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EUROPEAN COMMITTEE ON DEMOCRACY AND GOVERNANCE (CDDG)

DRAFT RECOMMENDATION OF THE COMMITTEE OF MINISTERS ON DEMOCRATIC ACCOUNTABILITY OF ELECTED REPRESENTATIVES AND ELECTED BODIES AT LOCAL AND REGIONAL LEVEL

For consideration with a view to final adoption by the CDDG
at its 14th meeting (in Strasbourg and by videoconference)
of 29-30 November 2021

Secretariat Memorandum
prepared by the
Directorate General of Democracy
Democratic Governance Division

Introduction

The GT-RE discussed the draft last at its 5th meeting (13 September 2021). Subsequently, the draft was examined by the CDDG Bureau at its meeting of 14-15 October 2021. The latter considered that the text should be shorter and more concise on various matters, and that to this end, it was preferable, *inter alia*, to have one set of appended rules instead of two. The present text submitted to the CDDG takes into account these proposals.

Action required

The CDDG is invited to consider the draft and to adopt it, with a view to its submission to the Committee of Ministers for final adoption.

Draft Recommendation, as amended in the light of the most recent discussions held at the GT-RE and Bureau meetings

The Committee of Ministers, under Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress;

Considering that there is an increasing desire of citizens to have a say in the management and scrutiny of public affairs at the territorial levels which are closest to them, and that active participation by citizens in the management of local and regional public affairs, *inter alia* by taking on elective functions, is a prerequisite for effective democracy;

Considering the many benefits brought by a developed system and culture of accountability of elected representatives and elected bodies at local and regional level, especially regarding the promotion of good governance, democracy, high standards of public ethics, trust in public institutions, and a healthy economic and social environment;

Considering that transparency, in general, regarding the actions of elected representatives and bodies and the various bodies under their purview, as well as the quality of information and easy access to information held by public authorities are particularly important features of an accountability framework;

Considering that clarity of legislation concerning local and regional self-government, in particular in the determination of responsibilities, including the consequences to be drawn from inadequate management, is an essential condition for good governance in accordance with the rule of law and fundamental rights, and for the legal security of those held to account;

Considering also that among recent trends, the use of various forms of violence against elected representatives has become a raising source of concern in many countries, and that this can deter candidacies and thus affect the necessary renewal of political leaders, but also have a negative impact on the capacity for initiative and the effectiveness of public action;

Considering that the experience of many member states demonstrates that it is necessary to organise systems of accountability in such a way as to guarantee, by virtue of the European Charter of Local Self-Government (CETS No.122), both their effectiveness and the maintenance of "a large measure of autonomy as regards the powers of local authorities, the manner in which they are exercised and the means necessary for the accomplishment of their mission";

Having regard to:

- the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 5);
- the European Charter of Local Self-Government (CETS No. 122) and its Additional Protocol on the right to participate in the affairs of local authorities (CETS No. 207);
- the various other legal instruments of the Council of Europe which contain relevant provisions for the subject-matter of public accountability, such as the Convention on Access to Official Documents (CETS No. 205), Recommendation CM/Rec(99)8 on the financial liability of local elected representatives for acts or omissions in the course of their duties, Recommendation CM/Rec(2014)7 on the protection of whistleblowers, Recommendation CM/Rec(2018)4 on the participation of citizens in public life at local level, Recommendation CM/Rec(2019)3 on the supervision of local authorities' activities;
- the Valencia Declaration and the Strategy on Innovation and Good Governance at Local Level, including the 12 Principles of Good Democratic Governance, adopted at the 15th session of the Council of Europe Conference of Ministers responsible for Local and Regional Government (15-16 October 2007), which refer to accountability (Principle 12);
- the work of the Congress of Local and Regional Authorities of the Council of Europe, in particular Recommendation 423 (2018) "Conflicts of interest at local and regional level", Recommendation 424 (2018) "Transparency and open government", Recommendation 395 (2017) on recurrent problems identified in the assessments following Congress election monitoring and observation missions, and its report entitled "A contemporary commentary by the Congress on the explanatory report to the European Charter of Local Self-Government" (December 2020), as well as Recommendation 459 (2021) "Holding referendums at local level";
- the work of the Venice Commission, including its Report on the popular dismissal of mayors and local elected representatives (June 2019);
- recurrent issues identified in the monitoring work of the Group of States against Corruption (GRECO);
- the United Nations Sustainable Development Goals, in particular SDG 16.

