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Opinion on the draft Law of Ukraine „On Procedures for Formation and Liquidation, Establishment and Change of Rayons Boundaries“

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I. Introduction

Further to a request of the Head of the Committee on State Building, Regional Policy and Local Self-Government of the Verkhovna Rada of Ukraine,[1] the Council of Europe has provided a legal opinion on the draft Law of Ukraine 'On Principles of Administrative Territorial Structure of Ukraine'.[2]

The present opinion was prepared in parallel and concerns the draft Law on 'On Procedures for Formation and Liquidation, Establishment and Change of Rayons Boundaries' (hereafter referred to as 'the Law on rayons').

The Council of Europe assistance with these two drafts falls within the framework of the Programme "Decentralisation and local government reform in Ukraine".

European Charter of Local Self-Government (ECLSG)

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

Provisions (and obligations) of the ECLSG relevant to this law can be found in its Articles 4, 5 and 13.

Article 4 (paragraph 3) on the Principle of subsidiarity reads: "*Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy*."

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

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

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

[1] By letter of Mr Vlasenko dated 16 March 2018
[2] CELGR/LEX(2018)4

Article 13 – Authorities to which the Charter applies states: *"The principles of local self-government contained in the present Charter apply to all the categories of local authorities existing within the territory of the Party."*

II. General observations

This Law establishes the procedure for formation, liquidation, establishment and change of rayons boundaries during the local self-government reform and territorial organisation of power in Ukraine.

It is prepared to support the implementation of the Law 'On Principles of Administrative Territorial Structure of Ukraine'. However, the publication of the law on principles is not a precondition for bringing and adopting a law concerning the different components of the administrative territorial structure. The constitutional basis is on place.

However, attention should be paid to ensure compatibility between the two laws. This would depend on the chronology of the parliamentary procedure and the respective dates of adoption of the two laws. Provisions relevant to rayons are set out in Articles 8, 9 and 16 of the (draft) Law 'On Principles of Administrative Territorial Structure of Ukraine'. A particular attention should be given to ensure harmonisation with Article 16. The law on rayons could refer to articles of the law on principles or identical provisions could be set in both laws.

The rayons have been directly impacted by the implementation of the Law of Ukraine "On voluntary amalgamation of territorial communities". Many rayons, and their number will grow with future amalgamations of communities, have inside their boundaries only 3 or 4 rather large and powerful communities (in some cases, even a single community). Moreover, the competences of amalgamated communities are very close to those of rayons. This creates problematic relations between political leaders and administrative services of the two levels and even some confusion as to the actual tasks of rayons. One of the objectives of the reform discussed previously was for the rayons to have greater territories.

Therefore, the modification of the boundaries of the rayons shall consider two quantitative issues: a reasonable population size and a sufficient number of communities. These two considerations are complex further because rayons cannot be too large as it would create similar problems at oblast level, i.e. too small number of rayons and the risk that larger rayons could become competitors to the oblast.

The intermediate territorial level: a general problem in Europe

Defining the rayons is not a problem specific to Ukraine. In many countries where a supra municipal territorial administration (departments or provinces) – which does not correspond to a "region" – exists, its relevance is questioned and debated. Schematically, three different situations can be observed in Europe:

- The Scandinavian model – with large and powerful communes, the counties have very focused functions (mainly for health and hospitals in Denmark).

- The second model consists in merging the two first territorial levels into large cities – in Germany all big cities are both communes and *Kreis*. This also becomes an option in France for the biggest cities, which are both communes and department (e.g. Paris, Lyon, and proposals exist for extension to others).

- The third category is observed in countries where there is a recurrent debate on conserving or abolishing the second tier. In France, during the last 15 years, many official reports and declarations have underlined the need to abolish the departments created in 1789; proposals are to transfer their competences mainly to the regions and partly to the inter-municipal co-operation entities (*communautés* and *metropoles*). In Italy, the same debate resulted in advanced projects to remove the provinces, but like in France there is a strong resistance, including from the State administrations at this level. There is a similar debate in Spain.

