separate division based on the competencies of the municipality from paragraph 3 of article 3 of this AI;

7.3. The decision to reject the initiative for termination of the activity of the educational institution or the separated parallel with appropriate justification.

8. Toward decision from paragraph 7, sub- paragraph 7.1 and 7.3 of this Article, municipality can file a complaint at the Appeal Commission in the Ministry within 30 days from the day of receipt of decision.

Applicant's allegations

36. The Court first recalls that the Applicant alleges that Articles 3 [Founder]; 4 [Conditions for establishing an educational institution and a separate parallel]; 5 [Proposal for the establishment of the educational institution or separate parallel]; 6 [Verification of conditions]; 7 [Decision] and 9 [Termination of the activity of the educational institution or the separate parallel] of the challenged act are incompatible with paragraph 2 of Article 12 [Local Government], paragraph 2 of Article 47 [Right to Education], Article 123 [General Principles] and Article 124 [Local Self-Government Organization and Operation] of the Constitution, as well as Articles 2 [Constitutional and legal foundation of local autonomy], 3 [Concept of local self-government], 4 [Scope of local self-government] and 9 [Financial resources of local authorities] of the European Charter of Local Self-Government.
37. Accordingly, the Applicant alleges that the challenged act was also issued and approved in violation of Article 17 (Own Competencies) of Law no. 03/L-040 on Local Self-Government (hereinafter in the text: Law on Local Self-Government); Article 3 (Ministry of Education, Science and Technology) and Article 4 (Extended Competencies and Competencies of Municipalities) of Law no. 03/L-068 on Education in Municipalities of the Republic of Kosovo (hereinafter in the text: Law on Education in Municipalities); as well as Articles 5 (Duties of the Ministry), Article 7 (Competencies of municipalities); 8 (Inspection of education) and 13 (Establishment of educational institutions) of Law no. 04/L-032 on Pre-University Education (hereinafter in the text: the Law on Pre-University Education).
38. In his referral submitted on 27 September 2021, the Applicant challenged the challenged act by: (i) elaborating the relevant constitutional provisions regarding the competencies of municipalities that according to him refer to the municipalities' own competencies in the field of education, namely Articles 12, 123 and 124 of the Constitution; (ii) referring to and elaborating the legal provisions of the legislation in force, namely Article 17 of the Law on Local Self-Government, Articles 3 and 4 of the Law on Education in Municipalities and Articles 5 and 13 of the Law on Pre-University Education; (iii) referring to the purpose and the relevant provisions of the European Charter of Local

Self-Government and in this regard specified that the respect of this Charter is normed by paragraph 3 of Article 123 of the Constitution; and (iv) stressing that the challenged act did not respect the procedure of prior consultation of the municipality before its adoption.

39. The Court notes that the Applicant in his Referral submitted to the Court on 27 September 2021 did not specify the articles of the challenged act that according to him are incompatible with the aforementioned constitutional and legal provisions. As a result, the Court, on 26 October 2021, had addressed the Applicant with the request for clarification of his referral, namely it had asked him to specify that: (i) which provisions of the challenged act according to him are incompatible with the constitutional provisions; and (ii) in what way those provisions of the challenged act violate the rights guaranteed by the Constitution, which he specified in his referral.
40. As a result of the Court's request, in its response of 9 November 2021 to the Court's request for additional information, the Applicant specifies that Articles 3 (Founder), 4 (Conditions for establishing an educational institution and a separate parallel), 5 (Proposal for the establishment of the educational institution or separate parallel), 6 (Verification of conditions), 7 (Decision) and 9 (Termination of activity of the educational institution or the separate parallel) of the challenged act are incompatible with paragraph 2 of Article 12 and paragraphs 2 and 3 of Article 124 of the Constitution. As regards Article 4 of the challenged act, the Applicant alleged that this provision is incompatible with paragraph 2 of Article 47 of the Constitution.
41. The Applicant further alleges that these provisions of the challenged act are also contrary to the provisions of the Law on Local Self-Government; the Law on Education in Municipalities of the Republic of Kosovo; and the Law on Pre-University Education.
42. Thereafter, the Court shall include the Applicant's allegations regarding Articles 3, 4, 5, 6, 7 and 9 of the challenged act, which he alleges are incompatible with the constitutional provisions and those of the legislation in force in the field of education in municipalities and pre-university education.

(i) Regarding the challenged provisions of the challenged Act

(a) Regarding Article 3 of the challenged Act

43. With regard to Article 3 of the challenged act, the Applicant alleges that the same is incompatible with paragraph 2 of Article 12, paragraphs 2 and 3 of Article 124 of the Constitution.
44. In addressing this allegation, the Applicant cites the content of Article 3 (Ministry of Education, Science and Technology) of the Law on Education in Municipalities, which regulates the powers of this ministry. In this regard, the Applicant underlines that: *"We see here that in no case and with no provision is stipulated that the founder of the educational institution is the Ministry of Education"*.
45. Further on, in his elaboration in relation to Article 3 of the challenged act, he also cites the content of Article 7 of the Law on Pre-University Education, which refers to the competencies of the municipality in the field of pre-university education regulated by this law and the Law on Local Self-Government and Article 13 [Establishment of educational institutions] in the municipalities.
46. With regard to Article 13 of the Law on Pre-University Education, the Applicant argues that: *"This Article, the only one that fully defines the establishment of educational*

institutions, does not at any single point define this procedure as a competence of the Ministry. As it can be seen, in particular in points 1 and 2 of this article, such competence is the competence of the municipalities, and nowhere in any point of the laws on education and all sub-legal acts of the Ministry, is stipulated that the Ministry has the competence to establish educational institutions. While it is provided that “primary schools (ISCED level 1) and lower secondary schools (ISCED level 2) are established in every municipality”, we can understand that “municipality” means not only the municipality in the administrative sense or as a territorial division, but also as a basic institution of local self-government. While “Primary schools (ISCED level 1) and lower secondary schools (ISCED level 2) are established in any municipality”, we understand that it is a matter of competence, because the fact that schools are established in any municipality (in the sense of territory) cannot be the norm until such a thing is implied. Where else but in every municipality should schools be established?!”

47. The Applicant also cites the content of Article 17 of the Law on Local Self-Government referring to the municipalities' own competencies.
48. In relation to the latter, the Applicant places emphasis on points h) and s) of Article 17 of the Law on Local Self-Government, specifying the following: *“If we stop at point h), and until it is determined that the own competence of the municipality and its duty is to provide public pre-primary, primary and secondary education, we know that this service is provided in educational institutions. While this sentence continues with “including registration and licensing”, it can be implied the establishment of educational institutions in the first part of the sentence “providing education ...”, because it is “conditio sine qua non” for their registration and licensing. In case such an interpretation would not be considered impartial, or an objective judgment by the municipality in this case because of the case it has raised before the Court and because it necessarily tries to defend its claim, the other basis is point (s), the content of which we have described above.”*

(b) Regarding Article 4 of the challenged Act

49. In reply of 9 November 2021 to the Court's request for additional information, the Applicant specified that Article 4 (Conditions for establishing an educational institution and a separate parallel) of the challenged act is incompatible with paragraph 2 of Article 47 of the Constitution.
50. The Applicant alleges that Article 4 of the challenged act, which lists *“the conditions that an educational institution or separate parallel must meet, where among others, it stipulates the minimum of one parallel for each class or the minimum of 60 students for level 1 (class 1-5)”*, conflicts with Administrative Instruction no. 22/2013 on the Maximal Number of Students per Class and the Report Teacher-Student, which stipulates the condition that the teacher-student ratio is 1:21.3.
51. According to the Applicant, if a class is allowed to have 5 students, while the specific bylaw stipulates that the class should normally have 30 students, then there is discrimination in providing the possibility of education where the right to education is violated on equal terms for all.

(c) Regarding Articles 5, 6 and 7 of the challenged Act

52. The Applicant specified that Articles 5, 6 and 7 of the challenged act are incompatible with paragraph 2 of Article 12 and paragraphs 2 and 3 of Article 124 of the Constitution.

53. Regarding to this allegation, the Applicant refers to his reasoning given in his referral in relation to Article 3 of the challenged act and in this regard specifies that: *“Since the Ministry is a non-competent body for the establishment of educational institutions, it is also a non-competent body for the conduct of this procedure, the details of which are set out in Articles 5, 6 and 7”*.

(d) Regarding Article 9 of the challenged Act

54. The Applicant alleges that Article 9 of the challenged act, which refers to the termination of educational institutions in municipalities, is incompatible with paragraph 2 of Article 12 and paragraphs 2 and 3 of Article 124 of the Constitution.
55. Regarding this provision of the challenged act, the Applicant specifies that: *“While above, we saw that an own and exclusive competence of the municipality by this Instruction has passed to the Ministry, here the issue deepens further, where a competence of the municipality passes to the general secretary of the ministry, i.e. not to the Ministry as a body. Given the above-mentioned and justified reasons not to repeat them, such competence cannot be assigned to the ministry, much less to the secretary of the ministry. Whereas the Constitution provides that the organization and competencies of local self-government units are regulated by law.*
56. Following this allegation, the Applicant cites the content of Article 17 of the Law on Local Self-Government, specifically points h) and s) of this Article specifying that: *“[...] we understand that the termination of the activity of educational institutions is the competence of the municipality while it has full and exclusive competence in providing public education at the levels defined in this provision, their registration, and licensing. While it carries out this legal duty, it also decides on the institutions where it provides such a thing, adding here their registration, and licensing. Also, if it is not expressly provided that the termination of the activity of educational institutions is a competence of the municipality, we have the other basis, which is point 5) described above. If we take another look at the competencies of the Ministry listed in this letter, we do not encounter any provision where the termination of the activity of educational institutions is assigned to the Ministry of Education, or any provision that can be interpreted as such. Therefore, both the establishment and the termination of the activity of educational institutions, by this sub-legal act, violate the full and exclusive competencies of the Municipality, defined by the Law and the Constitution of the Republic of Kosovo.*
57. Finally, the Applicant points out that: *“So, both the establishment and the termination of the activity of educational institutions, by this sub-legal act, violate the full and exclusive competencies of the Municipality, defined by the Law and the Constitution of the Republic of Kosovo.”*

(ii) Regarding the procedure of issuing the challenged Act

58. The Applicant alleges that as a municipality they have never been officially notified for public consultation despite the fact that according to paragraph 6 of Article 38 of the Government's Rules of Procedure, the Minister has authority to approve sub-legal acts that fall within the responsibility and within the competence of the Ministry, after the consultation process as defined in Article 7 of this Regulation and where it is provided that during the consultation process the relevant stakeholders should be included in relation to issues that have an impact on their respective competencies.
59. Finally, the Applicant requests the Court to: (i) declare his Referral admissible; (ii) approve the Applicant's Referral as grounded; (iii) find that the challenged act was issued

and approved contrary to Articles 12, 47, 123, 124 of the Constitution, Articles 2, 3, 4 and 9 of the European Charter of Local Self-Government, Article 17 of the Law on Local Self-Government, Articles 3 and 4 of the Law on Education in Municipalities and Articles 5, 7, 8 and 13 of the Law on Pre-University Education; (iv) annul the challenged act; and (v) request the Ministry of Education to notify the Court, in accordance with Rule 66, paragraph (5) of the Rules of Procedure, of the measures taken to implement the Judgment of the Constitutional Court.

Comments of the Ministry of Education of 26 October 2021

60. On 26 October 2021, the Court received written comments from the Ministry of Education.
61. The Ministry of Education in its comments initially emphasized that the challenged act is based on Articles 1, 2, 3, paragraphs 1 (subparagraph 2.3), 5, 6 and 16 of Article 5 and Article 13 of the Law on Pre-University Education.
62. In this context, the Ministry of Education alleges that the preamble of the challenged act is based on the Law on Pre-University Education and that municipalities with no legal provision, have no competencies on establishment and termination of educational institutions. Regarding this allegation, the Ministry of Education emphasizes that *“How could an education system function in Kosovo, if municipalities each according to their own whim would determine the conditions and procedures of establishment and termination of the activity of pre-university education institutions”*.
63. The Ministry of Education also points out that the challenged act has passed the preliminary and public consultation procedures and at no stage have they received comments from municipalities or any other institution. According to MEST: *“This field functions as such in the entire territory of Kosovo, while only the Municipality of Kamenica objects its implementation.”*
64. Finally, the Ministry of Education requests the Court to: (i) approve its response as grounded; and (ii) reject the Applicant’s referral as *“with no legal grounds”*.

Comments of the Ministry of Education of 3 June 2022

65. On 6 June 2022, the Court received written comments from the Ministry of Education against the Applicant's clarified referral of 9 November 2021. Further, the Ministry of Education, in addition to its comments to the Applicant's clarified referral, has also submitted the letter of 28 August 2020 with the draft Administrative Instruction to the Minister of Education; electronic communication if the representative of the municipality of Kamenica in the capacity of the member of the working group has provided comments regarding the draft Administrative Instruction.
66. The Ministry of Education first provided a factual chronology as follows:
 - “1. On 14.09.2020, the Minister of Education and Science (hereinafter in the text: MES) Mr. Ramë Likaj, signed the Administrative Instruction (MES) no. 104/2020 on Criteria and Procedures for Establishing and Discontinuing the Activity of Pre-University Education Institutions (hereinafter in the text: Administrative Instruction no. 104/2020).
 2. The instruction was drafted by a heterogeneous group established by decisions. The working group drafted the draft. The work group has been supported with expertise from GIL.

3. *The draft passed the preliminary and public discussion stages, as required by the relevant legislation for drafting normative acts (see the explanatory letter of the legal office of MESTI to Minister Likaj).*
4. *Representatives of the Municipality of Kamenica were part of the working group meetings, namely the director of the Municipal Directorate for Education and the official of this directorate (see the list of participants of the working group).*
5. *The Municipality of Kamenica did not object to any Article of the Instruction and their proposals are included in the text of the Instruction (clarification: the complainant has not submitted any comments to the public discussion. See communication with the official responsible for the public discussion platform).*
6. *The instruction has been in preliminary discussion 15 working days and in public discussion 15 calendar days on the platform for public discussion (see: <https://konsultimet.rksgov.net/institutions.php>). Such deadlines are according to the Administrative Instruction no. 03/2013 on Standards of Drafting Normative Acts.*
7. *The Municipality of Kamenica continues to implement this instruction and has not brought any complaint against the administrative instruction.*
8. *The Administrative Instruction entered into force and was published on 14 September 2020.*
9. *The Municipality of Kamenica has filed a complaint on 27 September 2021 out of legal deadline, not meeting the main criterion for admissibility of the complaint with the Constitutional Court.*
10. *The spirit of addressing the process of establishing educational institutions with a central level decision (ensuring compliance with standards and criteria) is a continuation of more than a decade since the entry into force of the Laws in the field of education.*
11. *The new Administrative Instruction 104/2020 only further specifies the process of establishment and termination of educational institutions and removes the political influence from the process.*

67. Secondly, regarding the admissibility of the referral, the Ministry of Education states as follows:

“On 27 September 2021, the Municipality of Kamenica submitted the referral to the Constitutional Court. The referral was based on Article 113, paragraph 4 [...] According to the Law on the Constitutional Court, it must meet the criterion as postulated in Article 41, where it notes about the deadline within which the act can be challenged by the municipality. Article 41 states that “The referral should be submitted within one (1) year following the entry into force of the provision of the law or act of the government being contested by the municipality”. This mandatory criterion by law has not been met by the Municipality of Kamenica with the submission of the complaint. This is because the Administrative Instruction entered into force on 14 September 2020, while the complaint was filed on 27 September 2021, precisely exceeding the legal deadline. This automatically and by law makes the complaint inadmissible and the Constitutional Court, according to the condition of the imperative deadline of 1 year, does not need to get into the merits of the case. [...]”

68. Thirdly, regarding the clarification of the referral by the Applicant, the Ministry of Education states that: *“Administrative Instruction no. 104/2020 is in full compliance with the competencies of MESTI according to Law no. 04/1—032 on Pre-University Education in the Republic of Kosovo and other legislation in force”.*

69. Following this, the Ministry of Education refers to Article 5 [Duties of the Ministry] of the Law on Pre-University Education through the provisions of which are listed the responsibilities of the Ministry of Education in the field of pre-university education. In this context, the Ministry of Education emphasizes that: *“In this regard, the aim of AI104/20 [the challenged act] is to clarify the role of the Ministry and the Municipality regarding the administration of the establishment of pre-university education institutions. To the point, Article 4 [of the challenged act] sets the necessary standards (necessary for the existence and functioning of educational institutions).”*

70. Further, the Ministry of Education underlines that:

In this spirit, AI 104/20 aims to incorporate the legal standards that are the obligation of the ministry into an ex ante audit, respectively before the legal consequences of the initiation of ex post activity occur after a process of establishment of a pre-university education institution. This contributes to the spirit of legal certainty of beneficiaries of educational services (children) and their best interest. According to the Law no. 06/L-084 on the Protection of Children, in Article 5, where it sets the best interest of the child states that “All actions and decisions relating to the child, taken by parents or guardians, institutions, child protection services, child protection professionals, courts, administrative authorities or legislative bodies, the best interest of the child shall be the highest and most overriding consideration.” In this regard, any ex-post control process would not be in the best interest of the children. In addition, such wording is in the spirit of Law no. 04/L-032 on Pre-University Education in the Republic of Kosovo, where in Article 5 it gives this obligation of ex-ante control by calling into action the Ministry in charge with the wording as follows “The Ministry bears the main responsibility for planning, setting standards and ensuring the quality of the pre-university education system”. This clearly demonstrates the active role of the Ministry to act in setting these unique standards and maintaining them.”

