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Legal opinion on the draft Law of Ukraine 'On Principles of Administrative Territorial Structure of Ukraine'

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I. Introduction

The Head of the Committee on State Building, Regional Policy and Local Self-Government of the Verkhovna Rada of Ukraine has requested[1] the Council of Europe's legal opinion on the draft Law of Ukraine 'On Principles of Administrative Territorial Structure of Ukraine'.

The present opinion was prepared on the basis of the contribution of Council of Europe experts, in the framework of the implementation of the Council of Europe Programme "Decentralisation and local government reform in Ukraine".

European Charter of Local Self-Government (ECLSG)

The ECLSG leaves full liberty to each member-State to decide in its constitution or law the number of administrative tiers, the distribution of territorial State services and self-government entities, their size, etc. Therefore it does not create obligations as to the number of territorial structures, their modifications and denomination.

The main provisions (and obligations) of the ECLSG relevant to this law can be found in its Articles 4 and 5.

Article 4 (paragraphe §3) on the Principle of subsidiarity reads: "*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*."

This article provides a guideline, which requires a methodical procedure taking into consideration the rationality of the triangle of coherence (see Appendix). It is important as it guarantees greater efficiency of local governments, of better service to population and of stronger democracy.

Article 5 on Protection of local authority boundaries reads *"Changes in local authority boundaries shall not be made without prior consultation of the local communities concerned, possibly by means of a referendum where this is permitted by statute."*

This article is precise and clearly compulsory. Consultation is essential as modification of boundaries changes the political community of citizens, which is the real holder of the right and power of self-government. Consultation is also a way to encourage democratic participation and make the procedure more transparent. It also facilitates awareness raising and understanding of the process and may lead to consensus. This obligation is taken into account by the law.

[1] By letter of Mr Vlasenko dated 16 March 2018 № 04-14/13-761

II. General observations

As described in the preface, this Law sets forth the principles of administrative territorial structure of Ukraine, the procedures for the establishment, liquidation, definition of and changes to the boundaries of administrative territorial units.

It is part of a wider and more ambitious programme for improving the territorial administration in order to make it more rational and efficient, and to comply better with the principles of the ECLSG, that has force upon ordinary laws.

The most important reform adopted in recent times is the reform consolidating the first level of territorial administration in Ukraine (amalgamation reform), creating larger local self-government entities more adapted to the economy and social realities of today.

In Ukraine State administrations and forms of local self-government coexist at the same level (rayon or Oblast). The only requirement of the ECLSG is that local self-government must comply fully with its provisions and must not have an executive who is directly under the authority of the central government. Such reform is however not possible without amending the Constitution. Therefore the territorial units that are under the jurisdiction of this law may be sometimes totally for local self-governments and sometimes for State authorities or for both[2]. For purely State districts the ECLSG does not apply.

This has direct consequences on the object of the law: in a given geographical territory there will be two different administrations. The size and other characters of the territory must be appropriate for both administrations; their functions and roles must be defined in order to be coherent with the size of the given district.

Former studies and experience in Ukraine have shown that the three main obstacles for developing powerful local self-governments were the size of the municipalities, poor competences and lack of resources. The question of capacity has also been often brought, but it is likely that, with the envisaged reform of the status of local government staff and the reform of the training system this issue can be solved if the others are. Therefore, territorial consolidation was an essential, preliminary step towards the reinforcement of local self-government in Ukraine.

Therefore, territorial consolidation was the absolute preliminary step to reinforcement of local self-government. The government and parliament, after hesitating between inter-municipal cooperation and amalgamation, decided that this latter was the best solution. This is now on a positive path. It had an immediate systemic impact on the existing territorial structure, especially on the rayons, which cannot contain a too small number of communities. This raises alternative questions: either to suppress rayons and give their competences to

[2] Article 5.1: "Administrative territorial unit (…) constitutes territorial basis for the organisation and operation of governmental authorities and/or local governments."

communities and, for some ones, to the Region (Oblast); or modify the limits of the rayons by merging them, which may become an issue in relation to the size of the Oblast.

This may become a "domino effect". Territorial limits must be considered not only in their geographic dimension but also in their political function which relies to the missions or competences of the territorial authorities. This is the signification of the principle of subsidiarity (ECLSG, Art. 4§ 3). The size and shape of a local entity should be consistent with the competences that will be implemented at that level.

