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OVERVIEW OF EUROPEAN EXPERIENCE ON ELECTED AND PROFESSIONAL OFFICIAL IN LOCAL SELF-GOVERNMENT

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Introduction

The present Report was requested by the Parliamentary Committee on State Building, Regional Policy and Local Self-Government (dd. 10 February 2016) within the framework of the Council of Europe Programme “Decentralisation and territorial consolidation in Ukraine”.

The government of Ukraine initiated amendments to the existing legislation on local government service in Ukraine (draft law “On Service in the Local Self-Government Bodies”, registration No. 2489) which was supported by the Parliament of Ukraine in the first reading on 23 April 2015. The Task force under the Parliamentary Committee on State Building, Regional Policy and Local Self-Government is further improving the draft law for the second reading expected in 2016. The Report provides outline of European practice and legal framework on professional and elected officials in local self-government to be considered by the above-mentioned Task force.

According to the European Charter of Local Self-Government (Art. 3), there is a local self-government where the local communities regulate and manage a “substantial share of public affairs" under their responsibility. The local authorities exercise this right directly through citizens’ participation or through elected councils or assemblies. This principle is also enshrined in the Constitution of Ukraine (Art.140).

In order for the local authorities to perform their tasks, the Charter states that the local authorities shall have at their disposal appropriate administrative structures and resources, and shall offer good conditions of service and office to their staff. In this regard, the Charter makes the distinction between professional and elected officials.

According to Article 6, paragraph 2:

> *"The conditions of service of **local government employees** shall be such as to permit the recruitment of high quality staff on the basis of merit and competence; to this end adequate training opportunities, remuneration and career prospects shall be provided"*.

Article 7 states on the main guarantees to be offered to elected local representatives:

*"1 The conditions of office of **local elected representatives** shall provide for free exercise of their functions.*

"2 They shall allow for appropriate financial compensation for expenses incurred in the exercise of the office in question as well as, where appropriate, compensation for loss of earnings or remuneration for work done and corresponding social welfare protection.

"3 Any functions and activities which are deemed incompatible with the holding of local elective office shall be determined by statute or fundamental legal principles".

The formulation “local elected representatives” remains unclear on whether it does include elected representatives with executive functions and especially full-time ones. However the explanatory notes under Article 7 resolve this ambiguity by affirming that “*The material considerations include*

appropriate financial compensation … particularly in the case of councillors elected to full-time executive responsibilities…".

It can therefore be concluded that the Charter considers the holders of executive functions - mayors in the first place - as local elected representatives and not as employees although their financial compensation is paid by the budget of the local authority.

Most European countries consider that the *elected* officials should be subject to special regulations, and not to public service regulations, which are applicable to *professional* officials. Several countries still follow the opposite conception.

There is also no confirmed position on whether special regulations or common rules applicable to the State's administration personnel should apply to local government officials, and to which extent, for example for the whole staff or for only a part of that personnel, and also on whether it should be employed under a career (statutory) or under a contract system.

Most European countries apply a career system to part of the local government personnel, but the scope of application of that kind of regulations varies very much from one country to another (most frequently this is the case for the highest level personnel or for a minority of the personnel).

The present Report will address first, the issue of the applicable regulations for elected and professional officials, and second, the issue on how to determine the legal framework for the employment of local government officials.

I. Elected and professional local government officials

In this part are presented examples of countries applying distinct regulations for elected, on one hand, and professional officials, on the other, as well as of countries treating the elected officials as public servants. The examples will allow to see that there are strong arguments in favour of the application of distinct rules.

A) Distinct rules for elected and professional officials

In all countries, the rise of local government functions has resulted into a professionalisation of executive mandates in local authorities, especially in cities and meso-level authorities (authorities that are established between the State and the local levels). As consequence, there has been a differentiation between councillors - or elected representatives in general - and holders of full-time executive functions such as mayors or presidents of local authorities, with the possible exception of small-size local communities.

However, the need to secure the economic situation of the elected officials holding full-time executive functions has not led to an "assimilation" with civil servants, but rather to the adoption of specific rules protecting them through for instance decent treatment, compensation of the expenses related to their duties and adequate social protection including own pension scheme. This is the case also in countries where the mandate is in theory exercised on a voluntary basis (France, Denmark, for example). Allowances or compensations have generally been provided for councillors in relation with the discharge of their functions, but this report will not deal with this issue. It will focus on the cases of England and France and provide with short information on some other countries.

1) <u>England</u>

The report leaves aside the peculiarities applicable to Scotland, Wales and Northern Ireland.

