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Special Adviser to the Government of Ukraine on Decentralisation

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Opinion[1]
of the Special Adviser to the Government of Ukraine on Decentralisation
On the amendments to certain legislative acts of Ukraine
(as to voluntary accession of territorial communities)

[1] This opinion reflects the views of the Special Adviser, based on Council of Europe standards and best European practice. It does not constitute an official position of the Council of Europe on the issue under consideration.

1. Situation of the amalgamation process in Ukraine

The decentralisation process in Ukraine is hindered by the fact that 93% of local authorities have less than 3,000 inhabitants; this is a threshold under which extremely few services if any can be provided independently by local authorities. The excessive municipal fragmentation is a very common European (and even) world problem which can only be dealt with in two ways: by amalgamation and/or by inter-municipal co-operation. The Council of Europe has standards (in particular in the field of amalgamation) and tools (in particular in the field of inter-municipal co-operation) and has supported or is supporting several countries to conduct such reforms.

Ukraine has chosen the path of amalgamation, usually seen as more efficient and less costly but more difficult both technically and politically. The process was launched in 2014 with full support from the Council of Europe. The process is based on the Law on voluntary amalgamation of territorial communities, signed by the President of Ukraine on 5 February 2015. This law starts from the very basic (and demanding) principle of fully voluntary amalgamation of local authorities and a mechanism whereas:

- Prospective amalgamation plans are prepared by oblast-level state administrations (respectively by the Council of Ministers of the Autonomous Republic of Crimea –ARC-), adopted by the oblast councils (respectively by the Supreme Council of ARC) then by the Cabinet of Ministers of Ukraine;
- Mayors, one third of local council or self-organisation bodies of population representing the interest of at least one third of community members can initiate a process of amalgamation;
- Public discussion are held within 30 days;
- Councils decide on the amalgamation by resolution;
- Snap local elections are held in the newly amalgamated municipalities;
- Each component settlement in an amalgamated community (with the exception of its administrative centre) will also have an elected starosta representing the interests of the settlements and delivering a number of services.

A number of incentives were subsequently established for communities to amalgamate: when all communities included in a prospective plan decide to amalgamate, the newly established amalgamated communities receives a special status (“capable community”) and hence more competences in particular in the fields of health and education (equivalent to competences of cities of oblast significance) and access to new sources of funding (new specific grants and a significant proportion -60%- of the personal income tax collected on its territory).

In the light of the experience of other European countries, the Ukrainian process of amalgamation can be assessed as difficult and complicated but very inclusive, while the incentives created can be considered as solid. At the date of preparation of this document (21 June 2016), 172 fully capable amalgamated communities exist, while negotiations are being held in a few dozen others. It can therefore be assessed that the success has been limited (which is normal in cases where amalgamation is strictly on a voluntary basis) and some obstacles identified in the 15 months since the entering into force of the Law may need to be removed.

2. European standards in the field of municipal amalgamation

The European standards in the field of municipal amalgamation are represented by Art. 4.6 and Art. 5 of the European Charter of Local Self-Government (ratified by Ukraine without reservations or observations on 11/09/1997) and Council of Europe Rec(2004)12 of the Committee of Ministers to member states on the processes of reform of boundaries and/or structures of local and regional authorities.

Art. 4.6 of the said Charter stipulates that "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 5 provides that "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".

Of outmost importance in this respect is the Explanatory Report to the Charter, which reads:

Under Article 4.6: inter alia, that "the manner and timing of consultation should be such that the local authorities have a real possibility to exercise influence, whilst conceding that exceptional circumstances may override the consultation requirement particularly in cases of urgency. Such consultation should take place directly with the authority or authorities concerned, or indirectly through the medium of their associations where several authorities are concerned";

Under Article 5 "Proposals for changes to its boundaries, of which amalgamations with other authorities are extreme cases, are obviously of fundamental importance to a local authority and the citizens whom it serves. Whilst in most countries it is regarded as unrealistic to expect the local community to have power to veto such changes, prior consultation of it, either directly or indirectly, is essential. Referendums will possibly provide an appropriate procedure for such consultations but there is no statutory provision for them in a number of countries. Where

statutory provisions do not make recourse to a referendum mandatory, other forms of consultation may be exercised."

Rec(2004)12 recommends that the governments of member states, where they engage in reforms of the boundaries and/or the structure of local and/or regional authorities:

1. undertake thorough preparation, in order to identify and take account of the applicable legal and practical preconditions;
2. ensure the existence of well-designed decision-making procedures based on good institutional dialogue;
3. elaborate a step-by-step plan and clearly assign responsibilities including leadership for the implementation of the reform, as well as arrange for the consistent monitoring of it;
4. undertake broad and unbiased evaluation of the results and keep the relevant local and/or regional authorities informed.

This recommendation further gives very detailed guidelines for the preparation (including analysis, participation and design), the decision making, the implementation and the evaluation of municipal territorial reforms.

