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APPRAISAL

OF THE DRAFT LAW OF UKRAINE

ON CO-OPERATION OF TERRITORIAL COMMUNITIES

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Introduction

This Council of Europe (CoE) legal appraisal of the draft law of Ukraine "On co-operation of territorial communities" (registration No. 3617 dd.13 November 2013) was requested by the Parliamentary Committee on State Building and Local Self-Government within the framework of the Council of Europe Programme "Strengthening the capacity of local authorities in Ukraine" (2011-2015, funded by the Governments of the Swiss Confederation and the Kingdom of Denmark).

In November 2013 the government of Ukraine submitted to the *Verkhovna Rada* a new draft law on the development of inter-municipal co-operation (IMC) that follows from the Concept of local government reform (recently approved). Two appraisals of the previous drafts on this issue were prepared by CoE in 2011 – 2012.[1] The CoE also appraised several versions of the Concept of the local self-government reform (the latest one is CELGR/LEX 5/2013 dd. 1/10/2013).[2] In the Concept, the territorial reform was left basically to the development of IMC. An attempt to put this strategy in place is seen in the present draft law.

The present draft is limited in ambition, suffers a number of shortcomings, and has to be improved. The CoE remarks are aimed at improving the draft law with regard to its purpose, considering that small steps are better than nothing.

The draft law may generally be seen as kind of a step towards the beginning of regular co-operation between territorial communities still insufficient however to solve the problem of the fragmentary administrative-territorial system and the reinforcement of the capacity of all territorial communities through the mechanism of such co-operation. The structure and philosophy of the draft law generally meet the European practice but in fact deal only with those forms of co-operation that envisage minimal integration among territorial communities.

The diagnosis of the municipal pattern of Ukraine is well known: too many small communities in rural areas, inadequately endowed with financial and human capacities; too much concentration of the jurisdiction of local authorities on settlements, and hence no planning power and no tax powers on surrounding areas. The present draft law is not aimed at

[1] Appraisal of the draft Law of Ukraine on Stimulation and State Support of Unification of Rural Territorial Communities (DPA/LEX 2/2011 dd. 22 February 2011) and Appraisal of the draft Law of Ukraine "On Amalgamation of Territorial Communities" (CELGR/ LEX 1/2012, 13 March 2012).

[2] This and all other Council of Europe appraisals and policy advice documents are available at http://www.slg-coe.org.ua/category/documents/appraisals/

achieving a territorial reform at the municipal level in Ukraine, be it in general or in rural areas only. The purpose of the draft law is rather to create an instrument for local communities (*hromada*) to develop co-operation on a voluntary basis for their common interest (art.2). This is a much more limited purpose; it can be quite useful and help creating conditions for further and enlarged co-operation, but co-operation has to be based on permanent institutions, not only on agreements, if it is supposed to last, and the project is very shy in this regard.

What follows is first a comment on the general concept of this draft law and then a series of detailed comments or suggestions for amendments on several articles.

General assessment of the draft law

The previous draft laws, mentioned above, were aimed at a general territorial reform which, in the most ambitious concept, took the form of amalgamation areas designed by the state administration, or at least according to criteria of size and distance. The purpose was to rationalise the municipal pattern.

The new draft law is based on the free will of local communities to cooperate (art. 2, p. 2) and relies on local initiatives to launch the process of establishing co-operation agreements between neighbour municipalities. The initiative can be taken by mayors, councillors, or citizens belonging to the local community (art. 5). Then, if approved by the council, discussions have to take place to work out the terms of the agreement. But the state administration has no say, according to the draft law, as regards the initiative of establishing such co-operation. According to the draft law, the role of the state administration is only to provide support, to monitor co-operation processes and to manage a registry of inter-municipal co-operation agreements (art.13, par.4).

The co-operation between local authorities in all regions of Ukraine is a plain necessity therefore the state administration at the *oblast* level should have the opportunity, acting on proposal of the *rayon* state administration, to take the initiative of establishing a co-operation agreement of municipalities in a given area. This would not deprive local councils of their right to take autonomously their decision, but this would give an opportunity to the local state administration to submit arguments in favour of co-operation and to overcome the reluctance of local councils that may object to being absorbed by larger communities.