71. Further, the Ministry of Education emphasizes that:

“The lack of an ex-ante control of documents and processes that lead to the establishment of a pre-university education institution by the Municipality, prevents the Ministry from carrying out its constitutional and legal duties, this creates a dangerous anti-legal precedent as it prevents the Ministry to:

1. promote a non-discriminatory education system in which the right of each person for quality education and educational opportunities is to be made available to all;

2. design, implement and supervise equivalent and efficient forms of educational administration and school management;

3. improve the quality, adequacy and educational efficiency at all levels; in this regard we clarify that the provisions of the sub-legal act are in accordance with the legal authorizations and should be in accordance with the principle of legality and legal security, respectively, predictability as an element thereof, as elaborated in the Checklist for Rule of Law by the European Commission for Democracy through Law (Venice Commission).

Furthermore, the Law on Pre-University Education underlines that it is “the general obligation of the Ministry, municipalities, educational institutions and all other bodies to plan and provide efficient, effective, professional services, designed to provide all children with equal rights to education, in accordance with their specific skills and needs.”

72. The Ministry of Education continues its reasoning against the Applicant's allegations that: *"In this spirit, Article 42 of the Law [on Pre-University Education] states that: "The Ministry may establish and maintain resource centres, special schools and other units providing special education for children with severe or multiple disabilities or learning difficulties who are assessed as being unable to be educated in municipal schools or public training institutions". This serves as an analogy to the clarification of the view regarding the implementation of the legislation on the establishment of schools without specific definition. The principle of "Mutatis Mutandis" is applied in this regard. Consequently, regulation within the law on pre-university education applies appropriately to the establishment of general schools."*
73. Further, the Ministry of Education also refers to Article 2 (Right to Education) of Protocol no. 1 of the European Convention on Human Rights (hereinafter in the text: ECHR) stating that: *"The first sentence of the article defining the right to education guarantees the right of every individual to education. However, this right also implies certain responsibilities for the state, in order to guarantee such a right."* Following this reasoning, the Ministry of Education refers to the case law of the European Court of Human Rights (hereinafter in the text: ECtHR), namely the cases *Golder v. United Kingdom*, *Leyla Sahin v. Turkey*, *Campbell and Cosans v. United Kingdom*, paragraph 33; *Sulak v. Turkey*; *Cyprus v. Turkey*, paragraph 278; and *Velyo Velez v. Bulgaria*.
74. According to the Ministry of Education: *"So, domestic and applicable international legislation delve into the continuity of dealing with the issue of the organization of the education system. Therefore, it is very clear that this continuity must continue at all levels, in all types and throughout the territory of Kosovo. This is done only by treating the education system as a unique system and which takes place under ex ante and ex post supervision."*
75. Finally, the Ministry of Education proposes to the Court to: *"DECIDE that the Applicant's Referral has been submitted outside the legal time limit set by Article 41 of the Law and Rule 39 (2) and 3 (d) of the Rules of Procedure, and as such is inadmissible"*.

Relevant constitutional and legal provisions

CONSTITUTION OF THE REPUBLIC OF KOSOVO

Article 12 [Local Government]

1. *Municipalities are the basic territorial unit of local self-governance in the Republic of Kosovo.*
2. *The organization and powers of units of local self-government are provided by law.*

Article 47 [Right to Education]

1. *Every person enjoys the right to free basic education. Mandatory education is regulated by law and funded by public funds.*
2. *Public institutions shall ensure equal opportunities to education for everyone in accordance with their specific abilities and needs.*

Article 123

[General Principles]

- 1. The right to local self-government is guaranteed and is regulated by law.*
- 2. Local self-government is exercised by representative bodies elected through general, equal, free, direct, and secret ballot elections.*
- 3. The activity of local self-government bodies is based on this Constitution and the laws of the Republic of Kosovo and respects the European Charter of Local Self-Government. The Republic of Kosovo shall observe and implement the European Charter on Local Self Government to the same extent as that required of a signatory state.*
- 4. Local self-government is based upon the principles of good governance, transparency, efficiency and effectiveness in providing public services having due regard for the specific needs and interests of the Communities not in the majority and their members.*

Article 124

[Local Self-Government Organization and Operation]

- 1. The basic unit of local government in the Republic of Kosovo is the municipality. Municipalities enjoy a high degree of local self-governance and encourage and ensure the active participation of all citizens in the decision-making process of the municipal bodies.*
- 2. Establishment of municipalities, municipal boundaries, competencies and method of organization and operation shall be regulated by law.*
- 3. Municipalities have their own, extended and delegated competencies in accordance with the law. The state authority which delegates competencies shall cover the expenditures incurred for the exercise of delegation.*
- 4. Municipalities have the right of inter-municipal cooperation and cross-border cooperation in accordance with the law.*
- 5. Municipalities have the right to decide, collect and spend municipal revenues and receive appropriate funding from the central government in accordance with the law.*
- 6. Municipalities are bound to respect the Constitution and laws and to apply court decisions.*
- 7. The administrative review of acts of municipalities by the central authorities in the area of their own competencies shall be limited to ensuring compatibility with the Constitution of the Republic of Kosovo and the law.*

European Charter of Local Self-Government [adopted by the Council of Europe on 15 October 1985]

Article 2

[Constitutional and legal foundation for local self-government]

The principle of local self-government shall be recognised in domestic legislation, and where practicable in the constitution.

Article 3

[Concept of local self-government]

- 1. Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.*

[...]

Article 4 **[Scope of local self-government]**

1. The basic powers and responsibilities of local authorities shall be prescribed by the constitution or by statute. However, this provision shall not prevent the attribution to local authorities of powers and responsibilities for specific purposes in accordance with the law.
2. Local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority.
3. *Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy.*
4. *Powers given to local authorities shall normally be full and exclusive. They may not be undermined or limited by another, central or regional, authority except as provided for by the law.*
5. *Where powers are delegated to them by a central or regional authority, local authorities shall, insofar as possible, be allowed discretion in adapting their exercise to local conditions.*
6. *Local authorities shall be consulted, insofar as possible, in due time and in an appropriate way in the planning and decision-making processes for all matters which concern them directly.*

Article 8 **[Administrative supervision of local authorities' activities]**

1. Any administrative supervision of local authorities may only be exercised according to such procedures and in such cases as are provided for by the constitution or by statute.
2. Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities.
3. Administrative supervision of local authorities shall be exercised in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect.

Law No. 03/L-040 on Local Self Government [published in the Official Gazette on 4 June 2008]

Article 3 **Definitions**

-“Own competencies”- shall mean competencies vested upon the municipalities by the Constitution or laws for which they are fully responsible in insofar as they concern the local interest and in accordance with the law;

Article 15 **Principle of subsidiary**

The municipalities shall exercise its competences in accordance with the principle of subsidiary.

Article 16 **Municipal Competencies**

Municipalities shall exercise own, delegated and enhanced competencies in accordance with the law

Article 17 **Own Competencies**

Municipalities shall have full and exclusive powers, insofar as they concern the local interest, while respecting the standards set forth in the applicable legislation in the following areas:

[...]

h) provision of public pre-primary, primary and secondary education, including registration and licensing of educational institutions, recruitment, payment of salaries and training of education instructors and administrators;

[...]

s) any matter which is not explicitly excluded from their competence nor assigned to any other authority.

Law No. 03/L-068 ON EDUCATION IN THE MUNICIPALITIES OF THE REPUBLIC OF KOSOVO [published in the Official Gazette on 15 June 2008]

Article 3 **Ministry of Education, Science and Technology**

The Ministry of Education, Science and Technology of the Republic of Kosovo (MEST) shall have the following responsibilities

- a) develop policies, draft and implement legislation for the development of education, including higher education, and science in Kosovo;*
- b) promote a non-discriminatory educational system in which each person's right to education is respected and quality learning opportunities are available to all;*
- c) establish and manage a general system of certification for all teachers in Kosovo;*
- d) extend non-formal education and adult education on all levels, including to remote areas, and promote life-long learning opportunities for all;*
- e) design, implement and supervise equitable and effective forms of educational administration and school management;*
- f) improve the quality, relevance and efficiency of education at all levels;*
- g) facilitate the development and qualitative improvement of the education system and the efficient delivery of educational services;*

- h) promote research related to the social, economic, scientific, technological and cultural development of Kosovo;*
- i) develop a comprehensive library system, which will include University and school libraries;*
- j) promote an inclusive policy for the integration of impaired and disabled persons into the educational system; and*
- k) promote parental and community participation in educational activities and appropriate forms of school-community partnerships at the local level.*
- l) education Inspection.*

Article 4

Competencies and Enhanced Competencies of the Municipalities

4.1 Municipalities shall have full and exclusive powers, insofar as they concern the local interest, while respecting the standards set forth in applicable legislation with respect to the provisions of public preprimary, primary and secondary education, including registration and licensing of educational institutions, recruitment, payment of salaries and training of education instructors and administrators.

4.2 Municipalities may, in addition to the powers referred to in Paragraph 1 of this Article, be vested with enhanced competencies in the field of education as prescribed by this law or other applicable legislation.

4.3 In accordance with the Law on Local Self Government, municipalities shall be entitled to cooperate, within the areas of their own competencies in the field of education, with other municipalities and other authorities. This entitlement includes cooperation with municipalities and institutions, including government agencies, in the Republic of Serbia.

Article 5

Competencies of the Municipalities in Public Education Levels 0, 1, 2, and 3 (Pre-Primary, Primary, Lower Secondary and Upper Secondary)

Competencies referred to in Article 4 of this law shall include the following specific municipal competencies in public education at levels 0 (pre-primary), 1 (primary), 2 (lower secondary) and 3 (upper secondary), in accordance with general guidelines and/or procedures and standards promulgated by the Ministry of Education, Science and Technology (MEST):

- a) construction of educational facilities in accordance with Chapter 3 of this law and other applicable legislation;*
- b) registration and admission of students in accordance with due respect for the principles of nondiscrimination under law;*
- c) employment of teachers and other school personnel in accordance with legal procedures for the recruitment, selection and employment of public employees;*
- d) selection of the Director and/or Deputy Director of educational institutions in accordance with legal procedures for the recruitment and legal criteria's determined by MEST from a commission established by the Municipality which two members shall be from the Municipality and one from MEST;*

- e) registration, public health and safety inspection and licensing of pre-primary educational institutions, in accordance with Chapter 4 of this law;*
- f) payment of the managerial staff as well as other employed personnel in accordance with Kosovo legislation;*
- g) training educators and other professional staff in accordance with guidelines, principles and standards promulgated by the MEST;*
- h) supervision and inspection of the education process in accordance with guidelines established by the MEST;*
- i) development, approval, and implementation of the Rules of Procedure for schools, including the Code of Conduct for managerial staff, teachers, other personnel, and students as well as disciplinary measures;*
- j) reporting on pre-primary level education, budgetary and management operations to municipal governments and the MEST in accordance with municipal and central legislation;*
- k) application of such delegated functions or competencies as shall be determined by formal agreement between the municipality and the Government of the Republic of Kosovo;*
- l) monitoring and reporting on students' educational and social progress to parents and other responsible authorities as determined by legislation; and*
- m) determination of the parents' participation fee for the admission of children to nurseries and kindergartens in accordance with the laws of Kosovo.*

Article 6

Administrative Responsibilities of the Municipalities

Competencies referred to in Article 4 of this law shall include the following municipal administrative responsibilities in public education, in accordance with general guidelines and/or procedures and standards promulgated by the Ministry of Education, Science and Technology (MEST):

- a) municipalities shall provide educational administration services sufficient for the functions of preprimary, primary, lower secondary, upper secondary and higher education in accordance with the law;*
- b) minimum educational administrative services shall include the appointment of a Municipal Director for the department/directorate including the education functional sector as well as sufficient professional and support staff to perform the duties required under Kosovo legislation; and*
- c) monitoring of and reporting on educational management and operations in municipalities shall be performed through the municipal administrative body identified as competent for that function by the Mayor of the municipality.*

Article 11

Licensing of Education

11.1 All educational institutions in the Republic of Kosovo shall be licensed in accordance with criteria and standards established by law. Public educational institutions shall be licensed by the municipality prior to beginning operations.

11.2 Municipalities shall only issue business licenses to private educational institutions in the same manner as other business licenses under the provisions of the law on Local Government Finance of Kosovo. Municipalities shall require documentary proof of business registration and licensing by the MEST as an educational institution prior to issuance of a business license to a private educational facility in their territory.

11.3 Municipalities shall issue administrative decisions granting, denying or repealing licensing of any public education institution, following a written opinion from the MEST.

a) the MEST will provide notification of its opinion to the municipality and the applicant institution within 60 days of the submission of a request for an opinion by the municipality.

b) the municipality shall inform the applicant institution of its decision no later than 60 days after the municipality receives the opinion from the MEST.

11.4 In any case in which the municipality's decision differs from the opinion of the MEST, the municipality shall provide detailed written explanation of the reasons for its decision to the MEST and the applicant institution; and

11.5 If the municipality does not notify the applicant institution within the 60-day period required by paragraph 3.b of this Article, the opinion of the MEST shall be considered the final decision on licensure of the Educational Institution.

LAW NO.04/L –032 ON PRE-UNIVERSITY EDUCATION IN THE REPUBLIC OF KOSOVO [published in the Official Gazette on 16 September 2011]

Article 5

Duties of the Ministry

1. The Ministry shall have the primary responsibility for planning of, setting standards in, and quality assurance of the pre-university education system, and shall have the following general duties:

1.1. to develop policies, draft and implement legislation for the development of preuniversity education and training;

1.2. to define the outcomes of the different levels of pre-university education and training and to award, or authorise the award of, qualifications at appropriate levels of the National Qualifications Framework to those who successfully complete pre-university programmes;

1.3. to promote a non-discriminatory education system in which each person's right to education and/or training is respected and equal quality learning opportunities are available for all;

1.4. to promote the protection of vulnerable groups within the education and training system, the health and welfare of pupils and employees of educational and/or training institutions, and measures to prevent drop-out;

1.5. to establish criteria and manage a comprehensive system of licensing and certification of all teachers through the State Licensing Council for Teachers established by this Law;

1.6. to establish and maintain an education and training management information system;

- 1.7. to provide annually to the Grants Commission sufficient data and formula standards in order to determine the specific grant for education in accordance with applicable law and the provisions of Article 28 of this Law;
- 1.8. to design effective and impartial forms of education administration and management of education and training institutions for implementation by municipalities and to establish criteria and procedures for monitoring the performance of governing boards;
- 1.9. to promote and improve the quality And efficiency of education and training through the mechanisms provided in Article 8 of this Law for inspection, monitoring and evaluation; to enhance the quality of education; and to ensure compliance with the Constitution and applicable law;
- 1.10. to set the criteria for the evaluation and assessment of pupils in educational and/or training institutions;
- 1.11. to organize and manage external assessment in ISCED levels 1, 2 and 3, in line with the requirements for the award of qualifications in the National Qualifications Framework, and consulting with the National Qualifications Authority as appropriate;
- 1.12. to ensure comprehensive policies for inclusion of persons with special needs;
- 1.13. to promote through the Kosovo Parents' Committee, the governing bodies of educational and training institutions and otherwise, parental and community partnership and participation in educational and training activities.
2. The Ministry shall issue bylaws in relation to:
 - 2.1. length and timing of the school year within the Kosovo Curriculum Framework;
 - 2.2. teaching hours and breaks, school holidays
 - 2.3. maximum class sizes and pupil-teacher ratios (with threshold for the establishment of classes or schools teaching in non-official languages lower than normally stipulated);
 - 2.4. examinations and assessment, in accordance with applicable law.
3. The Ministry shall issue bylaws regarding registration, retention and protection of personal data in the education system, taking into account the following criteria:
 - 3.1. official documents issued by educational and training institutions should contain personal data, as following: name, name of a parent –legal custodian, surname and date of birth;
 - 3.2. official documents shall be issued in all official languages; a pupil educated in a nonofficial language has the right to have his/her official documents kept and issued in his/her language of instruction, in addition to the official languages;
 - 3.3. personal data related to ethnicity or religious status may be recorded for statistical monitoring purposes, helping to promote equal opportunities and may not be used for any other purpose: such data may not be recorded in any way that may identify such individuals.
4. Within the annual Government Report, the Ministry shall report on pre-university education and the implementation of this Law to the Assembly at the end of the calendar year.
5. The Ministry shall name and rename publicly-funded educational and/or training institutions on the recommendation of the relevant Municipal Education Directorate, such recommendation to include up to three proposals made by the relevant governing board.
6. The Ministry shall determine for each educational and/or training institution a unique reference code for use in the education information management system.
7. Competencies of the Ministry, as complementary to the competencies granted under the Law on Education in Municipalities of Republic of Kosovo, no. 03/L-068, 21 May 2008 in educational and training facility infrastructure shall include:

- 7.1. drafting and monitoring the implementation of policies, standards and norms on education space;
- 7.2. providing technical assistance for municipalities in planning and designing training and education facilities;
- 7.3. drafting policies for school space management and maintenance;
- 7.4. providing technical assistance for municipalities in ensuring the adequacy of school buildings and equipment in accordance with international standard on health and safety and protection of the environment, accessibility for pupils and staff with physical disabilities, and assistive equipment to support inclusive education.
- 7.5. approving capital investments for construction and renovation of facilities financed by the Kosovo budget and donors
- 7.6. develops and maintains the school space program, which is interrelated with the Education Management Information System, and designs the national plan for capital investments in education.
8. The Ministry shall adopt in a bylaw licensing standards for educational and/or training institutions including the standards referred to in paragraph 7 of this Article.
9. The Ministry shall license and accredit institutions offering general educational qualifications according to the National Qualifications Framework according to criteria and standards established for this purpose; institutions offering other types of qualifications shall be accredited by the National Qualifications Authority according to criteria and standards established for this purpose, and licensed by the Ministry
10. The Ministry shall act as a second instance body for decisions of other educational and training bodies where the right of appeal is specified in this Law.
11. The Ministry may by bylaw, and for such period as it determines, at the request of a municipality or municipalities, confer exemption or relaxation from any requirement imposed by this Law on any municipality or institutional governing board, to facilitate the implementation by the municipalities or by educational and/or training institutions, of innovative projects that may contribute to the raising of the educational standards achieved by pupils. In exercising this power, the Ministry shall have regard to the effect of the project on the curriculum and assessment and the likely effect of the project on all the pupils who may be affected by it, including pupils with learning difficulties or disabilities, and members of different communities.
12. The Ministry, through this law and other laws in effect, and in agreement with the relevant municipality, shall promote public–private partnerships to improve provision of education and/or training services.
13. The Ministry shall issue a bylaw on the distribution and maintenance of free of charge textbooks authorised under the provisions of Articles 26 and 27 of this Law.
14. The Ministry, through a bylaw, shall determine the financial participation by pupils for ISCED Level 4.
15. The Ministry, in cooperation with relevant ministries, shall undertake special measures for the education of individuals in prisons or in young offenders' institutions, as well as for those confined in psychiatric institutions, or are subject to long-term hospitalization, and for those released from institutions or discharged from hospitals and continuing their education.
16. The Ministry shall issue sub-legal acts in any area of its responsibility under this Law or other applicable laws.