The basic rules on allowances and remuneration of employees and councillors are to be found in the *Local Government Act 1972*, as modified subsequently. In this respect, a wide discretion is left to the local authorities, within the framework determined by the law.

According to section 112, the employees/officers are appointed by the local authority to discharge their functions, under « *such reasonable terms and conditions* », including remuneration, that the local authority considers appropriate. However the « reasonableness » is subject to supervision by the district auditor as regards special positions. For the whole staff, the general employment and pay conditions are regulated by collective agreements negotiated between the Local Government Association and the trade unions representing the employees in the National Joint Council for local government service. The National Agreement on Pay and Conditions of Service is since 1997 the single status agreement for about 1.4 million local government employees of all categories and levels for England, Wales and Northern Ireland.

According to section 116, a member of a local authority (i.e. an elected representative) may not be appointed in a paid office of that authority as long as he/she is a member and during 12 months after he/she ceased to be a member of the authority, except if he/she is elected as chairman, vice-chairman, executive leader or member of the executive, depending on the operating executive arrangements adopted for that authority.

By contrast, the councillors may be elected to hold an office of the local authority but they are subject, as all councillors, to specific rules. The conditions to hold the office are regulated by sections 79 to 106 of the *Local Government Act 1972,* whereas the economic status is determined by the *Local Government and Housing Act 1989*, section 18. This law provides for the power of the Secretary of State (the minister in charge of local government matters) to authorise the local authorities to adopt allowance schemes for the councillors. Such an allowance scheme has to provide for : i) a basic allowance scheme for each councillor; ii) an attendance allowance in relation with the carrying out by a councillor of duties specified by regulations; iii) a special responsibility allowance for those vested with a special responsibility. The special responsibility allowance is devised for the remuneration of those « *who have significant additional responsibilities over and above the generally accepted duties of a councillor* » (see the presentation of the Members Allowances Scheme of the Birmingham City Council): leader and deputy leader of the council, cabinet member with portfolio, executive member for local services, chairman of an overview and scrutiny committee, chairman of the planning committee, chairman of the licensing and public protection committee, chairman of the audit committee, chairman of the trust and charities committee, leader and deputy leader of the largest opposition groups, lead opposition spokesperson, leader and deputy leader of other qualified opposition groups, political group secretaries. Allowances are scaled according to the level of responsibility and workload: for example in Birmingham, the leader of the council is entitled to 50,000 £ per annum; the leader of the largest opposition group to 12,000 £, political group secretaries to 2,500 £ (see: Scheme of 19 May 2015).

To sum up, professional officials and elected officials holding offices in the local authority are not placed on the same scale, and they are not compensated according to the same rules for the discharge of their duties.

2) <u>France</u>

In France, there is a clear distinction between the local government service (*fonction publique territoriale:* see laws of 13 July 1983 on rights and obligations of the civil service, and of 26 January 1984 on the territorial civil service, i.e. local government civil servants) and the local elected councillors and executives (subject to different legislation "*statut de l'élu local"* comprised in the general code of local government "*Code général des collectivités territoriales"*).

The local government staff are employed under a civil service status under the public law: almost 80% are appointed and subject to the status, the other 20% are employed on a contractual basis, but under the public law and not the labour law. Pay conditions are based on a uniform scale for

State and local government civil service; bonuses may be awarded by local authorities under conditions provided for by the law. A member of the staff cannot be elected as a councillor of the same local authority.

The councillors (*élus locaux*) are subject to specific rules. First, they are entitled to leaves from their work place in order to attend meetings and to discharge their duties. If they are elected to a full-time executive functions, they are entitled to be reintegrated in their former work place after two mandates (at most), provided that their employer still exists. If they are employed in the civil service, they are entitled to be seconded in order to discharge their mandate and must be reintegrated in their administration at the end of the mandate. They are also entitled to professional training after the end of the mandate in order to update their skills.

The financial compensation related to the discharge of the councillors' functions is regulated by the law: councillors are entitled to a compensation which is calculates as a percentage of the top rate of the civil service treatment, according to a numeral scale (there is also a letter scale, from A to G, for higher positions) and to the population of the local authority. For example, in municipalities, the compensation for the mayor of a municipality under 500 inhabitants will be 17% of the reference treatment, for the mayor of a municipality between 10,000 and 19,999 inhabitants it will be 65% for the reference treatment, and for the mayor of a city in excess of 100,000 inhabitants the compensation will be 145% of the reference treatment (art. L.2123-23 CGCT). The compensation scale for deputy mayors is half of the scale for the mayors. An additional compensation is possible in circumstances determined by the law. As a consequence, local councils have very little discretion as regards the amount of compensations paid from the local budgets. The rules are basically the same for members of departmental and regional councils.

