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Special Adviser to the Government of Ukraine on Decentralisation

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Opinion¹
of the Special Adviser to the Government of Ukraine on Decentralisation
on the draft Law of Ukraine “On amendments to Certain Legislative Acts of Ukraine on
conditions of change of rayon boundaries in the process
of voluntary amalgamation 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.

The draft Law of Ukraine “On amendments to Certain Legislative Acts of Ukraine on conditions of change of rayon boundaries in the process of voluntary amalgamation of territorial communities” was submitted to the Special Adviser to the Government of Ukraine on Decentralisation by the Head of the Committee on State development, Regional policy and local self-governance.

This draft law modifies one provision of the Land Code of Ukraine and several provisions of the Law “On voluntary amalgamation of territorial communities”. It aims at offering a solution to the situation where a municipality wants to join another (amalgamated) municipality from a different rayon. In this case, the draft law provides for a mechanism involving a proposal concerning the change of rayon boundaries prepared by the oblast state administration and addressed to the Cabinet of Ministers and to the Central Election Commission to approve a decision to call municipal elections. The Cabinet of Ministers would subsequently submit this proposal to the Verkhovna Rada.

1. Respect of European standards

The main European standards (and international obligations) in this case are Article 4 paragraph 6 and Article 5 of the European Charter of Local Self-Government.

Article 4 paragraph 6 reads: “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.”

The Explanatory report to the Charter gives more details as to the scope of this obligation: “[...] paragraph 6 is concerned both with matters coming within the scope of such authorities and with matters which are outside their scope but by which they are particularly affected. The text provides 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.”

“Article 5 – Protection of local authority boundaries

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.”

The Explanatory report under Article 5 reads: “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.”

The law on Voluntary Amalgamation of Territorial Communities does not provide for a consultation of rayon councils in the amalgamation process as amalgamation was not supposed to concern rayons directly. This is obviously no longer the case when as a consequence of amalgamation the rayon boundaries need to change.

As for the rayons concerned, while their number would likely be very limited, the impact on their boundaries would be serious enough to require their direct consultation under the European Charter.

In order to fulfil the obligations under the Charter it is therefore recommended:

- ***That a specific provision be included in the draft law to consult rayon councils involved before the Cabinet of Ministers makes its call on the Verkhovna Rada proposing the changes of boundaries of relevant rayons.***
- ***That the all-Ukrainian local government associations, the Ukrainian Association of Rayon and Oblast Councils in particular, have the opportunity to express their views on this draft law.***

2. Expediency of changing the rayon border during the municipal amalgamation process

The amalgamation process is without any doubt very difficult both technically and politically but also very important for the success of the decentralisation in Ukraine. Decentralisation in Ukraine concerns mainly a transfer of competences and resources directly to local authorities, not to intermediate and regional ones (*rayons* and *oblasts*). As such, putting the interest of communities to amalgamate in order to form communities capable of delivering good quality services to their citizens above the interests of *rayons* to maintain their borders is fully justified.

The Decentralisation Concept adopted on 1 April 2014 also includes references to a future amalgamation of *rayons*; indeed, if the municipal amalgamation process is successful, the current 490 *rayons* will clearly be too small and will also need to go through a process of territorial consolidation. This all means that *rayon* borders are not set in stone. A possible process of *rayonal* consolidation could be the disappearance of the effects of this draft law (if the affected *rayons* merge, the current border between them will disappear).

Of course, not any municipal amalgamation makes sense. Municipal amalgamation should be driven by the aim of achieving functional areas, obtaining economies of scale and integrating externalities. It may also sometimes be driven by identity issues. In principle, local councils can be trusted to decide in the best interest of the community on issues like whether to amalgamate or not. There may however be situations where such amalgamation may produce unwanted results, such as the modification of ethnic composition leading to potential conflicts, or simply diseconomies of scale. In such cases the process could be stopped by central authorities; the Cabinet of Ministers should be free to make any necessary data collection and evaluation before deciding whether to submit or not to the Verkhovna Rada the proposal concerning the change of boundaries of rayons. In its turn, Verkhovna Rada will likely listen to all vested interests before taking a decision.

In principle therefore the aim of this draft law is to be commended as it would promote the agenda of municipal consolidation and decentralisation.

3. Considerations on the substance of the law

Several observations can be made.

The first is very technical. Art. 7 of the Law “On voluntary amalgamation of territorial communities” is supposed to receive new parts 10 and 11 but they are enumerated as 9 and 10 (which is correct as the current Art. 7 has 8 parts).

The second is also technical and may be the consequence of a translation problem. Paragraph 10 to be added to Art 7 of the Law “On voluntary amalgamation of territorial communities” reads:

“The establishment of an amalgamated territorial community composed of a territorial community of the city of republican significance in the Autonomous Republic of Crimea or of that of oblast significance and territorial community (territorial communities) of village, settlement, or another city shall not entail any changes to the rayon boundaries except the case when territorial community of the city of republican significance in the Autonomous Republic of Crimea or of that of oblast significance and territorial community (territorial communities) of village, settlement, or another city which has acceded to an amalgamated territorial community located on the territory of different rayons”.

This draft law being about the changing of borders “in the event that territorial community (probably in Ukrainian “territorial communities”) located on the territory of adjacent *rayons* acceded an amalgamated community” it is not clear what the added value of stating that amalgamation shall not entail any changes to the rayon bounders unless the amalgamation is trans-rayonal. Are there any reasons why in case municipalities from the same rayon

amalgamate there would be any potential request for changing rayon borders? On the other hand, if the amalgamation process is successful there will be legitimate pressure to change the borders of *rayons* (to amalgamate them) to bring them in line with the new territorial structure and the Decentralisation concept adopted by the Government on 1 April 2014. The reason to include such provision should be explained.