Article 7

Competencies of municipalities

1. Competencies of the municipalities are regulated through the:

- 1.1. Law for Local Government, no. 03/LO40, of the date 20 February 2008 and Law for Education in the municipality, of the date 03/L-068, May 21, 2008, and
- 1.2. through any additional competencies assigned by provisions of this Law
2. The exercise by the municipality of their powers and duties in this field shall be monitored by the Ministry in collaboration with the Ministry of Local Government and Administration to ensure compliance with the applicable legislation.
3. Municipalities are responsible for the following additional competencies:
 - 3.1. construction of education and training facilities;
 - 3.2. maintaining and repairing the premises and equipment of educational and training institutions;
 - 3.3. ensuring a healthy environment for pupils and staff, including water, hygienic-sanitary conditions, health service, as well as a safe environment including safe utilities and effective security;
 - 3.4. through co-operation with parents, police and other public authorities taking steps to deal effectively with violent or bullying behaviour and substance abuse in or associated with the respective institution.

Article 8

Inspection of education

1. Inspection of educational and training institutions for the purposes set out in sub-paragraph 1.9 paragraph 1 of Article 5 of this Law is a function of the Inspectorate Department of the Ministry.
2. The authority for inspection derives from the Ministry; directors of educational and training institutions and Municipal Education Authorities shall co-operate with authorised inspectors, provide all necessary documentation and access to the institution, and attend the inspection personally or through an authorised deputy.
3. Inspection shall be organised in an annual planning cycle, with the possibility of special inspections in specific circumstances as decided by the Inspectorate Department.
4. The purposes of inspection of the operation of educational and training institutions at ISCED Levels 0, 1, 2, 3 and 4 are to check, in co-operation with inspectors from other fields (employment, sanitary, construction, financial, etc) and record:
 - 4.1. compliance with the respective duties and functions of the institution according to this Law, other applicable laws and bylaws;
 - 4.2. the functioning of the governing board of the institution, the Parents' and Pupils' Councils, the financial operations, accuracy of records of numbers of pupils by level and grade, accuracy of pedagogical and school documents, organisation of classes and examinations;
 - 4.3. the numbers, qualifications and arrangements for professional development of staff;
 - 4.4. the working environment including compliance with standards of health and safety of pupils and staff, records kept of disciplinary action and its outcome;
 - 4.5. compliance with the Kosovo Curriculum Framework, including the core, and schoolbased curriculum, assessment and examination procedures, and the use of approved textbooks, educational learning resources and learning materials;
 - 4.6. and, where non-compliance in any field is observed, to give the director of the institution concerned specific advice or recommendation for compliance within a specified timescale.
5. If adequate measures are not taken by the director of the institution to redress the deficiencies in any area listed in paragraph 4. of this Article, the inspector may institute disciplinary procedures against the director or any member of staff of the institution.

6. Following the report of the inspector, signed by the inspector and by the director of the institution concerned:

6.1. the Ministry may terminate the work of educational and training institutions which are unlicensed, or are operating in an unsafe or unhealthy environment;

6.2. the Ministry may instruct the municipality to terminate the employment of a teacher appointed contrary to the criteria established in this Law, or who is barred from work due to a medical condition or the order of a court, or who is otherwise disqualified according to the provisions of this Law or other applicable law;

6.3. if deficiencies relate to non-observance of the curriculum, the Ministry may require compliance through additional or alternative classes;

6.4. the Ministry may annul marks when assessment procedures have not been respected, and annul diplomas and other documents gained in contradiction with this Law or other applicable law.

7. The Inspectorate Department shall also have responsibility for monitoring and evaluating the academic work of educational and training institutions, as part of the annual cycle of inspections. The Ministry shall, in consultation with the KCSAA, establish criteria and procedures for national inspection, which may include experts in specific academic or professional fields, in accordance with paragraph 4. of Article 25 of this Law

8. Appeals against any actions or recommendations of an inspector may be made to the Appeals Committee of the Ministry.

Article 9

The organization of pre-university education

1. Pre-school and pre-university education shall be organized within a national framework for lifelong learning according to the following ISCED levels and corresponding Key Stages in the Kosovo Curriculum Framework KCF):

1.1. Level 0: Pre-primary education (normally ages zero (0) to six (6), KCF Key Stage and part of Key Stage 1), regulated by this Law only for age five (5) to six (6) (pre-primary school); otherwise in accordance with Article 10 of this Law;

1.2. Level 1: Primary education for five (5) years (normally from age six (6), remaining part of KCF Key Stage 1 and 2);

1.3. Level 2: Lower secondary education for four (4) years (normally from age twelve (12), KCF Key Stages 3 and 4);

1.4. Level 3: Upper secondary education for three (3) years, depending on curriculum determined by the Ministry (normally from age fifteen (15), KCF Key Stages 5 and 6), including gymnasium, high vocational school, schools of music and art; and

1.5. Level 4: Post-secondary vocational institution for one (1) to two (2) years, depending on the curriculum determined by the Ministry (normally from age eighteen (18), KCF postsecondary specialisation).

1.6. Lifelong learning programmes for adults which may be at ISCED Levels 3 or 4.

3. Primary education becomes compulsory as foreseen in the transitional provisions.

4. Compulsory schooling is free of charge.

5. The Ministry may issue bylaws to avoid anomalous situations arising in relation to the compulsory education requirements.

6. A child who is under the minimum compulsory school age at the beginning of the school year may be enrolled in compulsory schooling subject to a recommendation by school professional psychological service. The decision on enrolment is taken by the school director.

7. The Ministry may, by bylaw, specify selection tests for particular vocational schools at ISCED Level 3.

8. The Ministry may, by bylaw, adjust the ISCED definitions in this Law in line with the outcome of the UNESCO General Conference at its 36th Session (2011), based on the Review of ISCED reported to the UNESCO General Conference at its 35th Session (2009).

Article 13 **Establishment of educational institutions**

1. Primary (ISCED Level 1) and lower secondary (ISCED Level 2) schools shall be established in each municipality; schools at these Levels may be combined.

2. A municipality may establish and maintain satellite classes in ISCED Level 1 and 2 as a part of the school network in areas where it is not practicable to establish a main school, according to criteria determined by the Ministry through a bylaw.

3. Municipalities shall ensure that provision is made at ISCED Levels 1, 2 and 3 for teaching in all languages of instruction within their territories, with a threshold of enrolment lower than normally required through bylaw, or provide alternatives including subsidized transport to an area where such schooling is being offered.

4. Education and vocational training at ISCED Level 3 may take place either in schools or in training institutions, either public or private, or in private or public enterprises.

5. Post-secondary vocational education at ISCED Level 4 may take place in colleges, training establishments, either public or private, or in public or private enterprises, or under partnership arrangements according to applicable law. The Ministry shall regulate the entrance requirements for programmes offered at publicly-funded or partnership post-secondary non-university institutions.

REGULATION (GRK) - NO. 02/2021 ON THE AREAS OF ADMINISTRATIVE RESPONSIBILITY OF THE OFFICE OF THE PRIME MINISTER AND MINISTRIES

Article 8 **Minister**

1. In accordance with the Constitution, the legislation in force, policies and directives set by the Government or the Prime Minister, the Minister shall:
[...]

1.4. Issue decisions and bylaws and conclude memorandums of understanding/cooperation within the area of administrative responsibility of the ministry; and

1.5. Perform other duties within the area of administrative responsibility of the ministry, as defined by the legislation in force.
[...]

Request for withdrawal of Referral

76. The Court recalls that the Mayor of the Municipality of Kamenica, who took his mandate as mayor of this municipality on 3 December 2021, through his legal representative, submitted a request for withdrawal of the Referral.

77. The Court first recalls that the Referral on behalf of the Municipality of Kamenica was submitted by its previous Mayor, Qëndron Kastrati, whose mandate as Mayor of the Municipality of Kamenica ended as a result of the local elections in the Republic of Kosovo, held on 17 October 2021 and the second round of elections on 14 November 2021, and taking the mandate of the elected Mayor of the Municipality of Kamenica, Mr. Kadri Rahimaj, on 3 December 2021.
78. In the request for withdrawal of the Referral, submitted by the new Mayor of the Municipality of Kamenica, Mr. Kadri Rahimaj, is specified that: “[...] in accordance with [the Rules of Procedure], specifically Rule 35 point 1, we withdraw the Referral in case KO 173/2021, as the Municipality of Kamenica has no legal interest in the constitutional review of this case”.
79. In this respect, the Court refers to Article 23 of the Law [Withdrawal of a party] which provides that:

“The Constitutional Court shall decide on matters referred to it in a legal manner by authorized parties notwithstanding the withdrawal of a party from the proceedings.”
80. Furthermore, the Court also refers to paragraphs (1), (2) and (3) of Rule 35 [Withdrawal, Dismissal and Rejection of Referrals] of the Rules of Procedure, which specify:

“(1) A party may withdraw a filed referral or a reply at any time before the beginning of a hearing on the referral or at any time before the Court decision is made without a hearing.

(2) Notwithstanding a withdrawal of a referral, the Court may determine to decide the referral.

(3) If the Court determines to decide such a referral, it shall decide without a hearing and solely on the basis of the referral, any replies, and the documents attached to the filings.
[...]”
81. Based on the above-mentioned provisions of the Law and the Rules of Procedure, the Court highlights that despite the Applicant's request to withdraw the Referral, the Court may decide to review the Referral.
82. In the context of the present Referral, the Court recalls that the latter was filed based on paragraph 4 of Article 113 of the Constitution, based on which the municipality is authorized to file a referral with the Constitutional Court whereby it requests to assess whether an act of the Government has violated the municipal responsibilities or reduced the revenues of the municipality. Specifically, through the Referral submitted to the Court by the previous Mayor of the Municipality of Kamenica, Mr. Qëndron Kastrati, the constitutional review of the challenged Act, approved in the form of an Administrative Instruction by the Minister of Education was requested, related to which he basically alleged that its Articles 3, 4, 5, 6, 7 and 9 violated the municipal responsibilities in the field of pre-university education related to the establishment and termination of public educational institutions in municipalities and separate parallels.
83. As a result, when assessing the request of the new Mayor of the Municipality, Mr. Kadri Rahimaj, for withdrawal of the Referral, the Court will first examine and assess

whether in the context of the Referral submitted, the implementation of the challenged Act may have further effect on the municipal responsibilities of the Municipality of Kamenica which are related to exercising of its own powers in the field of pre-university education.

84. Firstly, the Court, referring to the challenged Act, notes that the latter is in force and the scope of this Act, in addition to the Municipality of Kamenica, also covers the other municipalities of the Republic of Kosovo.
85. Secondly, the Court also highlights that the challenged Act, approved in the form of an Administrative Instruction of the Ministry of Education, was issued pursuant to paragraph 16 of Article 5 of the Law on Pre-University Education. The challenged Act set the criteria for the establishment and termination of pre-university education institutions.
86. Thirdly, the Court also takes into account the issues that this Referral contains, and in light thereof, it points out that the allegations raised in the Referral submitted on 21 September 2021 are related to municipal responsibility in the field of pre-university education, provided by the applicable legislation implementing the principles set forth by Articles 123 and 124 of the Constitution. In this sense, the Referral or allegations raised therein are related to complying with the principles of local self-government in relation to the local self-government organization in the Republic of Kosovo and in particular the determination of the municipalities' own competences, as provided by the Constitution.
87. As a result, based on the content of the submitted Referral, namely: (i) the fact that the challenged Act is still in force and that the scope of this Act, in addition to the Municipality of Kamenica, also extends to other the municipalities of the Republic of Kosovo; and (ii) taking into account the public interest in the continuation of the review and making a decision based on merits that this Referral contains, with an emphasis on the importance of clarifying the allegations related to the municipalities' own competences in the field of pre-university education defined by the applicable legislation in implementation of the principles defined by Articles 123 and 124 of the Constitution, considers that it is necessary to continue with the examination of the Referral.
88. Therefore, the Court rejects the request for withdrawal of the Referral and, as a result, decides to proceed with the assessment of the admissibility of the Referral.

Assessment of the admissibility of the referral

89. The Court first examines whether the Referral submitted to the Court has met the admissibility criteria set out in the Constitution and further specified in the Law and the Rules of Procedure.
90. The Court, in this regard, initially refers to paragraphs 1 and 4 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which stipulate:

“1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

[...]

4. A municipality may contest the constitutionality of laws or acts of the Government infringing upon their responsibilities or diminishing their revenues when municipalities are affected by such law or act.

91. The Court also refers to Articles 40 (Accuracy of the Referral) and 41 (Deadlines) of the Law, which stipulate:

Article 40
(Accuracy of the Referral)

“In a referral made pursuant to Article 113, Paragraph 4 of the Constitution, a municipality shall submit, inter alia, relevant information in relation to the law or act of the government contested, which provision of the Constitution is allegedly infringed and which municipality responsibilities or revenues are affected by such law or act.”

Article 41
(Deadlines)

“The referral should be submitted within one (1) year following the entry into force of the provision of the law or act of the government being contested by the municipality.”

92. Finally, the Court also refers to Rule 73 (Referral pursuant to Article 113.4 of the Constitution and Articles 40 and 41 of the Law), which stipulates:

“(1) A referral filed under this Rule must fulfill the criteria established under Article 113.4 of the Constitution and Articles 40 and 41 of the Law.

(2) In a referral pursuant to this Rule, a municipality must submit, inter alia, the following information:

(a) relevant information in relation to the law or act of the government contested;
(b) the specific provision of the Constitution which is allegedly infringed; and
(c) the municipality responsibilities or revenues that are affected by such law or act.

(3) The referral under this Rule must be filed within one (1) year following the entry into force of the provision of the law or act of the Government being contested.”

93. Based on the aforementioned provisions of the Constitution, the Court emphasizes that requests submitted to the Court based on paragraph 4 of Article 113 of the Constitution must meet the following constitutional criteria: (i) The municipality must be an authorized party; (ii) The municipality must challenge the constitutionality of a law of the Assembly or of an act of the Government; and (iii) The municipality must specify (argue) that the law or the challenged act violates municipal responsibilities or reduces its revenues; (iv) The municipality must submit the referral within the time limit set by law. In this regard, the Court stresses that these conditions are cumulative, namely the respective Municipality should challenge the law of the Assembly or the act of the Government and argue that the same have violated or reduced the municipal responsibilities or its revenues, within the deadline set by law, respectively (see Court case KO139/18, with the Applicant, *Municipality of Skenderaj*, Constitutional review of the Sectoral Collective Contract, no. 05-3815, of 12 June 2018, Resolution on Inadmissibility, of 12 November 2020, paragraph 39).

(i) Regarding the authorized party

94. The municipality, based on paragraph 4 of Article 113 of the Constitution, is authorized to challenge before the Court the constitutionality of the laws or acts of the government which violate the municipal responsibilities or reduce the revenues of the municipality, in case the respective municipality is affected by that law or act.

95. Consequently, with regard to the first condition, namely for the party entitled to submit the request, the Court finds that the Municipality of Kamenica is a party authorized to raise constitutional issues before the Court in so far as it is stipulated by the Constitution.
96. As a result of the rejection of the request for withdrawal of the referral, the Applicant as an authorized party in this case is the Municipality of Kamenica, represented by the legal representative Mr. Alban Hashani with the authorization of its new Mayor, Mr. Kadri Rahimaj.
97. Consequently, in order to assess the admissibility of the request, the Court must first assess whether a law of the Assembly or an act of the Government is challenged before it, and if the answer is affirmative, then it must assess whether the relevant act violates municipal responsibilities or reduces its revenues.