Therefore it is suggested to add a sentence as follows:

"*The demographic size and the geographical limits of a territorial unit take into consideration the functions that the public authorities have to implement at that level, in line with the principle of subsidiarity."*

Territorial administration is a complex system. Its sustainability and efficiency depend essentially on the harmony of its components (see the chart *Triangle of coherence of local self-governments* in appendix). Each component is important, but a balanced combination of all is key. Building this progressively is the challenge of the Ukrainian territorial reform.

The law conserves the traditional categories of territorial units; some rationalisation could be useful

It would have been preferable to discuss this law after the revision of Constitutional provisions defining the territorial units. Ukraine has a complex list of concepts mainly based on geographical considerations and with unclear institutional and legal characters. This concerns in particular the first territorial level: populated locality, settlement, village, city, urban and rural community. Their rationalisation may modify the nature of territorial units (full local self-governments, State districts, both in parallel) and their missions or competences. However, as there seems to exist a relative consensus on this draft law it is recommended to go forward. Regarding its implementation, priority should be given to the territorial units that will be surely preserved in the future, i.e. cities, Oblasts... For rayons a draft law already exists.

It can be suggested for this law to bring about some simplification of the concepts of territorial organisation, by making a rational relation between the legal entities and their territorial basis and by abandoning concepts that are of little utility. The Constitutional implications of such simplification should however be examined.

The distinction of populated – non populated localities seems to be one of the concepts with little utility. Any *administrative* territorial unit should have a population; it is created for managing persons and not empty space; it needs people to become the responsible authorities. A territory that cannot be inhabited for security and sanitary reason can be attached to an

inhabited one or can exist as an exception, with a very special status ruled by specific laws[3]. But its existence should not complicate the basic principles and concepts and does not justify a general division between inhabited, non-inhabited localities.

A similar remark may be done for "temporary settlements". They are places with a momentary special regime, but they should not be considered as administrative structures belonging to the general territorial structure. The procedure for changing a temporary settlement into the category of village, which means transforming it into a permanent structure, is set out in article 19 of the draft law. It seems that a temporary settlement can be just a preliminary situation for a future new village. Such a settlement would probably be of rather small dimension; it is not clear if there is a real need to go through all these procedures to finally create a village that has not an appropriate size at a time when efforts are made for amalgamating existing municipalities.

Like in the majority of European countries, the first level of territorial administration should be considered as a united category of "community", with subcategories of urban (cities) and rural (villages) communities. The guidelines for deciding the division of the territory could then be expressed much easier. The legal concept of settlement brings additional complexity. Its geographical specificity is a mix of agricultural and industrial activities; but in reality can be rather similar to a big village or a small town. This kind of classification made some sense in the time of central planning but has no longer much utility. Anyhow the economic and demographic substance of Ukrainian territories suffered deep modifications in the last 20 years.

Considering their size, the "settlements" could be qualified as urban or rural communities. If, in particular for Constitutional reasons, it is not possible to abandon this category, the methodology to define the perimeters and boundaries should be similar to city or village in order to allow, in the future, re-qualification in one of these categories.

The role of the Parliament

The decision power given to the Parliament (*Verkhovna Rada*) on many issues regulated by the law is not common in comparative policies. These kinds of decisions are mainly a competence of executive and administrative authorities. They must combine two objectives: stability and flexibility. On one side, territorial structures are designed for the long time; they must remain stable and should not be subject of modifications for purely political or electoral reasons, which change frequently. On the other side, modifications of diverse importance may be necessary in the numerous administrative districts that exist in a large country like Ukraine. The procedures, though offering solid guarantees, should not be too complex and with long delays.

[3] As said in art. 11 § 3 of the draft law.

By choosing to give a decisive role to the Parliament, the authors of the draft law aim to create a guarantee of public debate, transparency and of political plurality. But one can discuss the pertinence of giving such responsibilities to the Parliament, which is not an institution exactly qualified for discussing such matters and whose agenda could be used for more important issues. One may question why is it necessary to have a resolution of the *Verkhovna Rada* on changing the city boundaries (Art. 18), on the classification of cities (Art. 21) or for naming a settlement (Art. 22 §7).

If the Parliament is considered having a decision role and if its members can amend, modify or reject the proposal under discussion, this may create national political battles on subjects that should not be matter of partisan politics at that level and for which a local or regional compromise has been found. If the Parliament is considered as a kind of "notary", giving authentic force to compromises that have been made by other authorities, this creates unnecessary delay and work.