Account taken of the decision of Ukrainian authorities to make the amalgamation process completely voluntary, of the implication of local and international experts in the analysis (including the invitation of a specific Council of Europe High-level Conference and a Peer Review exercise in September 2014), of the way in which the Prospective Plans were adopted by state administrations with the help of Regional offices, then adopted by oblast councils and the Cabinet of Ministers, it can be assessed that:

- The amalgamation process in Ukraine fully respects the obligations arising under the European Charter of Local Self-Government and broadly respects Rec(2004)12;
- The current draft law respects international obligations and is in line with European standards.

3. Observations concerning the draft law on amendments to certain legislative acts of Ukraine (as to voluntary accession of territorial communities).

a. Amendments to the Law on voluntary amalgamation

This draft law aims at removing some obstacles which the process of voluntary amalgamation faces under the law 157-VIII of 5 February 2015 (Official Bulletin of the Verkhovna Rada 2015, No 13, p. 91). This should be looked at as a normal procedure of supporting the very difficult process of amalgamation.

The first obstacle which is intended to be removed is the possibility of communities (*gromada*) to block the amalgamation process which may be desired by other *gromada*. This obstacle is actually not generated the original law, but rather by the methodology adopted by the Cabinet of Ministers. Art. 11 of the 2015 Law mentions that:

- Long-term (prospective) amalgamation plans for oblasts (respectively ARC) are developed by oblast state administration (respectively Council of Ministers of ARC), approved by oblast councils (respectively the Supreme Council of the ARC) and then approved by the Cabinet of Ministers of Ukraine.
- The methodology of formation of capable territorial communities is developed by central executive authorities and approved by the Cabinet of Ministers.

This methodology provides for attributing of the status of "capable communities" (with all the benefits in terms of new competences and new sources of funding) to new communities formed by the amalgamation of the *gromada* included in the Prospective Plans. The interpretation has been that all gromada need to join in order for this status to be granted; this gives any of the *gromada* an actual veto right over the amalgamation in the plan in which it is included. As such, this obstacle is not based in the legislation and could be removed without necessarily changing the law.

However, having clear legal criteria for the conditions to be met for an amalgamated *gromada* to be declared "capable" when it does not include all communities from the prospective plan is a very good idea, which should eliminate any arbitrary and politically motivated decision in this respect.

According to the revised Art.9 coma 4, the Cabinet of Ministers of Ukraine may recognise an amalgamated territorial community as "capable" if:

- It is created according to the current law;
- It is created around the territorial community identified by the Prospective Plan as the amalgamated territorial community's administrative centre;
- It includes at least half of the total population of territorial communities to be included into such amalgamated territorial community under the Prospective Plan.

This is very useful clarification. However, the conditions seem a bit lax. The average number of communities to amalgamate into a new one under the Prospective Plans is around 7.6. But it may often happen that the community defined as the centre of the future amalgamated one has already a population of over 50% of the total final population included in the Plan. As such, it could be declared as "capable" without any further amalgamation, which is likely not what it is intended in the law. It would probably be safer to include a double majority, of population and of number of local authorities as condition to be declared capable community. A different

solution was presented in a previous version of the draft law, which set the condition that a majority of the population *excluding the hromada defined as the future centre* should be included in the community to be declared as capable.

The suggested solution would therefore be for an amalgamated community to be declared as "capable" to require that it includes:

- the community defined as its centre in the Prospective Plan;
- either a majority of the population outside the gromada defined as centre or a majority of gromada included in the Prospective Plan.

Another important addition in the new draft law is that it foresees that financial support shall be distributed among amalgamated communities pro rata the surface areas and the size of rural population (already included in the previous law), but with an equal value of both these factors**.** It is not up to this opinion to make statistical evaluations of the respective impact of area and population on spending needs (in most countries the population has a higher weight in spending needs formulae) but **having a clear disposition on the relative value of the two factors is useful in order to promote transparency**.

b. Amendments to the Law on local elections

The second obstacle concerns the local elections in amalgamated communities.

In the original law, amalgamation was conceived as a one-off process at the level of all communities included in the Prospective Plan and would immediately be followed by snap local elections.

According to the draft revision, the communities which have not decided to amalgamate in the first step would be able to do so at a later stage. However, it would be indeed very cumbersome to hold new elections on the whole territory of the amalgamated community each time a new community decides to join. The draft law offers the following solution:

- New elections would not be held on the territory of the amalgamated (capable) community, but only on the territory of the newly merging one.
- The mayor of the newly merging community would automatically become *starosta* in the larger amalgamated community.
- Elections in the newly merging communities are held in a number of single past-the-post constituencies whose ratio to the number of constituencies in the amalgamated community would be proportional with the respective population ratio.

Concerning the fact that new elections would not be held again on the territory of the amalgamated (capable) community, this is a utilitarian approach and is acceptable for a transitional period until the next regular local elections. Indeed, if a Prospective plan includes e.g. 8 municipalities and only 4 decide to join at the first time and hold local elections, it would be difficult to ask them to hold new elections each time another one of the other four decides to join. This could lead to potentially 5 snap elections during one electoral cycle!