(ii) Regarding the challenged act

98. In the circumstances of the present case, it is clear that the Administrative Instruction (MES) no.104/2020, challenged by the Applicant, is not a law of the Assembly. Therefore, it should be assessed whether the same can be qualified as an “act of the Government” as defined by paragraph 4 of Article 113 of the Constitution.
99. The Court points out that based on paragraph 1 of Article 92 of the Constitution, the Government is composed of the Prime Minister, Deputy Prime Ministers and Ministers. The same, based on paragraph 2 of the same article, exercise the executive power in accordance with the Constitution and the law (see in this sense the Court case [KO61/20](#), with the Applicant, *Uran Ismaili and 29 other deputies of the Assembly of the Republic of Kosovo*, Constitutional review of the Decision [no. 214/IV/2020] on the proclamation of the Municipality of Prizren as a “quarantine zone” of the Ministry of Health of 12 April 2020; and Decisions [no. 229/IV/2020], [no. 238/IV/2020], [no. 239/IV/2020] “on the prevention, combating and elimination of COVID-19 communicable diseases in the territory of the Municipalities of Prizren, Dragash and Istog” of the Ministry of Health of 14 April 2020, Judgment of 5 May 2020, paragraph 99).
100. The Court in this context points out that in the scope of the “acts” of the Government, namely the Prime Minister, Deputy Prime Ministers and Ministers, their decision-making, as defined in Article 92 [General Principles], respectively Article 92 [General Principles] of the Constitution and as further specified by paragraph 4 of Article 93 [Competencies of the Government] of the Constitution, is stipulated that the Government: “...makes decisions and issues legal acts or regulations necessary implementation of laws;”.
101. The Court, through its judicial practice, has determined that without considering the formal designation of these issued decisions, the same are subject to constitutional control, if they raise “important constitutional issues” and taking into account the legal effects they produce, insofar as they have been brought before the Court in the manner defined by the Constitution and the Law (see case [KO61/20](#), cited above, paragraphs 92 to 98 and other references used therein).
102. In this regard, the Court points out that the decisions of the Ministers are also subject to the constitutional review of the Court to the extent that they have been brought before the Court in the manner defined by the Constitution and the Law, and based on the Court's assessment of their effect and whether the same raise “important constitutional issues” (see cases [KO73/16](#), with Applicant, *Ombudsperson*,

Constitutional review of Administrative Circular No. 01/2016, issued by the Ministry of Public Administration of the Republic of Kosovo, on 21 January 2016, Judgment of 12 December 2016; KO61/20, case cited above, paragraph 99; and [KO145/21](#), Applicant *Municipality of Kamenica*, Constitutional review of the Decision of the Ministry of Education, Science, Technology and Innovation no.01B/24 of 23 April 2021, Judgment of 10 March 2022).

103. Consequently, and based on the clarifications given, including those related to its judicial practice, the Court considers that the challenged act, approved in the form of an Administrative Instruction by the Minister of Education, falls within the scope of “acts of the government”, because: (i) it is an act whose content has a direct effect on “municipal responsibilities”, which are related to the municipalities’ own competencies guaranteed by paragraph 3 of Article 124 of the Constitution and defined by Article 17 of the Law on Local Self-Government; and (ii) it raises “important constitutional issues”, which are consequently subject to a constitutional review of the Court, taking into account that, in the circumstances of the present case, they have been brought before it by an authorized party.

(iii) Regarding the specification of the provisions of the Constitution and municipal responsibilities or revenues that are affected

104. The Court recalls that Article 41 of the Law and Rule 73 of the Rules of Procedure stipulate that the referral raised by the municipality in the context of paragraph 4 of Article 113 of the Constitution, presents, inter alia, the relevant information regarding the law or the challenged act of the Government, which provision of the Constitution is presumed to have been violated and which municipal responsibilities or revenues have been affected by such a law or act.
105. The Applicant specifies that Articles 3, 4, 5, 6, 7 and 9 of the challenged act are contrary to Articles 12, 45, 123 and 124 of the Constitution and Articles 2, 3, 4 and 9 of the Charter of Local Self-Government. More specifically, the Applicant specifies that the aforementioned articles of the challenged act violate the own competencies of the municipality defined by Article 17 of the Law on Local Self-Government, Articles 3 and 4 of the Law on Education in Municipalities, as well as Articles 5, 7, 8, 13 of the Law on Pre-University Education.
106. That said, the Court finds that the Applicant before the Court: (i) specifies the challenged act, namely specifies the relevant provisions of the challenged act for which it claims to have reduced municipal responsibilities, as defined in Article 40 of the Law and Rule 73 of the Rules of Procedure.

(iv) Regarding the deadline

107. The Court recalls that Article 40 of the Law and Rule 73 of the Rules of Procedure stipulate that the referral raised in the context of paragraph 4 of Article 113 of the Constitution must be submitted within one (1) year after the entry into force of the challenged act.
108. In the context of the entry into force of the legal acts, the Court refers to its case KO89/16 where it found that: “No legal act may enter into force before publication, which is the last legislative step and a necessary condition for a law to be effective” (see case KO89/16 with Applicant *Municipality of Prishtina*, Constitutional review of Administrative Instruction no. 02/2015, of the Ministry of Health, of 15 May 2015, Resolution on Inadmissibility, of 5 December 2016, paragraph 24).

109. In the circumstances of the present case, Article 12 of the challenged act stipulates that “*this Administrative Instruction enters into force seven days after signature by the Minister*”. In addition, the Court recalls that the Minister of Education signed the challenged act on 14 September 2020, and it was published on the website of the Ministry of Education on 15 September 2020.
110. In this regard and applying the Court's position established through its judicial practice in the circumstances of the present case, the Court points out that the challenged act entered into force seven (7) days after its publication on 15 September 2020, respectively on 22 September 2020.
111. The Court recalls the comments of the Ministry of Education to the Applicant's clarified referral, through which it had essentially emphasized that the Applicant's referral was submitted outside the date specified by law. In the context of this position, the Ministry of Education specifies that the Applicant submitted his Referral to the Court on 27 September 2021.
112. However, based on the evidence submitted by the Applicant, the Court notes that the latter submitted his application to the Court by mail on 21 September 2021. Consequently, the Court finds that the request was filed within the time limit set by the Law and the Rules of Procedure.

(v) Conclusion regarding the admissibility of the referral

113. The Court holds that the Applicant: (i) is an authorized party before the Court; (ii) challenges the specific provisions of the Administrative Instruction of the Ministry of Education, as an “act” of the Government; (iii) has specified which municipal competencies or responsibilities have been reduced through the challenged act; and (iv) has submitted his request within the deadline set by Law and Rules of Procedure.
114. Consequently, the Court shall declare the application admissible and shall forthwith examine its merits.

Merits of the Referral

I. Introduction

115. The Court points out that the constitutional issue that this referral implies, presented under paragraph 4 of Article 113 of the Constitution, is the constitutional review of Articles 3 (Founder), 4 (Conditions for establishing an educational institution and a separate parallel), 5 (Proposal for the establishment of the educational institution or separate parallel), 6 (Verification of conditions), 7 (Decision) and 9 (Termination of the activity of the educational institution or the separate parallel) of the challenged act of the Ministry of Education and Science (MES), adopted in the form of Administrative Instruction by the Minister of Education, whose scope includes “the definition of criteria and procedures for the establishment and termination of the activity of public educational institutions at pre-primary, lower secondary level, upper secondary level, as well as their separate physical parallels”.
116. More precisely, the essence of this referral, which constitutes the subject matter of the constitutional review of the aforementioned articles of the challenged act, is that according to the Applicant, through these provisions, municipal competencies in the field of pre-university education which are related to the establishment of public educational institutions at pre-university level and separate parallels in

municipalities, provided by the Constitution and regulated by the relevant legislation in force are violated.

117. In addressing the aforementioned allegations raised in this Referral, the Court initially recalls its jurisdiction set forth in paragraph 4 of Article 113 of the Constitution, which provides that:

“A municipality may contest the constitutionality of laws or acts of the Government infringing upon their responsibilities or diminishing their revenues when municipalities are affected by such law or act.”

118. In addition, the Court, by placing emphasis on the “violation of municipal responsibilities”, considers that the jurisdiction of the Court based on paragraph 4 of Article 113 of the Constitution extends to the review of laws or acts, namely the review of whether through these acts the municipal responsibilities provided in Chapter X [Local Government and Territorial Organization] of the Constitution, respectively Articles 123 and 124 thereof, which stipulate that these responsibilities or competencies are regulated by the legislation in force, are violated. More specifically, in the implementation of this review, the Court should determine whether the challenged act has violated the constitutional definition on the own competencies of municipalities, the types of which are specified in the relevant legislation in force.
119. In the light of the latter, the Court notes that the challenged act will be reviewed only in relation to the “own competencies” of the municipality in relation to the establishment and termination of public education institutions and separate parallels in municipalities, provided for in paragraph 3 of Article 124 of the Constitution further defined and specified by the relevant legislation in force. In this regard, the Court notes that its jurisdiction does not extend to reviewing whether the challenged act is incompatible with the law on the grounds that laws specifying municipal competencies or responsibilities in the field of pre-university education have been issued pursuant to paragraph 3 of Article 124 of the Constitution.
120. In addition, the Court, as noted above, reiterates that the scope of the challenged act extends to other municipalities of the Republic of Kosovo in addition to the Municipality of Kamenica.
121. Referring back to the Referral, which is the subject of the assessment in this case, the Court recalls that the Applicant alleges that Articles 3, 4, 5, 6, 7 and 9 of the challenged act are incompatible with:
- (i) paragraph 2 of Article 12 [Local Government], Article 123 [General Principles] and Article 124 [Local Self-Government Organization and Operation] of the Constitution;
 - (ii) articles 2 (Constitutional and legal foundation for local self-government), 3 (Concept of local self-government), 4 (Scope of local self-government) and 9 (Financial resources of local authorities) of the European Charter for Local Self-Government; and
 - (iii) article 17 (Own Competencies) of the Law on Local Self-Government; Articles 3 [Ministry of Education, Science and Technology] and 4 (Municipal Competencies) of the Law on Education in Municipalities; and Articles 5 (Duties of the Ministry), 7 (Competencies of municipalities), 8 (Inspection of education) and 13 (Establishment of educational institutions) of the Law on Pre-University Education.

122. In the context of the latter, the Court notes that the Applicant alleges a violation of the provisions of the Law on Local Self-Government, the Law on Education in Municipalities and the Law on Pre-University Education, provisions that refer to both the competencies of the municipality in the field of pre-university education and the competencies of the respective Ministry of Education. However, as elaborated above, the Court points out that in examining and assessing the Applicant's allegations of violation of municipal responsibilities through the challenged act, it will examine and assess whether the challenged act is incompatible with the provisions of the aforementioned laws, which refer only to municipal responsibilities in the field of pre-university education, responsibilities that are pursuant to the constitutional definition for the Local Self-Government Organization and Operation, more specifically the stipulation that municipalities have their own, extended and delegated competencies in accordance with the law.
123. In this regard, the Court notes that Article 3 (Ministry of Education, Science and Technology) of the Law on Education in Municipalities refers to the competencies of the Ministry in the field of education in municipalities, while Article 4 (Competencies and Enhanced Competencies of the Municipalities) of this law specifically refers to the competencies of municipalities in the field of education. The Court further notes that Article 5 (Duties of the Ministry) and Article 8 (Inspection of Education) of the Law on Pre-University Education refer to the competencies and responsibilities of the respective Ministry of Education, while Article 7 (Competencies of the Municipality) and Article 13 (Establishment of educational institutions) of this Law refer to the competencies of the municipality in providing pre-university level education and the establishment of educational institutions at this level.
124. Therefore, the Court, in the sense of the jurisdiction defined by paragraph 4 of Article 113 of the Constitution and the substance of the allegations raised in this referral, reiterates that the subject matter of the constitutional review that this referral entails is the constitutional review of the challenged act of the Ministry of Education, respectively if Articles 3, 4, 5, 6, 7 and 9 of this act violate municipal responsibilities, namely the own competencies of municipalities for the establishment of pre-university education institutions in municipalities, defined by Article 17 of the Law on Local Self-Government, Article 4 of the Law on Education in Municipalities and Articles 7 and 13 of the Law on Pre-University Education, competencies deriving from the principles provided by paragraph 2 of Article 12, Article 123 and Article 124 of the Constitution.
125. Consequently and in the following, the Court in addressing and reviewing the constitutionality of the subject matter of this case as specified above, will elaborate: General principles related to Local Self-Government according to (a) the Constitution of the Republic of Kosovo; (b) the European Charter for Local Self-Government; (c) the relevant legal framework related to the competencies of municipalities in the field of pre-university education; and (d) elaborated by the Venice Commission; to proceed with the application of these principles in reviewing the constitutionality of the provisions of the challenged act, namely whether the municipal responsibilities provided by the Constitution are violated through these provisions.

II. General principles regarding Local Self-Government according to the Constitution, the European Charter of Local Self-Government, the Venice Commission and the laws in force in the Republic of Kosovo

126. The Court first notes that the general principles regarding local self-government according to: the Constitution; the European Charter for Local Self-Government; the Venice Commission and the legal framework related to municipal competencies or

responsibilities in the field of pre-university education have also been elaborated by its Judgment in case KO145/21 [Applicant *Municipality of Kamenica*, cited above, paragraphs 132-167]. The Court in case KO145/21 has reviewed the referral submitted by the Municipality of Kamenica, filed under paragraph 4 of Article 113 of the Constitution, requesting a constitutional review of the Decision [no.01B/24] on Development of Accelerated Alternative Learning for 441 pupils of the Municipality of Kamenica, of the Ministry of Education, Science, Technology and Innovation, of 23 April 2021.

(a) General principles according to the Constitution

127. The Court first notes that the Constitution, in its Chapter I [Basic Provisions], has granted special regulation to the local government as well. More specifically, Article 12 [Local Government] of the Constitution stipulates that:

1. Municipalities are the basic territorial unit of local self-governance in the Republic of Kosovo.

2. The organization and powers of units of local self-government are provided by law.

128. Next, the Court notes that Chapter X [Local Government and Territorial Organization] of the Constitution, namely paragraphs 1 and 2 of Article 123 [General Principles] stipulate that:

1. The right to local self-government is guaranteed and is regulated by law.

2. Local self-government is exercised by representative bodies elected through general, equal, free, direct, and secret ballot elections.

129. Third, paragraphs 1, 2 and 3 of Article 124 [Local Self-Government Organization and Operation] of the Constitution stipulate that:

1. The basic unit of local government in the Republic of Kosovo is the municipality. Municipalities enjoy a high degree of local self-governance and encourage and ensure the active participation of all citizens in the decision-making process of the municipal bodies.

2. Establishment of municipalities, municipal boundaries, competencies and method of organization and operation shall be regulated by law.

3. Municipalities have their own, extended and delegated competencies in accordance with the law. The state authority which delegates competencies shall cover the expenditures incurred for the exercise of delegation. [...].

130. Finally, paragraph 4 of Article 123 of the Constitution sets out the principles on the basis of which local self-government is exercised, namely on the basis of: (i) good governance; (ii) transparency; (iii) efficiency; and (iv) effectiveness in providing public services, having due regard for the specific needs and interests of the Communities not in the majority and their members.

131. In relation to the latter, the Court stresses that the aim of the principles of efficiency and effectiveness of local government is closely related to the principle of subsidiarity, which principle implies that local self-government in some public policy sectors is much more efficient and effective than if the competence for them were entrusted to

central bodies (see case KO145/21, Applicant *Municipality of Kamenica*, cited above, paragraph 136).

(b) General principles under the European Charter of Local Self-Government

132. The Court first notes that the Constitution in paragraph 3 of its Article 123 has stipulated that: *“the activity of local self-government bodies [...] respects the European Charter of Local Self-Government.”* In addition, paragraph 3 of Article 123 of the Constitution states that: *“The Republic of Kosovo shall observe and implement the European Charter on Local Self-Government to the same extent as that required of a signatory stat.”*
133. In relation to the latter, based on the Court's case law, namely case KO145/21, in dealing with the principles of local self-government, the Court will focus: (i) on the main aspects of the European Charter of Local Self-Government, which commit the parties to implement the basic rules guaranteeing the political, administrative and financial independence of local authorities; and (ii) the main principles for the better functioning of local government. The European Charter of Local Self-Government states in its introduction that: *“...considering that the local authorities are one of the main foundations of any democratic regime”* and *“the right of citizens to participate in the conduct of public affairs is one of the democratic principles”*. Next, the European Charter of Local Self-Government defines the principle of subsidiarity, a principle that enables the decentralization of power to the level closest to the citizen (see Court case KO145/21, Applicant *Municipality of Kamenica*, cited above, paragraph 141).
134. In elaborating the relevant provisions of the European Charter relating to the subject matter of the Applicant's referral, the Court shall also refer to the Charter Explanatory Report [adopted by the Council of Europe on 15 October 1985].
135. The European Charter of Local Self-Government states in its preamble that: *“Considering that the local authorities are one of the main foundations of any democratic regime”* and *“the right of citizens to participate in the conduct of public affairs is one of the democratic principles.”*
136. The Court reiterates that the European Charter of Local Self-Government sets out the principle of subsidiarity, a principle that enables the decentralization of power to the level closest to the citizen.
137. In this connection, the Court recalls that Article 3 (Concept of local self-government) of the European Charter of Local Self-Government deals with the concept of Local Self-Government, stipulating in paragraph 1 of this Article that:

“Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.”
138. Furthermore, Article 4 [Scope of local self-government] of the European Charter of Local Self-Government sets out the general principles on which the responsibilities of local authorities should be based and the nature of their competencies.
139. Initially paragraph 1 of Article 4 of the European Charter of Local Self-Government stipulates that the basic competencies and responsibilities of local authorities shall be set by the Constitution or by law.