In most countries such decision is taken by the executive authorities at national level (by decrees issued by the government) or at regional level (decree of governor, prefect or other State representative). The guarantees are then in the procedures of consultation with citizens or councils directly concerned and the obligation to make studies and produce substantial documentation in order to justify the final decision. An agreement on the new entities or boundaries will appear between the local and regional actors which could then be accepted by State authorities unless they have major objections. Consultation and studies are required by the draft law and the decision could be left to executive authority; this decision can be challenged in Court, which is probably not the case of Parliament's resolutions. What would be the reasons for the *Verkhovna Rada* to modify or reject a proposal that has a wide support of local leaders or/and of the population?

The criteria for defining the boundaries and perimeters of territorial units

The draft law goes into substantial details, which makes difficult its reading and understanding, and in particular for practitioners who will have to implement it and for the citizens who should monitor the process. It could express a clearer strategic vision of each structure that then explains the methodology of the procedure.

Many criteria for the definition of the size of a new territorial unit or for drawing new boundaries could hamper operational action. Their legal signification is often low, so they cannot become an argument for going to Court to challenge the decisions. Their practical signification is also sometimes disputable. What means "cultural and social infrastructures" that must exist in every entity? When there are none, the creation of a new or larger entity can be the condition to develop them.

The more criteria are listed in the law, the smaller is their effective signification. The law could fix some hierarchy between the criteria and decide, for a given territorial unit, which are the two or three major criteria which are directly linked to the political, economic or cultural role this territorial unit has to assume.

An example is Article 5. One may question the meaning of "administrative centre"; as well as what will be the requirement in rural regions with dispersed habitat. Paragraph §2.2 demands that there are means that create ability for local authorities "to exercise in full the powers established by the law"; how can one measure such means? So, there will be no administrative structure in poor territories? "Availability of social and cultural infrastructure" is also a problematic condition.

Article 14 on the establishment of communities could be shortened. Several provisions are general and difficult to appreciate and their utility is low. Paragraph §3 stating that when there are insufficient facilities and infrastructures, the State budget will create and pay them, is strange. Can an ordinary law make such promises? And does it mean that existing villages which do not have adequate infrastructures and means of communication can expect to get them in short term?

Administrative territories are conceived for allowing an efficient implementation of public tasks, production of collective services, creation and management of specific facilities and infrastructures. The missions of each administrative territory should be made more visible and copied from the law on local self-government. The articles dealing with each category (Art. 7 Community, Art. 8 Rayon, Art. 10 Oblast) have general definitions, which should receive legal wording. Each territorial level has an important role in the global public system; this should provide guidelines for conceiving its size and boundaries (perimeter). The list of major functions to be implemented should be used in order to define which constraints and requirements have to be considered in priority. Attention must also be given to historical, sociological, cultural or language data. They are listed and described in the law, but the functional side of territorial divisions is absolutely fundamental.

Structures and finances

The strengthening of local self-government requires additional financial and human resources. On average, small territorial units do not have sufficient fiscal capacity. National equalisation mechanisms cannot fill the gap and provide for effective financial autonomy. Fiscal resources and equalization procedures are easier to manage when the administrative territories are larger and when the number of local self-government units is reduced. The economical substance of the territory is an important factor and a guideline for defining new perimeters is to have territories with their own economic richness, which grant them a certain degree of autonomy.

Rather than deciding that territories currently without sufficient resources can become local self-government units, the law could stipulate, as a guideline, that preliminary studies must pay attention to the financial issues and that a territorial unit should have, as far as possible, a minimal tax asset in its perimeter and conditions allowing for calculating easily the State grants.

Structures and governance

Political authorities elected in local self-governments must have the support of the population, and an acceptation by the citizens, including by those who did not vote for them. This result is

easier to obtain when the people living on the territory feel to belong to the same "community" and have a common "identity". This must be taken into account when drawing the limits of a political and administrative district. The idea is referred to in the article 2 paragraph 3, but it could be formulated in a way that underlines the importance of this factor.

III. Observations on specific issues

Article 2 on Principles of Administrative Territorial Structure of Ukraine

The principle that the whole territory of the Republic of Ukraine is covered with the different categories of territorial units, expressed by the sentence "*ubiquitous jurisdiction of executive authorities and local governments, except cases forth by this law*", is a very important and positive evolution. The fact that no territory is left outside an oblast, rayon or gromada, with the exception of what is decided in special laws, is very useful for local government.

The principle of harmony – the concept "*harmony"* can be replaced by "*solidarity"* that unites territories or populations of various levels of development and wealth.

The provision of **Article 13 paragraph § 6** seem to be redundant, repeating those in former articles. Several conditions or criteria mentioned are of weak legal signification and disputable, e.g. the ability to exercise full powers (paragraph 1) or "a complex of objects" (paragraph 4).