Furthermore, the proposed co-operation scheme differs from previous solutions in that it is very weak on the institutional side. Four forms of co-operation are distinguished: 1) the co-operation for the common exercise of responsibilities determined by the agreement; 2) the co-operation aimed at the realisation of a joint project; 3) joint financing of municipal enterprises, institutions or organisations, or infrastructure, and of municipal property; 4) joint enterprises, institutions or organisations.

The draft does not foresee co-operation based on joint administrative bodies for the municipalities involved in the co-operation. Noteworthy, the draft law that was prepared as far back as 2012 envisaged such a form. The pooling of resources and creation of joint administrative bodies can facilitate gradual formation of enlarged municipalities.

For either form of co-operation, the draft law provides for no detailed decision-making procedure and institution for co-operation. This is a big weakness. Even if reporting is performed, there will be no common body to discuss the reports, each municipality involved will take position only on the basis of its own particular interest; there is no incentive to bring municipalities together in order to consider their common interest and future. Only in the case of a project-based co-operation, e.g. an agreement on the implementation of a joint project, the draft law provides for a "co-ordination mechanism", the organisation of which is left to the agreement between municipalities (art.11, par.1, 6), and this is not a decision-making body, not even a monitoring body.

Municipalities may reallocate their respective functions between themselves through their agreement (art.10); this means that one or several municipalities will perform a given function for the sake of all municipalities, e.g. within the boundaries of the co-operation area. But there is no body representing other municipalities as regards the performance of the said function. In case of a project-based co-operation, the agreement shall settle the sharing of the costs and the tasks (art. 11). The agreement may also provide for joint financing of enterprises and institutions: in that case, the agreement has to settle the rules for sharing benefits and risks (art. 12, par. 2, 4). Lastly, municipalities may establish joint enterprises, institutions and organisations; the agreement has to settle questions on the legal status and the management body, but there is no joint supervisory body of the municipalities involved (art. 13, par. 2, in particular 4).

It is true, that the content of the agreements is not strictly determined by the draft law; the articles only list the issues that, in particular, have to be regulated by the agreement. To that extent, it is up to municipalities to agree on more integrated governance, with a board representing all municipalities, for instance. But, without a clear provision to this effect included in the law the agreement could certainly not provide for the delegation of public power to such a body.

Lastly, in article 10 to 13, co-operation is funded only by member municipalities from own resources. Provisions on resources of IMC subjects are to be found only in article 10 (par. 3) on redistributing functions between municipalities; they only refer to the Budget Code of Ukraine. But compliance with Budget Code provisions is not enough. The law should be more specific on this important issue and detail the kind of resources IMC subjects are entitled to. Additionally, the state will provide financial support to co-operation through budgetary resources. But, the draft law does not indicate to whom this financial support will be allocated: if there is no entity representing the IMC in which municipalities are involved, this funding can only be allocated to the municipalities, to whom particular functions or tasks were delegated by others, or to particular enterprises, institutions or organisations, and this can only make other municipalities suspicious. Also for the management of the resources involved in the co-operation, it is necessary to have a body representing all participating municipalities.

To sum up, the main shortcoming of the draft law is the lack of provisions on the governance of inter-municipal co-operation.

Further remarks and proposals are detailed below.

Article 5:

There is no reason to rule out the local state administration from any initiative regarding the development of inter-municipal co-operation. If the government is willing to pay respect to self-government rights, this will be satisfied by the fact that the state administration would have no final decision on co-operation schemes.

Therefore, the recommendation is to add a second sentence to paragraph 1 of article 5: ***"Additionally, the head of the regional state administration, after consultation with the district state administration, may take the initiative to propose to local self-government bodies of several territorial communities to conclude an inter-municipal co-operation agreement".***

The decision on engaging in the process of an agreement, according to paragraph 3, belongs to municipal councils. The draft law does not determine the majority that is required in order to open the negotiation stage. It follows that the support of each municipal council is required, and that it would be impossible to involve a municipality in the process if the council has voted against.

This option has been the traditional option for IMC in European countries. But it might be a serious obstacle to many IMC agreements. Therefore, requirement of a reinforced majority would be a better option.[3] A compromise should be found between local self-government rights and the abuse of (a kind of) veto right.