Thus, the French law makes a clear distinction between the local government staff, subject to the national civil service rules and a career system, and elected councillors holding a public office, such as the mayor or the president of a local authority.

<u>Other cases</u>

In the Netherlands, the mayor is appointed by a Crown decision, e.g. by the Government, after a complex consultation procedure between the Government and the municipal council. According to the *Municipal Law of 1992* in its current formulation (§66), the mayor is paid by the municipality, but he/she is not an employee of the municipality. Its remuneration is regulated nationally by a government decree subject to consultation of the Council of State. Expenditures for the discharge of his/her duties are compensated by the municipality and he/she is not allowed to receive any bonus or award or to perform any additional professional activity. The decree of 22 December 2009 regulates allowances for mayors, members of the executive college (*wethouders*) and members of the municipal council, and specifically heads of political groups in the council, according to 9 demographic classes of municipalities (*Besluit houdende wijziking van enkele rechtspositiebesluiten politieke ambtdragers in versamenvoeging van inwonersklassen en enkele technische aanpassingen*, 22 December 2009, *Staatsblad* 2009/561). On the other hand, the staff of the municipality is

employed on a contractual basis; only the « Secretary » and the « Greffier » are appointed by the executive body of the municipality. They are employees of the municipality, subordinated to political bodies.

In Spain, until the law of 27 December 2013, the local councils had full discretion as regards the amount of the allowances granted to mayors and councillors. This discretion was removed by the new law, which has imposed ceilings in accordance with demographic criteria. The law 7/1985 of 2 April 1985, as modified, contains however a gap because it does not include the elected representatives, and in particular the mayors and their deputies, in the definition of the personnel serving the local authorities. According to Article 89, the personnel of local authorities includes the civil servants, employees on the basis of the labour law and the temporary personnel.

Italian legislation makes a similar distinction. According to the Code of local authorities (*Testo unico enti locali*, D. Lgs n.267/2000, art.88), the personnel of the local authorities includes the *dirigenti* (e.g. managers) and the provincial and municipal secretaries employed on the basis of the legislative decree of 3 February 1993 (n. 29) on employment conditions in public administrations. But, chapter IV Part I of the Code is devoted to the status of the councillors (*amministratori locali*), among which are listed the mayors, members of the executive body (*giunta*), heads of inter-municipal bodies (art. 78). The law describes the duties related to the mandate resulting from elections, the right to leave to discharge the functions and attends meetings, and to be compensated for the loss of earnings. It also states the principle of an « allowance » for the duty (*indennità di funzione* – equivalent to a salary) discharged by mayors, presidents of provinces, and a smaller one for councillors (art.82). The amount of this allowance is regulated at national level according to demographic classes of local authorities (decree of 4 April 2000, n.119, as modified).

B) Elected officials as public servants

Several countries consider to a large extent the mayor and other holders of executive local government mandates as officials submitted to the general civil service legislation. This was the case in the former Soviet Union and remains still valid in Germany and Poland where the mayors are considered as civil servants. However, none of these two countries has included elected and professional officials in the same career.

1) Germany

In Germany, regulations pertaining to municipalities fall under the competence of regional (Land) legislator. The federal legislation is exclusively for the federal civil service (Bund) and only provides for the basic principles as regards the civil servants of regional (Land) and local administrations. The common tradition is to consider that the mayor is an officer, in a civil service relationship, as soon as elected or, more precisely, after being introduced in his office by the president of the council at the first session, and for the duration of his/her mandate. Rules applicable to mayors and other mandate-holders are to be found in the municipal law and in the civil service law of each *Land*.

Taking the example of North-Rhine-Westphalia (NRW – the most populous Land of Germany, with 17 million inhabitants), the municipal law (*Gemeindeordnung* : §65) provides for the direct election of mayors. Therefore the mayors are subject to civil service provisions as regards their service relationships with the local authority (« *für die dienstrechtliche Stellung gelten die beamtenrechtlichen Vorschriften* »).

The law of North-Rhine-Westphalia on the civil service includes provisions on mayors, heads of districts (*Landräte*) (§119) and other elected civil servants (mainly their deputies) (§120). They are qualified by the law as « elected civil servants, in a time-limited civil service relationship » (in particular : « *Bürgermeister sind Wahlbeamte in einem Beamtenverhältnis auf Zeit* » (§119.2). Civil service rules are applicable to them as far as nothing else is provided by the law. However, age limit for civil service does not apply to mayors and heads of district.