One may question how it will be possible to measure the impact of an administrative change on intergovernmental transfers from the State budget? If the territorial modification has sufficient objective justifications this result should not be a reason for rejecting the proposal; is this to avoid frauds where the complicated procedure to change an administrative structure is done only to get more grants? Justified modifications (amalgamation, changing from village to city, etc.) can have a financial impact which may be seen as an incentive to make the reform. Therefore the law should not create a veto; it could state that the impact of a reform on local budgets and on intergovernmental transfers from the State budget must be evaluated and one of the elements to be taken into consideration for the final decision.

In **Article 15 paragraph § 7** the distinction between procedures initiated by the government and initiated by local self-governments does not seem justified nor respectful of the equality between local self-governments. In the first case the costs are paid by the State budget; in the second case they are covered by the local self-government's budget. This may create political manipulation, whereas the government may decide to take the initiative (and pay) for some but not the others.

It is suggested to consider including the following provision:

"*when it is initiated by the local self-government body an agreement is signed with the government that decides how the cost will be shared between State and local budgets; the share of the State cannot be less than X% of the total cost".*

In **Article 18 paragraph §2** the proposal to modify the limits of a city must be based on the urban planning documents. But a city cannot adopt such documents that apply on territories which are located outside of its boundaries. Shouldn't the law stipulate "**prospective** urban planning documents" instead?

Article 18 paragraph §5 states that Cabinet of Ministers can accept or reject the proposal of the city. Does this mean that it can only say yes or no and cannot, though accepting the principle of a modification, discuss precisely the proposal? The Government may have its own reasons or priorities: security, defence, national transportation facilities, environment protection, etc. A negotiation with city representatives could find a compromise which will become the new proposal that goes to Parliament; or there can be two proposals, one from the Cabinet and one from the city.

A time limit of 6 months is given by the law for the Cabinet, the Parliament or the Oblast council to answer to demands for modifications. Provided that these authorities have to express a general opinion, acceptation or rejection, this time limit could be shortened. The procedures should not be too long. 3 months would be a more reasonable a time limit. The draft law can also say that when the concerned authority asks additional information, the time limit is postponed with 3 months after receiving the answer.

The tasks described in the law need thorough studies in order to define the **"territorial optimum".** One may question who will be in charge and cover the costs? The draft has punctual provisions on who pays. There is a need of professional experts in different social sciences (geography, regional economy, sociology, demography, statistics, law, etc.). This can be done case by case by recruiting the experts or a consulting society by contract. Costs may be important. A possible solution to accelerate the procedures might be the creation of a national funding for these tasks and/or a national service, with a ministry or as an independent institute, with devoted experts.

Territorial modifications have **legal consequences** on the properties of the territorial units, their budget and taxes, the existing services, etc. Section IV *Final and transitional provisions* of this draft law deals with this subject. The CoE does not envisage conducting an in-depth study of all legislation in order to ensure legislative coherence and has confidence that the national experts have paid attention to that. This will allow quick implementation of the new structures without waiting for additional laws with provisions on these questions.

IV. Conclusions:

Overall, the Council of Europe is in favour of this draft law. It appreciates the fact that it sets out the principles of territorial organisation of Ukraine (including the very important principle of ubiquity, which should be the norm and can only be derogated from by specific and justified legislation) and the basic mechanisms to change it.

It would have been ideal to pass this law after the final adoption of the Constitutional amendments on decentralisation; however, as no time horizon for their adoption currently

exists, it is to be hoped that this law can still be adopted and become operational under the current Constitution.

The law does not present specific challenges as to the European standards and international obligations for Ukraine, in particular under the European Charter on Local Self-Government.

Some parts of the law seem however too general and declarative and with very limited legal implications, which would make for a difficult reading and understanding by those who are supposed to implement it. Further efforts of simplification and shortening are highly recommended.

In comparison to the situation of other countries, the current draft gives a very important and extensive role to the Parliament in most decisions concerning the reforms (even relatively minor ones) of the administrative territorial structure of Ukraine. While this solution has the advantage of creating open, transparent and inclusive decision-making processes, whereas most legitimate interests are heard, it also has two possible risks: on the one hand, this may burden excessively the Parliament; on the other, it can become a process which is too political. It is therefore recommended to slightly diminish the role of the Verkhovna Rada in minor reforms of the territorial administrative structure.

The current opinion also makes some suggestions aimed at improving the effectiveness and efficiency of decision making processes.

Appendix

TRIANGLE OF COHERENCE OF LSG STRUCTURES