Articles 6 to 8:

These articles are about the negotiation process aimed at the agreement project. By contrast with previous draft laws where councillors and mayors had little decision-making power, the new proposed provisions give them the power to determine the framework as well as the purpose of their co-operation. According to these articles, the head of the municipality taking the initiative has to get the approval of the council on the proposal of a co-operation agreement, and then the subject will be further elaborated by the executive bodies of the municipality, and finally submitted to the council's decision. Then, a co-operation commission is formed with delegates of each municipality, on equal footing; this commission has to work out the co-operation agreement within 60 days. The commission terminates its existence with the approval of the agreement by the respective councils. Then, the head of each council involved in the process has to make public for discussion the agreement project during 15 days. Lastly, it is submitted for approval to the municipal council 30 days after the beginning of the public discussion stage (art. 8). Such provisions are in accordance with article 5 of the European Charter of Local Self-Government on the protection of local government boundaries, which requires the consultation of the local communities concerned.

However, it is not convincing that the municipality having taken the initiative should work alone during 90 days to elaborate the proposal, since there should be an agreement of all municipalities in the co-operation commission. As a matter of fact, the agreement proposal will be the outcome of the co-operation commission.

[3] In France, this is a majority of two-thirds of municipal councils representing half of the population or half of municipal councils representing two-thirds of the population, including the city or town with one quarter of the population of the area.

The publicity given to the agreement project has to be approved. However, ***the draft law should be more specific on this discussion stage: how to collect comments or objections of citizens? How shall these comments be compiled and analysed? Shouldn't the head of the municipality present an assessment report on these opinions? The draft law should be completed with such provisions.***

Articles 10 to 13:

Article 10 should gather paragraphs 1 of articles 10, 12 and 13 on the purpose of the IMC agreement (as paragraphs 1, 2 and 3). Then there should be a paragraph 4 on project-based IMC. Unlike in the previous cases, project-based IMC will be terminated when the project is completed. A paragraph 5 should lay down the following principle: ***once the co-operation agreement is entered into force, member municipalities can no longer perform the tasks delegated to the inter-municipal co-operation body*** (see below). A paragraph 6 should also solve the problem of the personnel. The transfer of a task to an IMC body has to be accompanied by the **transfer of the personnel in charge of the said task**. Otherwise the transferred task cannot be performed, or will be performed by additional personnel hired for this purpose, and IMC will increase costs instead of reducing them. Even if the provisions of the draft law are voted without any amendment, the transfer of a task from various municipalities to one of them requires compensation from them. Otherwise, and since the co-operation is based on the free will of municipalities, it cannot be expected that bigger or wealthier municipalities will take over additional responsibilities using their own resources. Referring to the provisions of the Budget Code (art.10, par.3) without further details is not enough.

Article 11 should be on the content of the co-operation agreement. ***The new article 11 can merge provisions of paragraphs 2 of present articles 10, 12 and 13. Some provisions need to be rewritten and merged when they have a similar object***. Furthermore, there should be a paragraph on the content of the co-operation agreement for project-based IMC.

Article 12 should be on the ***governance of IMC***. Whereas the law may leave a rather wide discretion to the parties, it has to determine basic rules and institutions. The principle should be that every IMC agreement shall be executed by an IMC body, as provided by the law. This body shall be a ***public law corporation, vested by the law with public powers similar to those of municipalities, within the limits of the***

competence assigned to it by member municipalities. Exceptions are possible for a project-based co-operation agreement between a limited number of municipalities (to be determined by the law) and for a co-operation agreement deemed to financing jointly on a regular basis an enterprise, an institution or an organisation in municipal ownership, if there is only a limited number of municipalities involved. The draft law has to regulate such exceptions.

In some cases, for the development of IMC in a broad sense or whether a co-operative body to be able to discharge powers vested in municipalities, it should be provided that such public law corporation shall be established by an administrative act issued by the head of the regional state administration, and vested with the powers provided by the law. These powers shall be exercised by a board and a chairman, with his deputies or an executive committee. In principle, such powers should be similar to those of a municipal council and its mayor, but within the limits of the functions of the IMC body delegated by municipalities.

A major problem is the composition of the ***board***, which is the decision-making authority. Following the logic of the present draft law, an equal representation of all member municipalities in the board would be preferred, and members of the board should be the mayors or delegates elected by their council. But such a solution will prevent any agreement between very different municipalities (for example a city and surrounding villages). Therefore more sophisticated representation techniques should be used. For example, the number of inhabitants should be taken in account to share the seats in the board, but the representation of municipalities should make sure that no municipality be able to have the majority of the seats, or combine a minimum equal representation for each municipality and a proportional representation for other seats.