Not electing a new *starosta* and "converting" automatically the mayor of the newly amalgamating community into a *starosta* is undoubtedly a measure meant to remove opposition from mayors to joining amalgamated (capable) communities. Electing new *starosta* during the election of the new council members would bear no cost. However, as a transitional measure and as these ad-hoc *starosta* would have the legitimacy of previous elections and less competence than before this can be assessed as an acceptable measure.

More problematic is the creation of new constituencies to ensure representation of the newly merging community in the local council of the amalgamated one without holding new elections everywhere.

Unlike most European countries, where the number of members of local councils is defined by the basic law on local self-government, in Ukraine such number is defined by the Law on local elections (Official Bulletin of the Verkhovna Rada of Ukraine, 2015, Nos 37-38), in its Art. 16 coma 5, along 11 population brackets (from 12 members in communities of less than 1,000 inhabitants to 120 members in communities with more than 2,000,000 inhabitants).

When a new small community joins a (larger and "capable") amalgamated one, the extra population may not be sufficient to pass into a different population bracket and extend the number of council members in order to allow for the representation of newly merging community. In order to deal with this difficulty, Part 2 para 6 of the draft law examined stipulates:

Article 16 amended to include part 5 to read as follows:

"5. Following the by-elections of deputies of villages, settlement, or city councils, the overall composition of a local council shall increase, above the limit set forth in Part 3 of the Article, by the number of newly established single-seat constituencies, which shall be defined as the ratio of the number of voters in the acceded territorial communities to the number of voters in a territorial community to which they have acceded multiplied by the overall composition of the council set forth in Part 3 of this Article, but at least the number of the acceded territorial communities".

It is understood that this article aims at ensuring that the newly merging municipalities should have a number of council seats which is proportional to its population. Beyond the heavy and imprecise formulation, there are two problems with this article:

- It looks like it establishes this derogation on a permanent basis; **such derogation should on the contrary only be transitional and the number of council seats should come back in line with that provided for by the Law at the next regular local elections**.
- It does not account for the case in which by adhesion of a new community the population bracket of the amalgamated community changes. It reads as if the number of councillors will always increase **above** the number set in Art. 16 of the Law on local elections with the number of newly created constituencies. But this may not be the case as the bracket of councillors number may change with the merging of new small communities, in which case the should be **less** councillors than provided for in the Law on local elections.

Let us take an example. If an amalgamated community has a number of inhabitants which is very slightly inferior to 20,000 it will be in the bracket 5,000-20,000 (with 26 deputies). If a 500 inhabitants community joins, it may change the bracket of the newly amalgamated municipality in the 20,000-50,000 bracket (34 deputies). This represents an increase of 8 deputies while the size of the newly merging municipality (using the principle of proportionality with a minimum of one deputy) would only entitle it to one deputy. So in this case the amalgamated hromada should normally have (on a transitional basis, until the next regular local elections), 27 deputies, which is less than what the law stipulates. It would be absurd to bring this number to 35, as the current formulation seems to indicate and have 9 constituencies in a gromada of 500 inhabitants…

It is difficult to express complex calculations in the text of a law. Below is a proposal of such formulation including the principle in the first sentence (and the actual calculation in the second one, in italics, although this second sentence is heavy and can normally be derived from the first, so it could be skipped).

"**As a transitional measure until the next regular local elections, following the merging of a new community into an already amalgamated one, the number of council members under Part 3 of Art.16 will be modified in order to ensure a representation of the newly merging community which is proportional with its number of voters, but with at least one representative for each newly merging community.** *This number shall be calculated at a sum between the number of council members for the initially amalgamated community and a ratio of voters between the newly merging and the initially amalgamated community multiplied by the number of council members for the initial amalgamated community (but at least one extra member per newly merging community).*"

There are a few other smaller issues to be raised in respect of the modification of the Law on local election, inter alia:

- the territorial election commission must determine the approximate number of voters in single-seat constituencies at least 40 days before the election day and establish the single-seat constituencies at least 38 days before the by-election day; the two calendar days between the two decisions may include holidays and the establishment of constituencies is usually a technically and politically sensitive exercise;
- the drafting of the law under examination is also less than perfect, as this text is not structured in articles but rather in paragraphs and referencing is difficult.

In any case, the amendment of a law of the importance of the Law on local elections (which is a very complex and important piece of legislation) is a significant legislative act, even though changes need to be clearly transitional until next regular local elections. Consultation with Electoral commission could be recommended

Conclusions

1. This draft law is an important step in removing obstacles observed in the voluntary amalgamation process so it can be considered as a very welcome initiative;
2. The law is fully in line with international obligations of Ukraine and other European standards;
3. The law can, and in a few cases should however be submitted to a few technical improvements and clarifications; several suggestions are made in this opinion;
4. Account taken of fact that the draft law modifies the Law on local elections and the complexity and importance of this second legal instrument, it is recommended that special consultations be held on the transitional changes introduced to the Law on local elections.