The remuneration of mayors and of other elected civil servants is based on salary groups for civil servants, combined with demographic classes of municipalities (Decree of the regional government of 9 February 1979 on salary groups of elected officials - *Eingruppierungsverordnung*). Mayors of municipalities in excess of 500,000 inhabitants have access to the highest grade (B11), and the mayors of municipalities under 10,000 have access to B2. Other elected civil servants begin at A13 (municipalities under 10,000) and the first deputy of a city in excess of 500,000 has access to B9.

Remarkably, the scale for elected civil servants is the same as for professional civil servants; however, elected civil servants are not paid on a salary scale above the professional civil servants in local government.

2) Poland

Poland has followed, in broad terms, the German model. The law of 21 November 2008 on « local government workers » (« *o pracownikach samorządowych* ») distinguishes three types of employment basis (art. 4): the election, the appointment and the contract.

According to this provision, the *elected* local government "workers" are: at the regional level (*województwo*) - the marshal (chair) of the regional assembly, his deputy and members of the regional executive board; at the district level (*powiat*) - the district head, his deputy and members of the district executive board; at the municipal level - mayors, heads and executive members of joint authorities and in Warsaw city – the district mayors and their deputies and executive members. Deputies of mayors and treasurers of local authorities are *appointed* workers. Other local government workers are employed on the basis of a *labour contract*, and among them the ancillary or support workers.

However, by contrast with Germany, the salary scale of "local government workers" of the three categories is different: for example, the highest grade for local government workers (XXII) was 3000 Zł, compared to a city mayor of a city over 300,000 inhabitants, whose earning is between 4,800 and 6,200 Zł, up to 6,500 Zł for the marshal of the regional assembly of a region in excess of 2 million inhabitants, without significant bonuses provided by regulations (see: decree of the Council of Ministers of 18 March 2009 "on remunerations of local government workers" - "*w sprawie wynagradzania pracowników samorządowych*" - Dz.U.2014.1786).

This imbalance is not likely to increase public support to and interest in working for the local government. A recent expert report reveals a low level of job satisfaction, of satisfaction with regard to recruitment and promotion conditions, a low level of motivation among "local government workers", and a low level of ethics (J. Bober and al., *Narastające dysfunkcje, zasadnicze dilematy, konieczne działania. Raport o stanie samorządnosci terytorialnej w Polsce*, Kracow, MSAP, 2013, in particular p.40).

C) General comparative observations

As it has been already stated, the European Charter makes a distinction between elected and professional officials. While it has to be recognised that the trend to professionalise the local mandate-holders makes necessary to grant them a clear economic regime, a pension scheme, social security and guarantees for their work place, most countries do not adhere to this conception. Russia abandoned this system: according to the federal law n°25 of 2 March 2007 "on the municipal service in the Russian Federation", local elected officials, including those in executive functions, are not subject to this legislation.

First of all, it is inconsistent to consider elected officials as employees of the local authority, whereas they are vested with this authority through election. Although the local authority has a legal status, it remains that elected representatives are entitled to decide on its behalf and the local authority would be a legal fiction without them. The elected officials therefore compose the local

government, but are not its personnel. The main difference between elected representatives and local government civil servants is that elected representatives are accountable to the citizens of the locality, whereas employees are accountable to the elected representatives.

The German solution may be seen as a pragmatic way to address the need of a legal status for elected officials. It involves nevertheless a conceptual confusion between the respective functions of holders of a political mandate and the personnel, because the election is the way to assign public functions. Especially in countries having little experience of local self-government, for historical reasons, the confusion in legislation between elected representatives and local government employees might blur the perception of their respective functions. It has to be clear that elected representatives are responsible for the management of local public affairs and answerable to citizens, and that they have the administration at their disposal in order to meet the needs of the population. Legislation has therefore to make clear this distinction.

II. Legal framework for the employment of local government personnel

This section provides with short overview of the local government employment systems in some European countries.

The table below[1] is based on a distinction between career system and contract based system, taking into account the scope of application of the career system in countries where it is implemented. In countries with a career system, there is still a fraction of the staff that is employed on a contract basis and without formal career guarantees.