The intermediate level is generally considered as superfluous, in particular after a consolidation reform of the communal level and where a regional tier exists. Having in mind the principle of subsidiarity, it is difficult to define which competences should be best assumed at this intermediate level. Also there is a risk of conflict of interest and power between the executive and political leaders at this level with their peers at the level above and below. Abolishing the intermediate level simplifies the structure of territorial administration, allows making economies, reducing conflicts and generating inefficiency. But such administrations often have a long tradition; they have their own territorial identity. This strong resistance cannot be undermined by political arbitration.

In Ukraine these questions have been discussed in the past, among experts and at the political level. Today, without access to any detailed study, the Council of Europe is not in a position to make a formal recommendation. Rayons cannot be eliminated under the current Constitution and could not be eliminated if the Constitutional amendments on decentralisation adopted in the first reading were adopted in the second reading either. In this context, technically the best solution would be to reduce their number and specialise them according to the Nordic model, in order to avoid overlap and conflicts with the other two level of sub-national authorities. But clearly the political and popular acceptability of such solution should be further evaluated.

III. Observations on procedures

This draft is clearly written and the procedures are well conceived and described. There are a few observations, mainly relating to the role of the Parliament and the nature of the rayon.

The role of the Parliament (*Verkhovna Rada*)

Article 2 on the procedure for formation and liquidation of a rayon, establishment and change of rayons boundaries, states in its **paragraph 1**: *"Formation and liquidation of a rayon, establishment and change of rayons boundaries shall be carried out by the Verkhovna Rada of Ukraine through enactment of the relevant law…."*

This provision gives a decisive role to the parliament. As explained in the legal opinion on the draft Law of Ukraine 'On Principles of Administrative Territorial Structure of Ukraine', there is a strong hesitation that one can have to give the responsibility to a political assembly to write all details of the territorial administrative structures in a law or in other decisions of the parliament.

With regard to **Article 2 paragraph 3** "*Law on formation and liquidation of a rayon, establishment and change of rayons boundaries shall establish the list of village, settlement, city territorial communities that make a part of a newly created rayon or rayons, which boundaries are changed without the formation of a new rayon, as well as the list of rayons to be liquidated, the name and the administrative center of a newly created rayon.*"

Such data cannot be fixed for the longer term. Throughout the amalgamation reform, the number and name of communities may change; settlements or villages may become cities. It is certainly not appropriate to change the law defining the composition of rayons every time one of its components undergoes modification.

In order to allow for more flexibility it would seem appropriate to have such a list in a chart annexed to the articles of the law, if this is allowed by constitutional law. This way, the list would not have full legislative force and its modification can be done without further involvement of the Parliament.

Uncertainty of the nature of the rayon

When ratifying the ECLSG, Ukraine made no declaration in relation to its Article 13. The exact nature of rayons is still discussed and a repeated demand of the Congress of local and regional authorities in Europe (CLRAE) is to clarify the status of the rayon by defining more precisely if it is a local self-government - for which the Charter applies - and what is State administration. Although this is not the object of the present law, it has some legal relation with the properties and rights of rayons when they are modified or merged.

Conclusion

The draft Law on 'On Procedures for Formation and Liquidation, Establishment and Change of Rayons Boundaries' is being assessed by the Council of Europe in parallel to the draft Law of Ukraine 'On Principles of Administrative Territorial Structure of Ukraine'. It is important to ensure coherence between the two drafts. The law on rayons can refer to articles of the law on principles or identical provisions could be set in both laws.

Overall, the Council of Europe is in favour of this draft law which is clearly written and the procedures are well conceived and described. Two specific observations, relating to the role of the Parliament and the nature of the rayon, were made with recommendations.

Appendix

TRIANGLE OF COHERENCE OF LSG STRUCTURES