140. In elaborating Article 4 of the European Charter of Local Self-Government, the Explanatory Report of the Charter initially points out that it is not possible, and not appropriate, to target, enumerate or list all the competencies and responsibilities that will be conferred on the local authorities. According to the Explanatory Report, Article 4 of this Charter provides for general principles on which the responsibilities of local authorities and the nature of their competencies must be based. *Since the nature of local authorities' responsibilities is fundamental to the reality of local self-government, it is in the interests of both clarity and legal certainty that basic responsibilities should not be assigned to them on an ad hoc basis but should be sufficiently rooted in legislation.*
141. Accordingly, paragraph 2 of Article 4 of the European Charter of Local Self-Government stipulates that: *"Local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority."*
142. Whereas, paragraph 4 of Article 4 of the European Charter of Local Self-Government stipulates that:
- "Powers given to local authorities shall normally be full and exclusive. They may not be undermined or limited by another, central or regional, authority except as provided for by the law."*
143. With regard to paragraph 4 of Article 4, the Explanatory Report clarifies that the statutory determination of any limitation of the powers of local authorities by another authority is aimed at avoiding any tendency to a continuous reduction of responsibilities.
144. Finally, the Court refers to Article 8 (Administrative supervision of local authorities' activities) of the European Charter which stipulates that:
1. *Any administrative supervision of local authorities may only be exercised according to such procedures and in such cases as are provided for by the constitution or by statute.*
2. *Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities.*
3. *Administrative supervision of local authorities shall be exercised in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect.*
145. With regard to the latter, the Court shall put emphasis on paragraph 1 of this Article, which requires that any supervision of the activities of local authorities by the central authority shall be set by the Constitution or by law. According to the Explanatory Report, the exception is, but not the only one, in the case of delegated tasks, when the body delegating the competencies may set to exercise supervision over the manner how those competencies are realized by the local authorities.
146. Next, with regard to paragraph 3 of Article 8 of the Charter, which refers to the respect of proportionality between the importance of the supervisory authority's intervention and the importance of the interests it seeks to protect, the Explanatory Report explains that the principle of proportionality in this case means that the the

controlling authority, in exercising its prerogatives, is obliged to use the method which affects local autonomy the least whilst at the same time achieving the desired result.

(c) Legislation in force in the Republic of Kosovo regarding the competencies of municipalities in the field of education

147. Referring to Articles 12, 123 and 124 of the Constitution, the Court notes that:
- (i) a basic unit of local self-government in the Republic of Kosovo is the municipality; and
 - (ii) by law are regulated:
 - (a) the establishment, boundaries, competencies, method of organization and operation of the municipalities expressly stipulating that the municipalities have three types of competencies: own, extended and delegated; and
 - (b) matters related to deciding, assigning, collecting and spending of their revenues.
148. In the light of the above, the Court notes that the primary law defining the competencies of municipalities is the Law on Local Self-Government.
149. This law in its scope stipulates that: “...*defines the legal status of municipalities, their competencies and general principles of municipal finances, organization and functioning of the municipal bodies, the intra-municipal arrangements and the inter-municipal cooperation including the cross border cooperation and the relationship between municipalities and central government.*”
150. Following and based on the provisions of the Law on Local Self-Government and those of the Law on Pre-University Education and the Law on Education in Municipalities, the Court shall elaborate the types and nature of competencies falling within the category of “own” competencies of municipalities in the field of pre-university education within the meaning of paragraph 3 of Article 124 of the Constitution.
151. In this regard, the Court first notes that the Law on Local Self-Government has established that municipalities, among other things, are the holders of their own competencies [Article 16] in some of the areas and as such, these competencies are exercised “in full and exclusive” with regard to the local interest [Article 17]. Whereas Article 15 [Principle of Subsidiarity] of this Law stipulates that: “*The municipalities shall exercise their competences in accordance with the principle of subsidiarity.*”
152. More specifically, it is Article 17 [Own competencies] of the Law on Local Self-Government which defines the municipalities' own competencies, and within these competencies paragraph 1 (h) of this Article as the municipalities' own competencies includes: “... *provision of public pre-primary, primary and secondary education, including registration and licensing of educational institutions, recruitment, payment of salaries and training of education instructors and administrators.*”
153. Secondly, Article 4 [Competencies and Enhanced Competencies of the Municipalities] of the Law on Education in Municipalities stipulates that Municipalities shall have “*full and exclusive competencies*”, insofar as they concern the local interest, while respecting the standards set forth in applicable legislation with respect to the provisions of public preprimary, primary and secondary education, including registration and licensing of educational institutions,

recruitment, payment of salaries and training of education instructors and administrators. Furthermore, the same article stipulates that municipalities may also be granted extended powers in the field of education, as prescribed by this law and other applicable laws. Next, Article 5 [Competencies of the Municipalities in Public Education Levels 0, 1, 2, and 3 (Pre-Primary, Primary, Lower Secondary and Upper Secondary)] of the Law on Education in Municipalities further breaks down the special municipal competencies in the field of pre-university education.

154. Third, the Law on Pre-University Education, in its Article 7 (Competencies of municipalities) defines the competencies of the municipalities, emphasizing that these competencies are regulated through: (i) the Law on Local Self-Government and the Law on Education in the Municipalities; as well as (ii) additional competencies assigned by provisions of this law. In addition, this article stipulates that: *“The exercise by the municipality of their powers and duties in this field shall be monitored by the Ministry in collaboration with the Ministry of Local Government and Administration to ensure compliance with the applicable legislation”*.
155. Based on the aforementioned elaboration of the legislation in force that relates to the competencies of municipalities in the field of pre-university education, the Court considers that: (i) the competency of municipalities defined in point h of Article 17 in the Law on Local Self-Government for; *“provision of public pre-primary, primary and secondary education, including registration and licensing of educational institutions, recruitment, payment of salaries and training of education instructors and administrators”*; and (ii) the competency of municipalities defined in Article 4 of the Law on Education in Municipalities and Articles 7 and 13 of the Law on Pre-University Education with regard to the establishment of pre-university education institutions and separate parallels falls into the category of own competencies provided for in paragraph 3 of Article 124 of the Constitution and as such constitutes an essential element of what Article 12 of the Constitution calls the right of “local self-government”.

(d) General principles developed by the Venice Commission

156. In terms of elaborating the principles regarding local self-government, the Court, as in its case KO145/21, also refers to the principles developed through the opinions of the Venice Commission. In this context, the Court refers to the Venice Commission's summary of opinions [CDL-PI(2016)002] entitled: *“The Venice Commission's summary of opinions pertaining to the constitutional and legal provisions for the protection of local self-government”*. Based on the latter, the Court notes that the Venice Commission, *inter alia*, has dealt with issues such as: (i) constitutional guarantees for local self-government; and (ii) the scope of local self-government and competencies (see case KO145/21, with *the Applicant Municipality of Kamenica*, cited above, paragraphs 169-170).
157. With regard to point (i) regarding constitutional guarantees for local self-government, the Venice Commission addresses the principle of local self-government (decentralization), treating it based on three main principles as follows: a) the principle of decentralization; b) the principle of subsidiarity; and c) the adequacy between competencies and financial resources.

(i) Regarding constitutional guarantees for local self-government

a. The principle of decentralisation

158. Regarding this principle, the Venice Commission, in its Second Opinion [CDL-AD \(2013\) 032](#), of the final draft of the Constitution of the Republic of Tunisia, among others, emphasized that:

“48. While the extent and form of self-government are left to international standards, and especially the European Charter of Local Self-Government, at the discretion of states, certain principles are essential: that public responsibilities are exercised, according to preference, by those authorities that are closest to citizens; that delegation of powers should be accompanied by the allocation of sufficient resources; and that administrative oversight of the activities of local authorities should be limited.

b. The principle of subsidiarity,

159. Regarding the second principle, in its Second Opinion [CDL-AD\(2014\)037](#), regarding the Draft Law on amending the Constitution of Ukraine, the Venice Commission, among other things, emphasized that:

180 The amended Article 120 (1) is based on the current Article 120, which sets out the principles of decentralization, local autonomy and decentralization of public services. It adds that decentralisation should be implemented according to the principle of subsidiarity and that the transfer of competence should be accompanied by appropriate financial resources [...].

c. Adequacy between competencies and financial resources

160. The third principle of the Venice Commission regarding the adequacy of competencies and financial resources includes: (a) the principle of state financial support for local self-government; and (b) the principle of financial autonomy.
161. With regard to this principle, the Venice Commission in its Opinion on the Draft Constitutional Law on Amendments and Amendments to the Constitution of Georgia has emphasized the obligation of the state government to provide financial coverage to the functions delegated to the local government bodies. The Venice Commission stated that: “State power will be exercised at the local level by state authorities, while all the power of local self-government will be exercised by local self-government bodies, except when specific state obligations are delegated to local self-government bodies and exercised on behalf of the state. This provision should stimulate the development of local self-government at all levels. It is also foreseen that the cost of delegated functions should be covered by budget transfers or the transfer of resources or property. However, this provision does not guarantee that the amount of resources allocated will cover the cost of delegated functions. Therefore, it is recommended that the provision be modified and expressly provide for full compensation of the financial burden resulting from the delegation, thus avoiding the risk that state duties are mainly delegated to mitigate the aggravation of the state budget” (see CDL-AD (2010) 008, Opinion on the Draft Constitutional Law on Amendments and Amendments to the Constitution of Georgia (Chapter VII – Local Self-Government). Regarding the third principle of Local Self-Government, the Venice Commission had supported its position along the same lines with other opinions (CDL-AD (2015) 028, Opinion on Amendments to the Constitution of Ukraine regarding the Territorial Structure and Local Administration).

(ii) Regarding the scope of local self-government and competencies

162. Based on the opinions of the Venice Commission, the Court notes that the latter has also addressed the issue of the scope of local self-government and competencies, dividing them into: (a) own/delegated competencies; (b) de-concentrated/decentralised competencies (see also Court case KO145/21, Applicant *Municipality of Kamenica*, cited above, paragraph 176).

(a) own/delegated competencies

163. In this regard, with regard to own/delegated competencies, in Opinion [CDL-AD \(2015\) 028](#) regarding the Amendments to the Constitution of Ukraine, the Venice Commission had emphasized that an essential feature of the regulation of local self-government is the identification of basic functions (“own” functions as opposed to delegated competencies) and a solution would consist in defining at the constitutional level the “own competencies” of local self-government units which would prevent governments from removing competencies from local government, if they do not have a qualified majority. Another improvement, according to the Venice Commission, is that the Constitution stipulates that *“the fundamental principles of the powers of local self-government are defined by organic law.”*
164. Furthermore, as regards the delegation, the Venice Commission in Opinion [CDL-AD \(2009\) 024](#) regarding the draft law on amending the Constitution of Ukraine stresses that it may mean the permanent transfer of a state power or activity to the local government in order to become an “own power” of the local government. It is an extension of decentralization and the power of local self-government.

(b) de-concentrated/ decentralized competencies

165. The Venice Commission in Opinion CDL-AD (2009) 024 regarding the draft law on amending the Constitution of Ukraine had emphasized that deconcentration is quite different from decentralization. *“Deconcentration” depends on the existence of the territorial districts in which the state is present in the form of its services, while decentralisation relies on the presence of the territorial communities, whose bodies are elected and exercise certain powers on their behalf [...]*”.

III. Application of the aforementioned principles in the assessment of the Applicant's allegations

166. The Court initially recalls the substance of the Applicant's allegations that, according to him, are specifically related to the intervention of the Ministry of Education in the municipality's own competencies in the field of education, namely the establishment and termination of the activity of pre-university education institutions and separate parallels in municipalities.
167. When examining and assessing the claims raised in the Referral, the Court shall elaborate each article of the challenged act, for which the Applicant alleges that they have violated the municipal responsibilities in the field of pre-university education defined as their own competence through the legislation in force.
168. In this line, the Court reiterates that municipal autonomy is expressed primarily in terms of the disposition and realization of own competencies by the municipalities, *“as defined by law”*. The legislative body, when exercising discretion in determining the areas of these competencies, is nevertheless bound by the obligation that the competencies provided for in the Law on Local Self-Government be at least those that derive directly from the principles set out in paragraph 3 of Article 124 of the Constitution, i.e. the competencies subject to the principle of subsidiarity, a principle

that is also defined by the European Charter of Local Self-Government, as well as the principle of efficiency and effectiveness of competence as regards its proximity to the citizen resident in the municipality. In this sense, the Court considers that these competencies defined by the legislative body should not be violated by the Government, and in the present case by the Ministry of Education (see Court case KO145/21, Applicant *Municipality of Kamenica*, cited above, paragraph 196).

169. In this case, the Court recalls that also based on the European Charter of Local Self-Government, and the Venice Commission Opinions the principle of subsidiarity means that public responsibilities should generally be entrusted to the level of government that is closest to the citizens. This principle is also affirmed through the Law on Local Self-Government. While in the field of education, more specifically the field related to the provision of pre-university education, this principle is also affirmed in the Law on Education in Municipalities and the Law on Pre-University Education.
170. Consequently, the Court will proceed with the assessment and review of the Applicant's allegations regarding the articles of the challenged act, specified by him, which he alleges have violated the municipal responsibilities of the Municipality in the field of pre-university education specified by the aforementioned laws, stemming from the principles set out in Articles 123 and 124 of the Constitution.

(i) Regarding Article 3 of the challenged Act

171. The Court first notes that the Applicant in his Referral alleges that Article 3 [Founder] of the challenged act violates the municipal responsibilities, namely own competencies defined by Article 17 of the Law on Local Self-Government, Article 3 of the Law on Education in Municipalities and Articles 7 and 13 of the Law on Pre-University Education, stemming from the principles provided by paragraph 2 of Article 12 of the Constitution, paragraphs 2 and 3 of Article 123 of the Constitution.
172. With regard to Article 17 of the Law on Local Self-Government, the Applicant, by placing emphasis on point (h) of this Article, specifies that under this provision, the provision of public pre-primary, primary and secondary education is an own competence of the municipality.
173. More specifically, the Applicant, referring to the content of paragraph h) of Article 17 of the Law on Local Self-Government, which stipulates that: *“Municipalities have full and exclusive powers [...] h) provision of public pre-primary, primary and secondary education, including registration and licensing of educational institutions, recruitment, payment of salaries and training of education instructors and administrators”*, places emphasis on the sentence “registration and licensing” and consequently states that under this provision the municipality has competence for the establishment of pre-university educational institutions.
174. The Applicant, referring to Article 13 of the Law on Pre-University Education, points out that this provision at no single point defines the competence of the Ministry of Education for the establishment of pre-university educational institutions.
175. In addressing this allegation, the Court initially refers to Article 3 [Founder] of the challenged act, which stipulates that:
- 1. The Ministry, at the request of the municipality, establishes all types of ISCED level 1-3 educational institutions, as well as their separate classes outside the territory of the municipality where the parent institution is located.*

2. *Part of educational institutions by level 1 ISCED paragraph 1 of this Article may be even pre-school classes of level 0 according to ISCED.*
3. *The municipality, with the consent of the Ministry, establishes pre-school institutions and separate parallels of educational institutions of level 1-3 according to ISCED within its territory.*

176. Based on the content of paragraph 1 of Article 3 of the challenged act, the Court notes that it is essentially through this provision that the Ministry, i.e. the Ministry of Education at the request of the municipality, establishes public educational institutions of levels 1-3 according to *ISCED* [International Standards of Classification of Education, adopted by UNESCO in November 1997 and later amended], namely the lower elementary level, the lower secondary level and the lower secondary level and their separate parallels outside the territory of the municipality where the parent institution is located.
177. Whereas paragraph 3 also stipulates that the Ministry with the consent of the municipality establishes pre-school and separate parallel institutions of level 1-3 institutions according to *ISCED* within its territory.
178. Based on the above, the Court notes that with regard to the establishment of separate parallels, Article 3 of the challenged act distinguishes between the establishment of separate parallels outside the territory of the municipality where the parent institution is located [paragraph 1 of Article 3 of the challenged act] and the establishment of separate parallels within the territory of the municipality [paragraph 3 of Article 3 of the challenged act].
179. In addition, the Court also notes that through the challenged act, among other things, the Administrative Instruction 08/2015 on “*Establishment of Educational Institutions*” of the Ministry of Education was repealed, which Administrative Instruction also through its Article 2 [Founder] had stipulated that: “*The establishment of the school and the separate physical parallel is done by the Ministry of Education, Science and Technology.*”
180. In order for the Court to proceed with its assessment whether this competence of the Ministry of Education defined by Article 3 of the challenged act has violated the municipal responsibilities, namely the own competencies of the municipality, it will initially recall the competencies of the municipality and the Ministry of Education, respectively that the legislation in force has accorded them in relation to pre-university education.

a. Competencies of municipalities

181. As specified above, the Court notes that the basic law that has defined to the municipality exclusive and full competence in the field of pre-university education is the Law on Local Self-Government. Based on Article 17 of this Law, as specified above, this law recognizes to the municipality “exclusive and complete competencies in terms of local interest, respecting the standards set out in the legislation applicable in “provision of public preschool, primary and secondary education, including registration and licensing of educational institutions, employment payment of salaries and training of instructors and administrators of education;” in relation to this provision, the Court places emphasis on the section of the sentence: “*provision of pre-school, primary and secondary education, including registration and licensing of educational institutions [...]*”.