Public or private law career structure for executive and managerial posts	Public law career structure applied generally	Job-based private or public law employment system
Albania	Belgium	Bulgaria
Austria	Cyprus	Denmark
Bosnia and Herzegovinia	France	FYROM
Croatia	Greece	Netherlands
Czech Republic	Hungary	Norway
Estonia	Ireland	Poland
Finland	Latvia	Slovakia
Germany	Lithuania	Sweden
Italy	Luxembourg	United Kingdom
Serbia	Malta	
Switzerland	Montenegro	
	Portugal	
	Romania	
	Slovenia	
	Spain	

Attention should be paid to the fact that the personnel which is part of the local government staff is not counted in the same way in all countries. In Eastern and Central Europe, the notion of local government or municipal service is much narrower than in Western Europe. It used to apply only to the personnel of the administrative machinery, under the head of the executive power. This did not include the personnel of bodies delivering services to the population (education, social care, health care...) and the support personnel (so called budgetary organisations). This is why in Russia and Ukraine figures of the local government personnel might be lower: 280,000 and about 100,000 respectively. The discussion undergoing at present in Ukraine on this issue could result in a different conception. In Poland the personnel of local government budgetary organisations is counted in the total of the local government personnel.

[1] G. Marcou, Chapter "Europe" in: UCLG, *Decentralization and local democracy in the World*. First UCLG Global Report, Barcelona, 2008, edited by G. Marcou, p.151.

Most countries have separate legislations for State civil service and the personnel of local government bodies, including Russia, Ukraine and Poland. Germany is an exception, since the personnel of local government bodies is employed under the civil service law of the region (Land), applicable to the civil service of the region (Land) and of local authorities, or under collective agreements for the personnel that are applicable again to all personnel, employed by the region or by local authorities with specific rules for several sectors. Beyond historical circumstances, separate legislation is more in accordance with the principle of self-government, which involves the capacity for local government to develop own administrative capacities, and it facilitates the development of an ethos of local self-government in the personnel and the identification of local self-government administration by citizens.

There are also significant differences as regards the share of local government personnel in the total of public employment. It varies from around 80% in Sweden and Denmark down to 22% in Portugal, with about 28% in Germany, 34% in France, 24% in Spain, 19% in Italy. Main variables are the staff employed in education, health and social care coming under municipal responsibility. But there are also "hidden" personnel, which are not employed by local government bodies or their budgetary organisations, but work in private law entities that provide various services to the population but are funded by local budgets.

Some changes did occur after the publication of the table. In particular, the statutory civil service system was removed in Portugal except for some State functions: at the local level, the personnel is now fully employed on a contract basis. This was required by the EU as a "structural measure" following the debt crisis. Such a reform in Italy from 1993 hardly had any impact on public expenditure. European countries with the highest number of public employees per capita are those that have replaced a statutory regime with a contract based regime (OECD data).

As already pointed out, most local government employment systems combine in various proportion career and contract elements, public law and private law. If to consider executive and managerial positions (without elected officials), it appears that career systems prevail. When local government employment is based on contracts, individual contracts have to comply with collective agreements, usually negotiated at the national level (also in Germany) between representative organisations of local authorities and unions. They organise also a career with grades and salary scales similar to civil service practices, despite the fact that individual contracts are labour contracts under labour law. This is clearly the case in Germany for non-civil service personnel, in Italy (with negotiation sectors determined by the law) and also in the UK. In Germany, employees on contracts have access to tenure after 15 years, although they do not become civil servants in the legal sense. But such systems require two preconditions: 1) strong local government organised with powerful national associations representing their interests with regard to central government as well as with regard to the unions; 2) strong personnel unions involving most of the personnel. If these conditions are not fulfilled, it is preferable to establish a statutory regime.

A public law career regime has also major advantages for the executive and managerial level of the local government personnel. It makes possible to limit the politisation of higher positions, it makes

easier to guarantee the consideration of merits in recruitment procedures, it facilitates mobility among local authorities and hence the professional development of employees. It makes also possible to compensate lower salaries (if the gap is not too big) by a secured future, in various interesting positions. Lastly, it is easier to assign civil servants in remote places if they are sure that after some years they can apply for another position in a place they prefer, and this can improve administration in such remote places.

In various countries the career system is extended to all categories, although it is not the exclusive form of employment. In France it covers about 80% of the personnel employed by local government bodies. The legal situation is similar in Belgium and Spain, but with a higher proportion of contract positions.

Civil service regimes have been challenged by New Public Management ideas from the beginning of the 1980s, and in the late 2000s as a consequence of the financial crisis and of the debt crisis. NPM prescriptions are now considered with more caution, and incur some setback in various countries. Debates on civil service regimes are very much driven by budget prospects as if there were a relationship between the budgetary cost of public employment and the legal regime. There is no evidence of such a direct relationship. Ideological arguments are also influential whereas very little evaluations of existing employment systems exist, and even less of recent reforms. Therefore it is recommended to begin with consideration for the *objectives* of the local government service reform, and for the *capacity* (adequacy) of the various options to attain these objectives.