Lastly, there is to decide whether ***members*** of the board are delegates of the municipal councils or are directly elected by citizens. The second solution is much more preferable in order to introduce political debate at the scale of the co-operation area during electoral campaigns.

The IMC governance is a crucial issue for the success of the reform, and the law has to provide robust solutions as a minimum, and leave discretion to the parties to work out political compromises.

In case of enterprises, institutions and organisations in joint municipal ownership, the IMC board will be the political authority representing all member municipalities upon their management.

Lastly, article 13 should be devoted to ***financial aspects of IMC***. According to the underlying spirit of the draft law, the IMC bodies cannot have own resources. This means that the activities of such bodies, as well as joint meetings in cases where such a body was not established, are funded by contributions of member municipalities (see: art. 15, par. 1, 1). The main issue is then ***to determine the basis of the various contributions***. ***The present draft law gives no indication on this important issue.*** The key for the calculation of municipal contributions can be based on many criteria and combinations of criteria. In particular, the key could be based on the number of inhabitants or on an indicator representing the revenue level of each municipality; considering the system established by the Budget Code of Ukraine, the contribution could be based on the following principle: a) a percentage of the revenues assigned to expenditures subject to equalisation, including the equalisation grant, on the basis of an amount per inhabitant; b) a percentage of revenues assigned to expenditures not included in the equalisation formula. Thus, the first part will reflect the equalisation and the second part will reflect the difference of wealth.

Other resources mentioned by article 15 are additional and incentive resources; they will obviously not cover the major part of expenditures resulting from transferred tasks. Member municipalities have to transfer resources corresponding to the tasks they will no longer perform.

Articles 14 to 16:

These articles are about the role of the state administration. They provide for the state support to IMC, for the categories of resources allocated to IMC, and for the monitoring. The Ministry of Regional Development is responsible for the state support and for the monitoring.

Then, another function should be added: the supervision of the activities of IMC bodies. In fact, such provisions are not needed in the logic of the present draft law, since no additional body has to be established. Since the draft law does not provide for any IMC governance, the supervision of municipalities is enough. But, if the governance of co-operation is organised, as recommended by the CoE, it will be necessary to add provisions on supervision. It would be enough to ***add a third paragraph to article 16, for example: "The provisions of the law on local self-government regarding state supervision upon local self-government bodies of territorial communities are applicable to inter-municipal co-operation bodies".***

Articles 17 to 19:

These articles are about the termination of IMC.

In particular, article 17 concerns the legal grounds for termination. Point 6 of paragraph 1 raises a question: an IMC may be terminated by a decision of justice, whereas other points list all grounds that can justify the termination. But the decision of a court is not a ground for termination; it is rather the form or the procedure for termination. Therefore, this paragraph should be rewritten in order to clarify in which cases the termination of an IMC requires the decision of a court of justice.

Paragraph 3 of article 17 is not adequate. It states that the termination of an IMC shall not damage the quality or the level of service offered to the population. This is rather a political commitment than a legal norm. Who will assess whether the termination of an IMC has such a consequence? It is difficult for a judge to base a sentence on such an assessment. Then, does it mean that a judge or the local state administration, at the regional or district level, could oppose, on this ground, the termination of an IMC, although the conditions for it are fulfilled? Therefore, ***the recommendation is to delete paragraph 3 of article 17.***

Finally, the termination of an IMC cannot be left only to a discretionary agreement between member municipalities. In a number of grounds for termination listed in paragraph 1, some require more radical steps, involving a court decision or a decision of the head of the regional state administration. For example, the bankruptcy of an IMC might be declared by the court, and the court might pronounce the termination of the co-operation agreement. But, in case one or several municipalities want to leave the IMC agreement, the law should give the power to assess the consequences of such step to the state administration, and if necessary to oppose this exit if it is likely to damage other municipalities, unless it could be demonstrated that the participation in such an IMC has been harmful to the claimant municipality. On the other hand, ***the termination of the IMC has to remain in the hands of the state administration for such causes as the breach of the law or a conflict between municipalities that cannot be solved. The draft law should be amended accordingly.***

Other provisions do not call for further comments.