182. Accordingly, the Court also refers to the content of paragraph 1 of Article 4 [Competencies and Enhanced Competencies of the Municipalities] of the Law on Education in Municipalities, which similarly to Article 17 of the Law on Local Self-Government stipulates that: *“Municipalities shall have full and exclusive powers, insofar as they concern the local interest, while respecting the standards set forth in applicable legislation with respect to the provisions of public preprimary, primary and secondary education, including registration and licensing of educational institutions, recruitment, payment of salaries and training of education instructors and administrators.”* The Court also with regard to this legal provision places emphasis on the part of the sentence: *“respecting the standards set forth in applicable legislation with respect to the provisions of public preprimary, primary and secondary education, including registration and licensing of educational institutions [...]”*.
183. Further, the Court also refers to Article 5 (Competencies of the Municipalities in Public Education Levels 0, 1, 2, and 3 (Pre-Primary, Primary, Lower Secondary and Upper Secondary)) of the Law on Education in Municipalities, which lists all competencies or municipal responsibilities in the field of pre-university education, namely the pre-school to upper secondary level. More specifically, Article 5 of the Law on Education in Municipalities stipulates that *“Competencies referred to in Article 4 of this law shall include” specific municipal competencies in public education at levels 0 (pre-primary), 1 (primary), 2 (lower secondary) and 3 (upper secondary), in accordance with general guidelines and/or procedures and standards promulgated by the Ministry of Education, Science and Technology [MEST]*.
184. Referring to the content of Article 5 of the Law on Education in Municipalities, the Court places emphasis on paragraph e) of this Article, which stipulates that municipalities have their own competence for: *“... registration, public health and safety inspection and licensing of pre-primary educational institutions, in accordance with Chapter 4 of this law”*. In addition, the Court notes that Chapter IV of the Law on Education in Municipalities, through its Articles 10 and 11, defines “Licensing and Registration of Teachers” and “Licensing of Institutions”. Against this background, the Court also refers to Article 11 [Licensing of Education] of the Law on Education in Municipalities, which in its paragraph 1 stipulates that: *“All educational institutions in the Republic of Kosovo shall be licensed in accordance with criteria and standards established by law. Public educational institutions shall be licensed by the municipality prior to beginning operations”*.
185. While the Law on Pre-University Education, namely Article 7 (Competencies of municipalities) stipulates that the competencies of the municipalities in the field of pre-university education are regulated through: (i) the Law on Local Self-Government and the Law on Education in the Municipalities; as well as the following it also stipulates (ii) additional competencies that include: (a) the construction of educational and training facilities; (b) maintaining and repairing the premises and equipment of educational and training institutions; (c) ensuring a healthy environment for pupils and staff, including water, hygienic-sanitary conditions, health service, as well as a safe environment including safe utilities and effective security; and (d) through co-operation with parents, police and other public authorities taking steps to deal effectively with violent or bullying behaviour and substance abuse in or associated with the respective institution.
186. Finally, the Court also refers to Article 13 [Establishment of educational institutions] of the Law on Pre-University Education, which in its paragraphs 1 and 2 stipulates that:

- 1. Primary (ISCED Level 1) and lower secondary (ISCED Level 2) schools shall be established in each municipality; schools at these Levels may be combined.*
- 2. A municipality may establish and maintain satellite classes in ISCED Level 1 and 2 as a part of the school network in areas where it is not practicable to establish a main school, according to criteria determined by the Ministry through a bylaw.*

187. Based on the content of point h), paragraph 1 of Article 17 of the Law on Local Self-Government and paragraphs 1 and 2 of Article 13 of the Law on Pre-University Education, the Court notes that this provision expressly stipulates that ISCED level 1 and 2 educational institutions, namely primary and lower secondary schools, are established in municipalities. While paragraph 2 of this article also expressly stipulates that the separate parallels of ISCED levels 1 and 2 are established by the municipalities in those municipalities in which there is no primary school. From this provision it results that the municipalities have their own competence to establish the pre-university institutions of ISCED levels 1 and 2, including the separate parallels of these two levels according to the criteria defined by the Ministry of Education through a sub-legal act pursuant to this law.
188. Therefore, as elaborated above, paragraph 1, point h) of Article 17 of the Law on Local Self-Government, Articles 4 and 5 of the Law on Education in Municipalities and Article 13 of the Law on Pre-University Education clearly define the own competence of municipalities to establish pre-university level education institutions and separate parallels.
189. As elaborated above, the Court reiterates that the aforementioned competencies set forth in paragraph 1 (h) of Article 17 of the Law on Local Self-Government, Articles 4 and 5 of the Law on Education in Municipalities and Articles 7 and 13 of the Law on Pre-University Education stem from the very principles set out in the Constitution, namely paragraph 4 of Article 123 of the Constitution, which defines “efficiency and effectiveness in providing public services”, and the principle of subsidiarity, because the same principle ensures the decentralization of power towards the level closest to the citizen.

b. Competencies of the Ministry of Education by law

190. More specifically, as regards the competencies of the Ministry of Education, the Court notes that under paragraph 1 of Article 5 (Duties of the Ministry) of the Law on Pre-University Education this ministry bears the main responsibility for planning, setting standards and ensuring the quality of the pre-university education system, inter alia, by: (i) developing policies, drafting and implementing legislation for the development of education; (ii) establishing criteria and managing a system of teacher licensing; (iii) designing and overseeing effective forms of administration and management of educational and training institutions to be implemented by municipalities (see in this context also the Court case KO145/21, cited above, paragraph 202).
191. Further, based on paragraphs 9 and 10 of Article 5 of the Law on Pre-University Education, the Ministry of Education:

“9 The Ministry shall license and accredit institutions offering general educational qualifications according to the National Qualifications Framework according to criteria and standards established for this purpose; institutions offering other types of qualifications shall be accredited by the National Qualifications Authority according to criteria and standards established for this purpose, and licensed by the Ministry.

The Ministry shall act as a second instance body for decisions of other educational and training bodies where the right of appeal is specified in this Law.

192. Further, Article 3 (Ministry of Education, Science and Technology) of the Law on Education in Municipalities, stipulates, inter alia, that the Ministry has the responsibility to: (i) develop policies, draft and implement legislation for the development of education, including higher education, and science in Kosovo; (ii) establish and manage a general system of certification for all teachers in Kosovo; (iii) improve the quality, relevance and efficiency of education at all levels; and (iv) education Inspection.
193. Finally, the Court also notes that paragraph 2 of Article 7 of the Law on Education in Municipalities stipulates that: *“The exercise by the municipality of their powers and duties in this field shall be monitored by the Ministry in collaboration with the Ministry of Local Government and Administration to ensure compliance with the applicable legislation.”*

c. Review of Article 3 of the challenged act

194. Based on the elaboration of the municipalities' own competencies and the competencies of the Ministry of Education in the field of pre-university education defined by the Law on Local Self-Government, the Law on Education in Municipalities and the Law on Pre-University Education, the Court notes that these laws in terms of the content of the European Charter also define: (i) the principle of subsidiarity, which enables the decentralization of power to the level closest to the citizen; (ii) the competencies defined by the municipalities at the level of pre-university education are defined by law; and (iii) the supervision of municipal competencies by the central authority, namely the Ministry of Education, is defined by law, namely the Law on Education in Municipalities and the Law on Pre-University Education.
195. The Court, referring back to the allegations raised in the Referral, recalls that paragraph 1 of Article 3 of the challenged act stipulates that the Ministry of Education is the founder of public educational institutions at pre-university level. More specifically, paragraph 1 of Article 3 of the challenged act specifies that the Ministry of Education, at the request of the Municipality, establishes all types of educational institutions of level 1-3 according to ISCED, as well as their separate parallels outside the territory of the municipality where the institution is located.
196. Within the scope of this Article, the Court, referring to the competencies of the Ministry of Education defined by the Law on Education in Municipalities and the Law on Pre-University Education, notes that such competence is not defined by any of the provisions of these laws. Furthermore, the Court, referring again to Article 13 (Establishment of educational institutions) of the Law on Pre-University Education, notes that under this provision the primary schools of level 1 and lower secondary schools of level 2 according to ISCED are established in each municipality. This legal definition under Article 13 of the Law on Pre-University Education coincides with the competencies defined under paragraph 1 (h) of Article 17 of the Law on Local Self-Government and Article 4 of the Law on Education in Municipalities that consist in that the municipalities have full and exclusive competencies in the provision of pre-school, primary and secondary public education, including *“registration and licensing of educational institutions [...]”*.

197. Whereas, the Ministry of Education in its comments, submitted to the Court on 26 October 2021 stressed that the challenged act is based on Articles 1, 2, 3, paragraphs 1 (sub-paragraph 2.3), 5, 6 and 16 of Article 5 and Article 13 of the Law on Pre-University Education.
198. In this context, the Ministry of Education alleges that the preamble of the challenged act is based on the Law on Pre-University Education and that municipalities with no legal provision, have powers in establishing and terminating educational institutions. Regarding this allegation, the Ministry of Education states that: *“How could an education system function in Kosovo, if the municipalities each according to their own whim would set the conditions and procedures of establishment and termination of the activity of pre-university education institutions”*.
199. The Court also recalls the comments of the Ministry of Education to the Applicant's clarified Referral of 9 November 2021 submitted to the Court on 3 June 2022 specifying that the Applicant's Referral is out of time. With regard to the latter, the Court recalls that with regard to the prescription of the Referral, as elaborated above, it has concluded that the Referral was submitted within the time limit set by law. However, in its comments, the Ministry of Education regarding the Applicant's allegations, among other things had argued that:
- “The lack of an ex-ante control of documents and processes that lead to the establishment of a pre-university education institution by the Municipality, prevents the Ministry from carrying out its constitutional and legal duties, this creates a dangerous anti-legal precedent as it prevents the Ministry to:*
- 1. promote a non-discriminatory education system in which the right of each person for quality education and educational opportunities is to be made available to all;*
 - 2. design, implement and supervise equivalent and efficient forms of educational administration and school management;*
 - 3. improve the quality, adequacy and educational efficiency at all levels; in this regard we clarify that the provisions of the sub-legal act are in accordance with the legal authorizations and should be in accordance with the principle of legality and legal security, respectively, predictability as an element thereof, as elaborated in the Checklist for Rule of Law by the European Commission for Democracy through Law (Venice Commission).*
- Furthermore, the Law on Pre-University Education underlines that it is “the general obligation of the Ministry, municipalities, educational institutions and all other bodies to plan and provide efficient, effective, professional services, designed to provide all children with equal rights to education, in accordance with their specific skills and needs.”*
200. Further, the Court also recalls that the Ministry of Education in its comments referring to the cases of ECtHR case law related to Article 2 of Protocol no. 1 of the ECHR emphasizes that local or state institutions have an obligation to guarantee the right of children to education.
201. In relation to the latter, the Court reiterates that the present Referral is not aimed at assessing the issue of education or the right to education of children, but that the subject matter of the referral of the Applicant is to examine whether the challenged act has violated the own competencies of the municipality for the establishment and termination of pre-university education institutions in municipalities.

202. In relation to the latter, the Court notes that the right to education guaranteed by the Constitution is also guaranteed within the municipality's own competence in the field of education.
203. In this regard, the Court recalls paragraphs 6 and 7 of Article 124 of the Constitution, which define the obligation of municipalities as follows:
6. *Municipalities are bound to respect the Constitution and laws and to apply court decisions.*
7. *The administrative review of acts of municipalities by the central authorities in the area of their own competencies shall be limited to ensuring compatibility with the Constitution of the Republic of Kosovo and the law.*
204. Based on this, the Court notes that there are two levels of executive power, namely central and municipal, whose responsibilities and obligations in the field of education are defined by the Constitution and the relevant laws in force.
205. In addition, the Court refers to the principles set out in the provisions of the European Charter of Local Self-Government that relate to the activity of local self-government bodies, which, based on paragraph 3 of Article 123 of the Constitution, must be respected.
206. As elaborated above, paragraph 1 of Article 4 of the European Charter of Local Self-Government stipulates that the basic competencies and responsibilities of local authorities are defined by the Constitution and by law. According to this article, the powers defined by the Constitution or by law must be complete and exclusive. Accordingly, on the basis of this principle, these powers may not be limited or undermined by a central authority except in the case provided for by law. Consequently, based on Article 8 [Administrative supervision of local authorities' activities] of the European Charter for Local Self-Government, it results that the intervention or limitation of the municipality's own powers cannot be done in any way other than by law.
207. The aspect of supervision or administrative control by the central authority in the field of pre-university education is determined through the competence of inspection by the Ministry of Education. Such competence, defined by Article 8 [Inspection of education] of the Law on Pre-University Education stipulates that: *"Inspection of educational and training institutions for the purposes set out in sub-paragraph 1.9 paragraph 1 of Article 5 of this Law is a function of the Inspectorate Department of the Ministry"*.
208. In this line, the Court recalls that the laws that have defined the municipality's own competencies in the field of pre-university education are: the Law on Local Self-Government, the Law on Education in Municipalities and the Law on Pre-University Education, all three laws adopted by the Assembly of the Republic of Kosovo. Accordingly, the Court notes that the Law on Local Self-Government in its preamble stipulates that it is based, inter alia, on paragraph 1 of Article 123 and Article 124 of the Constitution. While the Law on Education in Municipalities and the Law on Pre-University Education in the regulation of municipal competencies in the field of pre-university education are based on the Law on Local Self-Government and the Law on Education in Municipalities.
209. The Court reiterates that the activity of local self-government bodies is based on the Constitution and the laws of the Republic of Kosovo and respects the European Charter of Local Self-Government. In this line, the Court in the context of the

challenged act reiterates that the competence for the provision of public pre-school, primary and secondary education, based on the Law on Local Self-Government including the “*registration and licensing of educational institutions [...]*” provided for in Article 17, point (h) of this law falls into the category of “own” competencies in which paragraph 3 of Article 124 of the Constitution is mandatory and constitutes an essential element of what Article 12 of the Constitution considers as “local self-government”. Therefore, the competence of the municipalities for the organization of preschool, primary and secondary education, which includes the establishment of education institutions of these levels, constitutes one of these competencies that according to the Constitution fall within the obligations of paragraph 3 of Article 124 of the Constitution, and that in this present case the Law on Local Self-Government applies this constitutional norm in a fair manner. This competence, which the Law on Local Self-Government calls “own competence”, as such in Article 3 of this law, is defined as a competence for which the municipality is fully responsible in terms of the local interest, or in accordance with the law. Further, based on paragraph 1 of Article 4 of the Law on Education in Municipalities it is determined that the municipalities have “full and exclusive competencies” with regard to the provisions of public preschool, primary and secondary education, including registration and licensing of educational institutions (see the Court's finding in case KO145/21, cited above, paragraph 166).

210. Referring back to the challenged act, the Court recalls that the challenged act, adopted in the form of an Administrative Instruction by the Minister of the Ministry of Education is based on paragraph 16 of the Law on Pre-University Education, which stipulates that: “*The Ministry shall issue sub-legal acts in any area of its responsibilities under this Law or any other law in force*”.
211. Based on this, the Court notes that the challenged act is a sub-legal act, adopted by the Minister of Education. In this sense, the Court notes that paragraph 16 of Article 5 of the Law on Pre-University Education stipulates that the Ministry of Education adopts sub-legal acts related to the areas of responsibility of the Ministry of Education, defined by the Law on Pre-University Education and other laws defining the competencies of the Ministry of Education in the field of education. In this sense, the Court therefore considers that the Ministry of Education through sub-legal acts cannot define itself competencies that are not defined by law, which competencies can interfere with the activity of local self-government in the field of education or violate municipal responsibilities in this field. Such a principle in the sense of local self-government derives also from the provisions of the European Charter for Local Self-Government, which clearly stipulates that any intervention or supervision of the central authority must be defined by law. In this context, the Court recalls that this principle set out by the European Charter of Local Self-Government has also been affirmed through the Venice Commission (see Opinion of the Venice Commission regarding the draft Amendment to the Constitution of Ukraine) and the Court's own case-law practice in case KO145/21 (see paragraph 196 of the Judgment in case KO145/21).
212. Referring to the content of Article 3 of the challenged act, the Court notes that this provision, respectively in its paragraphs 1 and 2, specifies the Ministry “at the request” of the Municipality, while in its paragraph 3 specifies the municipality “with the consent” of the Ministry establishes educational institutions of level 1-3. In the meaning of the latter, the content of this provision does not appear to make clear the difference in which reason in the case of paragraphs 1 and 2 of Article 3 of the challenged act, the Municipality shall submit a request and the Ministry of Education shall be the founder, while in paragraph 3 of Article 3 of the challenged act with the consent of the Ministry of Education, the Municipality is the founder of the preschool

institutions and separate parallels of the level 1-3 educational institutions according to ISCED within its territory.