The third comment concerns the expediency of the provision that the “oblast state administration shall submit a proposal to the Cabinet of Ministers [...] as well as to Central Election Commission for its approval of a decision to call first elections of deputies [...] in the event that territorial community (territorial communities) located on the territory of adjacent rayon acceded an amalgamated territorial community”. It is understood (and this is confirmed in the draft Law on the Principles of Administrative Territorial Structure”) that *rayon* borders need to coincide with *gromada* borders: a local authority cannot be situated across a rayon border nor be situated in more than one *rayon*. As such, the decision of cross-border amalgamation is legally linked to the decision to change the *rayon* border. At the moment when the *oblast* state administration submits the proposal to the Cabinet of Ministers, such decision still needs to be approved by the Cabinet of Ministers and the Verkhovna Rada, so it is yet unsure and may take a considerable amount of time. It looks therefore very premature at that moment to already submit a proposal to organise elections to the Central Election Commission. Such proposal could rather be submitted by the Cabinet of Ministers either when sending the decision to the Verkhovna Rada or once this decision is adopted by the Verkhovna Rada.

The fourth comment concerns the suggestion to include a Part 13 to Article 8 of the Law “On voluntary amalgamation of territorial communities”, which reads “individual composition of the respective *rayon* councils shall not change on this ground”. It is clear why the authors do not want to provoke the organisation of new elections for the affected *rayons*’ councils but there are two difficulties with this provision:

- First, the total number of members of rayon councils is established by Art 16 of the Law on local elections, based on population brackets. It is very possible that due to the modification of two *rayons*’ borders following trans-border municipal amalgamation the population in one or both *rayons* will pass in another bracket. If elections are not desired to be organised according to the new population bracket (which is an understandable concern in view of the multiplication of local elections brought by the amalgamation process), then it is the Art. 16 of the Law on local elections and not Art. 8 of the Law on voluntary amalgamation of local communities which needs to be amended;
- In any case, such amendment to the number of *rayon* councillors following modification of rayon borders as a result of trans-border municipal amalgamation should only be transitional until the next regular local elections. After the first regular local elections,

the number of deputies of all rayon councils should be in line with their population, as provided for in Art. 16 of the Law on local elections.

The fifth and last comment concerns the financial implications of the modification of *rayon* borders. It is understood that *rayon* councils should transfer “budgetary institutions” (meaning probably institutions financed by the *rayonal* budget, including probably the earmarked resources for them) and property located on the territory they “lose” to the rayons which “gain” that new territory but will continue to fund them until the transfer process is completed.

However, it is not clear what the budgetary implications for other sources of revenue which are not earmarked to the transferred institutions will be for the two *rayons*. Such “transfer” of territory and population from one *rayon* to the other will affect both the fiscal base of the two rayons and their annual budgets, some of which depend not on the “budgetary institutions” on their territory, but rather on their territory and population. How should this be calculated? As from the finalisation of the transfer process (pro-rata time) as would probably be fairer or as from the next budgetary year, as it would clearly be easier?

4. Legislative coherence issues

On the one hand, this law revises mainly the Law “On voluntary amalgamation of territorial communities”. It is not the only draft law amending this important piece of legislation; there is another legislative initiative (on which the Special Advisor to the Government of Ukraine also produced an opinion) “On the amendments to certain legislative acts of Ukraine (as to voluntary accession of territorial communities)”.

On the other hand, this draft law aims at providing a procedure of changing rayon borders in a very specific situation, i.e. in case of trans-*rayonal* amalgamation of local authorities. This is a particular situation of a general process (modifications of *rayon* borders) dealt with in general in another important draft piece of legislation prepared by the Ministry of Regional Development, Construction and Municipal Economy, “On principles of administrative territorial structure of Ukraine” (on which the Council of Europe also produced an opinion).

It would be useful to examine the relation between these three draft pieces of legislation. It is very likely that this draft law could be integrated as a special situation of the general procedure of changing rayon borders provided for in the draft Law “On principles of administrative territorial structure”.

Of course, it is very possible that these other two pieces of legislation would not be adopted or that the urgency of changing *rayon* borders in the process of municipal amalgamation is such that it cannot wait for the adoption of a more comprehensive (and difficult) piece of legislation

such as the draft Law “On principles of administrative territorial structure”. If this is the case, the Explanatory note should underline the reasons for the urgency and/or specificity of the draft piece of legislation which is analysed in the current opinion.

It is however more likely that the discussion and possible adoption of the current draft law could be more efficiently proposed at a later stage, when the possible plans for territorial consolidation of rayons are known and this could be only a specific case of a more general process involving the modification of *rayonal* borders.

Conclusions

On the substance, the draft law can be supported; interest of local authorities to amalgamate should normally prevail over the interest of *rayons* to maintain their territory, in particular in the context of a possible future territorial consolidation of *rayons*.

It is however recommended that a few issues, mostly concerning the relation with the Law on local elections and the budgetary implications of border changes be better solved.

If this has not yet been done, it is recommended that the all-Ukrainian local government associations, the Ukrainian Association of Rayon and Oblast Councils in particular, have the opportunity to express their views on this draft law.

It is also recommended to include an obligation for the Cabinet of Ministers to consult the councils of the affected rayon councils before sending the proposal to change their borders to the Verkhovna Rada.

It is also recommended that an Explanatory note be improved: explain in more details the justification and objectives of various paragraphs (possibly answering the five issues raised in this opinion) and should also examine relations with other similar legislative initiatives (in particular the draft Law “On principles of administrative territorial structure of Ukraine”) in order to ensure legislative coherence and simplicity.

It may be more efficient to have more clarity on the general process of rayonal consolidation before adopting this law.