213. In this regard, the Court considers that such competence conferred on the Ministry through Article 3 implies full decision making of the central government for the establishment of pre-university level institutions in municipalities. Consequently, the Court considers that this competence conferred on the Ministry through Article 3 of the challenged act violates the own competencies of the municipality, defined by the Law on Local Self-Government, the Law on Education in Municipalities and the Law on Pre-University Education. Further, the Court also points out that such competence of the Ministry of Education defined by a sub-legal act approved by this Ministry is not in line with the standards set by the European Charter of Local Self-Government and the opinions of the Venice Commission in the field of local self-government.
214. In relation to the latter, the Court recalls that Article 4 of the European Charter of Local Self-Government stipulates that: *“Powers given to local authorities shall normally be full and exclusive. They may not be undermined or limited by another, central or regional, authority except as provided for by the law.”* In support of this, the Court also refers to the assessment of the Legal Office of the OPM, which in reviewing the challenged act had found that the powers of the Ministry of Education, defined in the challenged act, are not specified by law.
215. Further to the above elaboration, the Court considers that paragraphs 1 and 2 of Article 3 of the challenged act which stipulate that the Ministry, at the request of the municipality, establishes ISCED level 1-3 institutions and paragraph 3 which stipulates that, with the consent of the municipality, pre-school and separate parallel level 1-3 institutions are established within its territory violate the municipal responsibilities defined by the Law on Local Self-Government, the Law on Education in Municipalities and the Law on Pre-University Education. More specifically, the Court notes that paragraphs 1 and 2 of Article 3 of the challenged act violate the municipal responsibilities or own competencies defined in point (h) of Article 17 of the Law on Local Self-Government, Article 4 of the Law on Education in Municipalities and Article 13 of the Law on Pre-University Education, competencies related to the establishment of public institutions of pre-university education in municipalities.
216. Finally, the Court, based on the elaboration as above, finds that Article 3 of the challenged act violates the municipal responsibilities for the provision of pre-university public education, defined by paragraph 1 of Article 17 of the Law on Local Self-Government, Article 4 of the Law on Municipalities Education and Articles 7 and 13 of the Law on Pre-University Education, which, within the meaning of paragraph 2 of Article 12 of the Constitution, paragraph 1 and 3 of Article 123 of the Constitution and paragraph 2 of Article 124 of the Constitution, constitutes competence provided by law, while according to paragraph 3 of Article 124 of the Constitution, constitutes competence provided by law as *“own competence”*.

(ii) Regarding the allegation for Article 4 of the challenged Act

217. The Court first notes that the Applicant alleges in his Referral that Article 4 of the challenged act is incompatible with paragraph 2 [Right to Education] of Article 47 of the Constitution.
218. The Applicant alleges that Article 4 of the challenged act, which lists: *“the conditions that an educational institution must meet or separate parallel, where among others, it determines the minimum of one parallel for each class or the minimum of 60*

students for level 1 (class 1-5)”, is in contradiction with Administrative Instruction no. 22/2013 on the “*Maximal Number of Students per Class and the Report Teacher-Student*”, which determines the condition that the teacher-student ratio is 1:21.3.

219. According to the Applicant, if a class is allowed to have 5 students, while the specific bylaw stipulates that the class should normally have 30 students, then there is discrimination in providing the possibility of education where the right to education is violated on equal terms for all.
220. The Court first recalls that the content of Article 4 of the challenged act sets out the specific criteria for establishing and terminating pre-university educational institutions and separate parallels. The content of this provision is reflected in the “disputed provision of the challenged act” of this Judgment.
221. As set out above, the subject matter of the constitutional review of the Applicant's Referral is whether the provisions specified by him in the challenged act violate municipal responsibilities, which responsibilities or competencies are based on the application of the principles set forth in paragraph 1 of Article 123 and paragraphs 2 and 3 of Article 124 of the Constitution and those set forth by law. Specifically, the subject matter of the review of this referral is whether the specified provisions of the challenged act are incompatible with the municipalities' own competencies in the field of pre-university education that are regulated by paragraph 1 (h) of Article 17 of the Law on Local Self-Government, Article 4 of the Law on Education in Municipalities and Articles 7 and 13 of the Law on Pre-University Education and which provisions are pursuant to paragraph 3 of Article 124 of the Constitution.
222. Based on the Applicant's allegation, the Court notes that this allegation of the Applicant does not refer to the violation of municipal responsibilities, an assessment which falls within the jurisdiction of the Court, defined by paragraph 4 of Article 113 of the Constitution. Consequently, based on this elaboration, the Court holds that the Applicant's allegation that Article 4 of the challenged act is incompatible with paragraph 2 of Article 47 of the Constitution and is also contrary to Administrative Instruction no. 22/2013 on the “*Maximal Number of Students per Class and the Report Teacher-Student*” of the Ministry of Education is unacceptable, because the Applicant is not an authorized party to the referral based on paragraph 4 of Article 113 of the Constitution to raise such an allegation, namely the allegation of violation of the right to education of the students of the Municipality of Kamenica.
223. However, in the context of assessing whether this article of the challenged act may have violated the municipal responsibilities defined by law, the Court notes that the content of this article refers to the definition of specific criteria for the establishment and termination of pre-university educational institutions. In light of the elaboration of the competencies of the Ministry of Education defined by the Law on Education in Municipalities and the Law on Pre-University Education, it results that the definition of the above-mentioned criteria derives from Article 5 [Duties of the Ministry] of the Law on Pre-University Education.
224. In this context, the Court refers to sub-paragraph 2.3 of paragraph 2 of Article 5 of the Law on Pre-University Education, which stipulates that:

2. The Ministry shall issue bylaws in relation to:
[...]

2.3. maximum class sizes and pupil-teacher ratios (with threshold for the establishment of classes or schools teaching in non-official languages lower than normally stipulated);

[...].

225. Based on the above, it results that Article 4 of the challenged act does not violate the municipal responsibilities defined by the relevant laws, because this competence of supervision of the central authority, namely the Ministry of Education that is related to the definition of criteria and conditions that an educational institution or a separate parallel should meet is regulated by law.
226. The Court shall then consider the Applicant's allegations under Articles 5 [Proposal for the establishment of the educational institution or separate parallel], 6 [Verification of Conditions] and 7 [Decision] of the challenged act, which he alleges are incompatible with paragraph 2 of Article 12 and paragraphs 2 and 3 of Article 124 of the Constitution. Notwithstanding the fact that the Applicant in his Referral provides the same reasoning for Articles 5, 6 and 7, the Court, in its assessment, will examine the Applicant's allegations in relation to Articles 5, 6 and 7 of the challenged act for each Article separately.

(iii) Regarding the allegation for Article 5 of the challenged Act

227. In addressing this allegation, the Court initially refers to Article 5 [Proposal for the establishment of the educational institution or separate parallel] of the challenged act, which stipulates that:
- 1. The proposal for the establishment of the educational institution or separate parallel is done by municipality.*
 - 2. The proposal from paragraph 1 of this Article shall be accompanied by these documents:*
 - 2.1. Arguing the necessity of opening a public education institution or a separate classroom, including demographic data for the community living within the institution's coverage area;*
 - 2.2. Arguing fulfilment of general and special conditions from Article 4 of this Article;*
 - 2.3. Cadastral document for the ownership of the educational facility parcel;*
 - 2.4. The educational facility plan;*
 - 2.5. Construction permit or technical acceptance decision of the facility;*
 - 2.6. Proposed code of educational institution;*
 - 2.7. Other documents supporting the proposal.*
 - 3. The proposal must be submitted to the Ministry at least 3 months prior to the commencement of the work of the educational institution or separate parallel.*
228. The Court, referring to the content of Article 5 of the challenged act, notes that this provision sets out the proposal procedure for the establishment of pre-university educational institutions. The Court further notes that the municipality, which proposes the establishment of an educational institution through its request submitted to the Ministry of Education, should accompany it with the relevant documentation related to the conditions for the establishment of an educational institution at pre-university level.
229. Based on the elaboration of the competencies defined by law, the Court recalls Article 11 [Licensing of Education] of the Law on Education in Municipalities, which refers to the decision-making of the municipality regarding the licensing of the educational institution. Paragraphs 3, 4 and 5 of Article 11 of the Law on Education in Municipalities stipulate that:

11.3 Municipalities shall issue administrative decisions granting, denying or repealing licensing of any public education institution, following a written opinion from the MEST.

a) the MEST will provide notification of its opinion to the municipality and the applicant institution within 60 days of the submission of a request for an opinion by the municipality.

b) the municipality shall inform the applicant institution of its decision no later than 60 days after the municipality receives the opinion from the MEST.

11.4 In any case in which the municipality's decision differs from the opinion of the MEST, the municipality shall provide detailed written explanation of the reasons for its decision to the MEST and the applicant institution; and

11.5 If the municipality does not notify the applicant institution within the 60-day period required by paragraph 3.b of this Article, the opinion of the MEST shall be considered the final decision on licensure of the Educational Institution.

230. The Court also refers to paragraph 7 of Article 5 of the Law on Pre-University Education, which stipulates that:

7. Competencies of the Ministry, as complementary to the competencies granted under the Law on Education in Municipalities of Republic of Kosovo, no. 03/L-068, 21 May 2008 in educational and training facility infrastructure shall include:

7.1. drafting and monitoring the implementation of policies, standards and norms on education space;

7.2. providing technical assistance for municipalities in planning and designing training and education facilities;

7.3. drafting policies for school space management and maintenance;

7.4. providing technical assistance for municipalities in ensuring the adequacy of school buildings and equipment in accordance with international standard on health and safety and protection of the environment, accessibility for pupils and staff with physical disabilities, and assistive equipment to support inclusive education.

7.5. approving capital investments for construction and renovation of facilities financed by the Kosovo budget and donors.

7.6. develops and maintains the school space program, which is interrelated with the Education Management Information System, and designs the national plan for capital investments in education.

231. Based on the above, and also on the procedure for the establishment of pre-university educational institutions, the Court considers that the opinion of the Ministry of Education, which is based on the fulfilment of all the necessary conditions for the establishment of educational institutions, falls within the competence of drafting the criteria and standards as well as the preliminary verification of the fulfilment of these criteria and standards set by law of the Ministry of Education, which should ensure that all the necessary conditions are met for the establishment of an educational institution.

232. In the context of the definition of Article 5 of the challenged act for the submission of the proposal for the establishment of an educational institution or a separate parallel, by the municipality with the documents set out in paragraph 2 of this Article, the Court recalls Article 8 of the European Charter, which in the sense of administrative control stipulates that:

1. Any administrative supervision of local authorities may only be exercised according to such procedures and in such cases as are provided for by the constitution or by statute.

2 Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities.

3 Administrative supervision of local authorities shall be exercised in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect.

233. In addition, the Court notes that an “administrative control of the local authority” as elaborated in the European Charter for Local Self-Government, in the context of the verification of the criteria and the opinion of the Ministry, in the present case given to the municipality by the Ministry of Education, which is exercised with respect to the principle of proportionality, is possible. Likewise, in the present case, a preliminary verification by the Ministry of Education for the verification of the conditions listed in paragraph 2 of Article 5 of the challenged act does not imply an interference with its own competence, but an opinion, defined by the Law on Pre-University Education, which enables the municipality to exercise its own competencies efficiently in defence of the interests of students and the pre-university education system as a whole.
234. Furthermore, the Court recalls that Article 11 of the Law on Education in the Municipalities defines the establishment of educational institutions.
235. Furthermore, the Court recalls that in relation to Article 4 of the challenged act it has considered that the definition of the criteria for the establishment of a pre-university educational institution listed [in Article 4] is defined as the competence of the Ministry of Education by law. In this connection, the Court also considers that the preliminary verification of the conditions listed in paragraph 2 of Article 5 is closely related to the competence of the Ministry of Education to establish specific criteria for the establishment of educational institutions and separate parallels at pre-university level.
236. Therefore, the definition of Article 5 of the challenged act for the municipality to submit the proposal with the listed documents for the establishment of the educational institution is not considered to fall within the meaning of the decision of the Ministry of Education, but a preliminary verification mechanism that results in giving an opinion and serves the establishment of the educational institution in accordance with all the criteria and standards set by law and the relevant sub-legal acts. The Court also recalls the clarification of the Explanatory Report on paragraph 3 of Article 8 of the European Charter, which states that the principle of proportionality means that the supervisory authority, in the exercise of its duties, is obliged to use the method that least affects local autonomy to achieve the desired results.
237. In this specific context, the Court places emphasis on respecting the principle of proportionality between the importance of the intervention of the Ministry of Education in terms of preliminary verification of the fulfilment of the criteria and the importance of the protection and development of the pre-university education system in accordance with the standards specified by law. Consequently, a verification by the central authority in this sense and in the specific context of the definition of Article 5

of the challenged act implies a cooperation between the central and local authorities in full service of the education system.

238. In the light of the above elaboration, it results that Article 5 of the challenged act does not violate the municipal responsibilities defined by the Law on Local Self-Government, the Law on Education in Municipalities and the Law on Pre-University Education.
239. Consequently, the Court finds that Article 5 of the challenged act is in compliance with paragraph 1 (h) of Article 17 of the Law on Local Self-Government, Article 4 of the Law on Education in Municipalities and Articles 7 and 13 of the Law on Pre-University Education and consequently does not constitute a violation of the municipal responsibilities for “the provision of public preschool, primary and secondary education”.

(iv) Regarding Article 6 of the challenged Act

240. Hereafter, the Court also refers to Article 6 [Verification of Conditions] of the challenged act, which stipulates that:

- 1. The verification of the conditions for the development of the educational activity on the basis of a proposal from the municipality is done by the commission of the Ministry. The Commission has 3 or 5 members and is appointed by the General Secretary of the Ministry for a four-year term.*
- 2. The Commission shall carry out the verification within 60 days from the day of receipt of the proposal.*
- 3. The Commission analyses the documentation, makes field visits, consults specialists within the Ministry and, where appropriate, requests additional documents and information from the municipality.*
- 4. The Commission compiles a comprehensive report with a clear conclusion on the acceptability of the municipality's proposal. The report shall be submitted to the General Secretary of the Ministry.*
- 5. The decision on the proposal of the municipality is taken by the General Secretary of the Ministry.*
- 6. The decision from paragraph 5 of this Article may be:*
 - 6. 1. Decision on the establishment of an educational institution or a separate parallel based on the competencies of the Ministry from Article 3, paragraph 1;*
 - 6.2. Decision for granting consent to the municipality to issue a decision on the establishment of an educational institution or a separate parallel based on the competencies of the municipality for Article 3, paragraph 3.*
 - 6.3. Decision for rejecting the proposal of the municipality, which is accompanied by a justification.*
- 7. The municipality may appeal the decision to the Appeals Commission of the Ministry within 30 days of its receipt.*

241. With regard to paragraphs 1-4 of Article 6 of the challenged act, the Court, referring to the reasoning given in this Judgment, which relates to the duties and responsibilities of the Ministry of Education in determining the conditions for the establishment and functioning of educational institutions and separate parallels, these responsibilities set out in Article 5 of the Law on Pre-University Education, considers that the procedure of verification of the conditions by a Commission established by the Ministry of Education, which verifies the conditions set by the Law related to the establishment of educational institutions at pre-university level, falls within the competence of an administrative control of the Ministry of Education of

such a level that it does not imply a violation of the municipality's own competencies. Based on the reasoning given in this Judgment in relation to Article 5 of the challenged act, the Court notes that even in relation to paragraphs 1, 2, 3 and 4 of Article 6 of the challenged act, the preliminary verification of the criteria through the commission of the Ministry of Education and the provision of an opinion or recommendation regarding the fulfilment or not of the criteria does not imply interference with the own competencies of the municipalities, but enables the municipality to exercise its own competencies efficiently in protecting the interests of the students and the pre-university education system as a whole.

242. In the light of the elaboration as above, it results that paragraphs 1-4 of Article 6 of the challenged act do not violate the municipal responsibilities defined by the Law on Local Self-Government, the Law on Education in Municipalities and the Law on Pre-University Education.
243. Insofar as it refers to paragraph 5 of Article 6 of the challenged act, the Court also refers to its reasoning in relation to Article 3 of the challenged act. In relation to the latter, the Court recalls that based on the three aforementioned laws regulating the issue of the establishment and organization of education at pre-university level, which also define the own competencies of the municipalities as well as the duties and responsibilities of the Ministry of Education for the establishment of pre-university educational institutions and separate parallels, it is assigned as its own competence to the municipality. In this line, the Court notes that paragraph 5 of this article stipulates that: *“The decision on the proposal of the municipality is taken by the General Secretary of the Ministry.”* Consequently, the Court concludes that paragraph 5 of Article 6 of the challenged act violates the competencies of the municipality in the field of pre-university education.
244. Further, in paragraph 6 of Article 6 of the challenged act, the Court also refers to its reasoning in relation to Article 3 of the challenged act. More specifically, subparagraph 6.1 provides that the Secretary-General may issue *on the establishment of an educational institution or a separate parallel based on the competences of the Ministry from Article 3, paragraph 1*. In relation to the latter, the Court has already clarified and found that the final decision after meeting all the criteria should be issued by the municipality itself as the founder of pre-university educational institutions and separate parallels. In this sense, the Court reiterates that such competence for the establishment of pre-university educational institutions has been conferred on the municipality through paragraph 5 of Article 11 of the Law on Education in Municipalities. Consequently, the Court concludes that paragraph 6 of Article 6 of the challenged act violates the competencies of the municipality in the field of pre-university education.
245. The Court also notes that in paragraph 7 of Article 6 of the challenged act it is stipulated that: *“7. The municipality may appeal the decision to the Appeals Commission of the Ministry within 30 days of its receipt.* In relation to the latter, the Court recalls that it has already found that paragraphs 5 and 6 of Article 6 of the challenged act reduce the own competencies of the municipality. Therefore, within the meaning of paragraph 7 of Article 6 of the challenged act, where it is determined that the municipality has the right to file a complaint against the decision of the Ministry, the Court emphasizes that the word “decision” in this paragraph constitutes a violation of the municipality's own competence.
246. However, as the Court has reasoned and found in relation to paragraphs 1-4 of Article 6 of the challenged act, these provisions do not constitute a violation of the municipality's own competence, and that the Ministry within the meaning of a

preliminary verification may review and verify the conditions set out in Articles 4 and 5 of the challenged act. Consequently, the competence of the Ministry of Education in this case is limited to providing a recommendation or opinion and not a decision. While in paragraph 4 of Article 6 of the challenged act it is specified that the Commission may issue a comprehensive report regarding the proposal, this report or the proposal given by the Commission for verification, the Municipality has the right to challenge or complain within the Ministry of Education, but within the specific powers and authorizations that the Ministry of Education has specified by law without exceeding or violating the own competencies of the municipality in this field.

247. Consequently, the Court concludes that the word “decision” in paragraph 7 of Article 6 of the challenged act violates the competencies of the municipality in the field of pre-university education.
248. Consequently, the Court finds that paragraphs 5, 6 and 7 of Article 6 of the challenged act violate the responsibilities of the municipalities defined by paragraph 2 of Article 12 [Local Government], paragraphs 1 and 3 of Article 123 [General Principles] and paragraphs 2 and 3 of Article 124 [Local Self-Government Organization and Operation] of the Constitution of the Republic of Kosovo.

(v) Regarding Article 7 of the challenged Act

249. Finally, the Court refers to Article 7 [Decision] of the challenged act, which stipulates that:

1. The decision to establish an educational institution or a separate parallel contains:

- 1.1. Name of the founder;*
- 1.2. Municipality and location of educational institution;*
- 1.3. Name of the institution (if any);*
- 1.4. Type of educational institution;*
- 1.5. Code of the educational institution;*
- 1.6. Level of educational activity;*
- 1.7. Teaching languages.*

2. For educational institutions and separated parallels from Article 3, paragraph 1, the General Secretary of the Ministry takes the decision as described in Article 6, paragraph 6, sub-paragraph 6.1.

3. For educational institutions and separated parallels from Article 3, paragraph 3, the decision is taken by the mayor, on the basis of the consent of the General Secretary of the Ministry.

250. With regard to Article 7 of the challenged act, the Court also refers to its reasoning in relation to Article 3 of the challenged act. In relation to the latter, the Court recalls that based on the three aforementioned laws regulating the issue of the establishment and organization of education at pre-university level, which also define the own competencies of the municipalities as well as the duties and responsibilities of the Ministry of Education for the establishment of pre-university educational institutions and separate parallels, it has been assigned as its own competency to the municipality. In this line, the Court notes that paragraph 2 of this article stipulates that: “*2. For educational institutions and separated parallels from Article 3, paragraph 1, the General Secretary of the Ministry takes the decision as described in Article 6, paragraph 6, sub-paragraph 6.1.*”

251. While in paragraph 3 of this Article of the challenged act, more specifically is stipulated that: “*For educational institutions and separated parallels from Article 3,*

paragraph 3, the decision is taken by the mayor, on the basis of the consent of the General Secretary of the Ministry”.

252. With regard to the latter, the Court has already found that the final decision after meeting all the criteria should be issued by the municipality itself as the founder of pre-university educational institutions and separate parallels.
253. Therefore, as elaborated and ascertained in the Judgment of the Court in relation to Article 3 and Article 6 of the challenged act, the Court finds that such competency defined by paragraphs 2 and 3 of Article 7 of the challenged act is incompatible with the municipality's own competencies in the field of pre-university education, defined by paragraph 1 of Article 17 of the Law on Local Self-Government, Article 4 of the Law on Education in Municipalities and Articles 7 and 13 of the Law on Pre-University Education and consequently constitutes a violation of the municipality's responsibilities for “the provision of pre-school, primary and secondary public education”, which, within the meaning of paragraph 2 of Article 12 of the Constitution, paragraph 1 and 3 of Article 123 of the Constitution and paragraph 2 of Article 124 of the Constitution, constitutes a competency provided by law, while according to paragraph 3 of Article 124 of the Constitution, constitutes a competency provided by law as “own competency”.
254. Consequently, the Court finds that paragraphs 2 and 3 of Article 7 of the challenged act violate the responsibilities of the municipality defined by paragraph 2 of Article 12 [Local Government], paragraphs 1 and 3 of Article 123 [General Principles] and paragraphs 2 and 3 of Article 124 [Local Self-Government Organization and Operation] of the Constitution.

(vi) Regarding the allegation for Article 9 of the challenged Act

255. The Court recalls that the Applicant alleges that Article 9 [Termination of the activity of the educational institution or the separated parallel] of the challenged act is incompatible with paragraph 2 of Article 12 and paragraphs 2 and 3 of Article 124 of the Constitution.
256. In this regard, the Applicant specifies that: *“While above, we saw that an own and exclusive competence of the municipality by this Instruction has passed to the Ministry, here the issue deepens further, where a competence of the municipality passes to the general secretary of the ministry, i.e. not to the Ministry as a body. Given the above-mentioned and justified reasons not to repeat them, such competence cannot be assigned to the ministry, much less to the secretary of the ministry. Whereas the Constitution provides that the organization and competencies of local self-government units are regulated by law.*
257. Following this allegation, the Applicant cites the content of Article 17 of the Law on Local Self-Government, specifically points h) and s) of this Article specifying that: *“[...] we understand that the termination of the activity of educational institutions is the competence of the municipality while it has full and exclusive competence in providing public education at the levels defined in this provision, their registration, and licensing. While it carries out this legal duty, it also decides on the institutions where it provides such a thing, adding here their registration, and licensing. Also, if it is not expressly provided that the termination of the activity of educational institutions is a competence of the municipality, we have the other basis, which is point 5) described above. If we take another look at the competencies of the Ministry listed in this letter, we do not encounter any provision where the termination of the activity of educational institutions is assigned to the Ministry of Education, or any*

provision that can be interpreted as such. Therefore, both the establishment and the termination of the activity of educational institutions, by this sub-legal act, violate the full and exclusive competencies of the Municipality, defined by the Law and the Constitution of the Republic of Kosovo.

258. Finally, the Applicant states: *“So, both the establishment and the termination of the activity of educational institutions, by this sub-legal act, violate the full and exclusive competencies of the Municipality, defined by the Law and the Constitution of the Republic of Kosovo.”*

259. In addressing this allegation, the Court initially refers to Article 9 [Termination of the activity of the educational institution or the separated parallel] of the challenged act, which stipulates that:

1. Termination of the activity of the educational institution or the separated parallel can be initiated by the Ministry or the respective municipality in these cases:

1.1. If the institution or the separate parallel does not meet the conditions regarding Article 4 of this Instruction;

1.2. If there is no justification for continuing the activity;

1.3. If with continuation of the activity is endangered the health and safety of children / students;

1.4. Upon the recommendation of the responsible body of the inspectorate following a comprehensive inspection of the institution or the separate parallel.

2. The initiative for termination of the activity of the educational institution or a separate parallel contains detailed arguments for the reasons for termination of the activity, referring to the legal conditions, namely the objective circumstances justifying such a step. In particular, it should contain a plan for:

2.1. Concrete opportunities for transferring children / students of the institution / parallel that will cease the activity in another public educational institution;

2.2. Procedures for transferring children / students of the institution / parallel that will cease operating in another institution / other public educational institutions;

2.3. Determining the destination of the furniture's inventory, teaching means etc., of the institution;

2.4. Determination of employment opportunities for the staff of the educational institution / parallel that ceases to operate.

3. During preparation of the initiative from paragraph 2 of this Article, the Ministry takes all necessary steps to obtain data and prepare action plans such as: site visits, consultation with the municipality and the school, consultations with competent specialists within the Ministry, etc. Members of the Ministry Commission established in accordance with Article 6, paragraph 1 of this Instruction, cannot be involved in the process of preparing the initiative.

4. The initiative is reviewed by the Commission of the Ministry established in accordance with Article 6, paragraph 1 of this Instruction. The Commission acts in accordance with the procedure set out in Article 6, paragraph 3.

5. The Commission compiles a comprehensive report with a clear conclusion on the acceptability of the initiative to cease the activity of the institution or separate parallel.

6. The decision on the initiative is taken by the General Secretary of the Ministry.

7. The decision can be:

7.1. The decision on termination of the activity of an educational institution or a separate parallel based on the competencies of the Ministry from Article 3, paragraph 1;

7.2. Recommendation to the municipality to issue a decision on termination of the activity of the educational institution or a separate division based on the competencies of the municipality from paragraph 3 of article 3 of this AI;

7.3. The decision to reject the initiative for termination of the activity of the educational institution or the separated parallel with appropriate justification.

8. Toward decision from paragraph 7, sub- paragraph 7.1 and 7.3 of this Article, municipality can file a complaint at the Appeal Commission in the Ministry within 30 days from the day of receipt of decision.

260. The Court also recalls that it has elaborated the legal basis regarding the municipalities' own competencies in providing pre-university education. In addition, the Court has elaborated the basic responsibilities of both the municipalities and the Ministry of Education in the field of pre-university education.
261. With regard to Article 9 of the challenged act, the Court, referring to the aforementioned provisions of the Law on Local Self-Government, the Law on Education in Municipalities and the Law on Pre-University Education notes that the issue of terminating the activity of the educational institution or the separate parallel is not specified in any of the provisions of the aforementioned laws. More specifically, as regards the termination of educational institutions and the separate parallel, which is the content of Article 9 of the challenged act, the relevant provisions of the three aforementioned laws do not specify which is the authority or body that issues the decision to terminate pre-university educational institutions.
262. In this regard, taking into account that the legal provisions do not define the competence of the municipalities for the termination of educational institutions and of the separate parallel, the Court will assess this competence set out in Article 9 of the challenged act within the own competence of the municipality set by law for the “provision of public preschool, primary and secondary education,” which also includes the “registration and licensing of educational institutions”.
263. Regarding the competence of the Ministry of Education established by Article 3 of the challenged act, the Court has found as above that Article 3 (Founder) and paragraphs 5, 6 and 7 of Article 6 (Verification of Conditions) of the challenged act violate the municipal responsibilities for the provision of pre-university public education, defined by paragraph 1 of Article 17 of the Law on Local Self-Government, Article 4 of the Law on Education in Municipalities and Articles 7 and 13 of the Law on Pre-University Education which, within the meaning of paragraph 2 of Article 12 of the Constitution, paragraph 1 and 3 of Article 123 of the Constitution and paragraph 2 of Article 124 of the Constitution, constitutes competence provided by law, while according to paragraph 3 of Article 124 of the Constitution, it constitutes competence provided by law as “own competence”.
264. In this line, the Court considers that the competence for both the establishment and the dismissal of pre-university education institutions should be considered as the own competence of the municipality defined by the legislation in force.
265. With regard to paragraph 1 of Article 9 of the challenged act, the Court considers that the initiation of the termination of the activity of the educational institution or the separate parallel may be initiated by the Ministry only within the framework or within the meaning of the competence of the Ministry of Education in the field of inspection,

defined by Article 8 [Inspection of Education] of the Law on Pre-University Education. In this context, the Court considers that such a specification which must be in full compliance with Article 5 and Article 8 of the Law on Pre-University Education should be specified in a provision which refers to the termination of the activity of the educational institution or the separate parallel. Insofar paragraphs 1 - 5 of Article 9 do not appear to be incompatible with the spirit and competencies defined by the municipality and the Ministry of Education, defined by law. Consequently, the wording or definition of the competencies of the municipality and the Ministry of Education should be specified in the spirit of the findings given in relation to Article 3 of the challenged act.

266. The Court considers that the procedure for terminating the activity of educational institutions and separate parallels can be initiated through the proposal of the municipality itself or the Ministry of Education, within its competence defined by Article 8 of the Law on Pre-University Education.

267. Accordingly, the Court notes that paragraphs 6 and 7 of Article 9 of the challenged act are in essence similar to paragraphs 5 and 6 of Article 6 of the challenged act, for which the Court has found that they violate the competencies of the municipality in the field of pre-university education because they provide as follows:

6. The decision on the initiative is taken by the General Secretary of the Ministry.

7. The decision can be:

7.1. The decision on termination of the activity of an educational institution or a separate parallel based on the competencies of the Ministry from Article 3, paragraph 1;

7.2. Recommendation to the municipality to issue a decision on termination of the activity of the educational institution or a separate division based on the competencies of the municipality from paragraph 3 of article 3 of this AI;

7.3. The decision to reject the initiative for termination of the activity of the educational institution or the separated parallel with appropriate justification.

268. Whereas as regards paragraphs 6 and 7 of Article 9 of the challenged act, the Court, as it has elaborated in relation to Article 3, paragraphs 5, 6 and 7 of Article 6, as well as paragraphs 2 and 3 of Article 7 of the challenged act, finds that such competence defined in paragraphs 6 and 7 of Article 9 of the challenged act is incompatible with the municipality's own competencies in the field of pre-university education, defined in point h) of paragraph 1 of Article 17 of the Law on Local Self-Government, Article 4 of the Law on Education in Municipalities and Articles 7 and 13 of the Law on Pre-University Education and consequently violates the responsibilities of municipalities for "the provision of public preschool, primary and secondary education", which, within the meaning of paragraph 2 of Article 12 of the Constitution, paragraph 1 and 3 of Article 123 of the Constitution and paragraph 2 of Article 124 of the Constitution, constitutes a competence provided by law, while according to paragraph 3 of Article 124 of the Constitution, constitutes a competence provided by law as "own competence".

269. The Court also notes that in paragraph 8 of Article 9 of the challenged act is stipulated that: *"8. Toward decision from paragraph 7, sub- paragraph 7.1 and 7.3 of this Article, municipality can file a complaint at the Appeal Commission in the Ministry within 30 days from the day of receipt of decision.*

270. With regard to the latter, the Court recalls that it has already found that paragraph 7 of Article 6 of the challenged act violates the own competencies of the municipality.

Therefore, within the meaning of paragraph 8 of Article 9 of the challenged act, where it is determined that the municipality may file a complaint against the decision of the Ministry, the Court emphasizes that the word “decision” in this paragraph constitutes a violation of the municipality's own competence.

271. Finally, as the Court has reasoned and found in relation to paragraphs 1-5 of Article 9 of the challenged act, these provisions do not constitute a violation of the municipality's own competence, and that the Ministry in the sense of a preliminary verification and that of the inspection after reviewing and verifying the conditions may propose the termination of an institution, however in the sense of the competence of the inspection, the competence of the Ministry of Education in this case is limited to making a recommendation, which recommendation can be challenged or appealed within the Ministry of Education, but within the specific competencies and authorizations that the Ministry of Education has specified by law without exceeding or violating the municipality's own competencies in this area.
272. Consequently, the Court considers that paragraphs 6, 7 and 8 of Article 9 of the challenged act are incompatible with the municipality's own competencies in the field of pre-university education, defined in paragraph 1 (h) of Article 17 of the Law on Local Self-Government, Article 4 of the Law on Education in Municipalities and Articles 7 and 13 of the Law on Pre-University Education and consequently constitute a violation of the responsibilities of municipalities for “the provision of public preschool, primary and secondary education”, which, within the meaning of paragraph 2 of Article 12 of the Constitution, paragraph 1 and 3 of Article 123 of the Constitution and paragraph 2 of Article 124 of the Constitution, constitutes a competence provided by law, while according to paragraph 3 of Article 124 of the Constitution, constitutes a competence provided by law as “own competence”.
273. Finally, the Court finds that Article 3; paragraphs 5, 6 and 7 of Article 6; paragraphs 2 and 3 of Article 7; and paragraphs 6, 7 and 8 of Article 9 of the Administrative Instruction no. 104/2020 on “*the Criteria and Procedures for the Establishment and Termination of the Activity of Pre-University Education Institutions*” of the Ministry of Education and Science are not in accordance with paragraph 2 of Article 12 [Local Government], paragraph 1 and 3 of Article 123 [General Principles] and paragraph 2 and 3 of Article 124 [Local Self-Government Organization and Operation] of the Constitution.
274. Consequently, and in connection with this finding, the Court concludes that the Ministry in accordance with Rule 66 (5) of the Rules of Procedure must notify the Court of the measures taken to implement the Court's Judgment.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.4 of the Constitution, Articles 40 and 41 of the Law, and pursuant to Rule 59 (1) of the Rules of Procedure, on 7 December 2022, unanimously

DECIDES

- I. TO DECLARE the Referral admissible;
- II. TO HOLD that Article 3; paragraphs 5, 6 and 7 of Article 6, paragraphs 2 and 3 of Article 7, and paragraphs 6, 7 and 8 of Article 9 of the Administrative Instruction no. 104/2020 on “*the Criteria and Procedures for the Establishment and Termination of the Activity of Pre-University Education Institutions*” of the Ministry of Education and Science are not in accordance with paragraph 2 of Article 12 [Local Government], paragraph 1 and 3 of Article 123 [General Principles] and paragraph 2 and 3 of Article 124 [Local Self-Government Organization and Operation] of the Constitution of the Republic of Kosovo;
- III. TO ABROGATE Article 3; paragraphs 5, 6 and 7 of Article 6, paragraphs 2 and 3 of Article 7, and paragraphs 6, 7 and 8 of Article 9 of the Administrative Instruction no. 104/2020 on “*the Criteria and Procedures for the Establishment and Termination of the Activity of Pre-University Education Institutions*” of the Ministry of Education and Science;
- IV. TO REJECT the request for withdrawal of the referral;
- V. TO NOTIFY this Judgment to the Applicant, the Government of the Republic of Kosovo, the Ministry of Education, Science, Technology and Innovation, and the Ministry of Local Government Administration;
- VI. TO PUBLISH this Judgment in the Official Gazette, in accordance with Article 20.4 of the Law;
- VII. TO DECLARE that this Judgment is effective on the day of its publication in the Official Gazette.

Judge Rapporteur

President of the Constitutional Court

Radomir Laban

Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.