Recommends that the Governments of Member States, having regard to the definitions, principles and guidance set out in the appendix, undertake the tasks set out in the paragraphs 1 to 5 below or entrust these tasks to the competent public authorities, taking into account their respective constitutional or legislative provisions:

1. establish and maintain an accountability framework for elected representatives and elected bodies at local and regional level, that framework comprising as appropriate legislation, institutions, procedures, practices and norms of conduct, which together create the conditions and culture whereby:
 - (a) decision-makers take responsibility for their decisions;
 - (b) those decisions are reported on, explained, examined and where appropriate sanctioned; and
 - (c) there are effective and proportionate remedies against inappropriate decisions or omissions and any resulting actions or inactions;
2. ensure that provisions within this framework operate complementarily to the judicial, political, and administrative systems of the Member State, including those systems put in place for elected representatives and elected bodies at the national level of government.
3. Involve local and regional elected representatives in the considerations about reforms to be undertaken in the accountability framework and the procedures for their implementation.
4. Evaluate periodically the measures adopted and undertake, if necessary, legislative reforms to improve the effectiveness of the accountability mechanisms as set out in the framework, as well as the consistency of their implementation. In doing so, they should take into account the recommendations resulting from the monitoring and observation activities carried out by the Congress of Local and Regional Authorities of the Council of Europe on the implementation of the European Charter of Local Self-Government.
5. Translate this recommendation into the official language(s) of the country and actively disseminate and promote it to local and regional authorities, their associations and other interested parties.

Any reading of Recommendation CM/Rec (99)8 of the Committee of Ministers to member states on the financial liability of local elected representatives for acts or omissions in the course of their duties, should have regard to this recommendation.

Appendix

Definitions, principles and guidelines in relation to the accountability of elected representatives and elected bodies at local and regional level

1. Definitions

1.1 For the purposes of this Recommendation:

- a) "elected representatives at local and regional level" (also referred to as "ERs") refers to those elected directly or indirectly by the people of a geographic unit to represent them. This includes those selected by other elected representatives to hold an office within a local or regional authority and/or its executive organ (including a councillor, mayor, leader, provost etc);
- b) "elected bodies at local and regional level" (also referred to as "EBs") refers to bodies composed exclusively or mainly of elected representatives, including an authority's assembly and/or its executive organ and any sub-committee of that assembly /executive organ (including councils, municipalities and municipal districts, territorial units, counties, regions, provinces etc);
- c) "accountable" means being willing and able to take responsibility for one's decisions, to report on and explain those decisions and to be prepared to be examined on those decisions, and to accept any proportionate sanction against inappropriate decisions or omissions;
- d) "accountability", is the condition of being accountable;
- e) an "accountability framework" comprises as appropriate legislation, institutions, procedures, practices, and norms of conduct, in order that citizens can be confident about the accountability of their ERs and EBs at local and regional level;
- f) "responsibilities" means those functions, powers, matters, actions and tasks for which the ER or EB must give an account.

2. Principles of accountability

- 2.1 Accountability involves a set/variety of relationships between parties and a transfer of powers, functions and responsibilities from one party to another.
- 2.2 As a basic principle, ERs and EBs are accountable to those who have granted them a position of authority or power through direct election. Likewise, those who have been granted a position of power or authority to perform executive or supervisory functions, through designation or appointment within an elected body, are accountable to those who have granted them that position.

- 2.3 Therefore, ERs and EBs are required to give an account of their actions to the citizens and voters in relation to a domain of responsibilities embodied in their office. They will also be required to give an account to other actors involved in a formal system of audit or scrutiny. In addition, there may be officers or bodies who are responsible for an ER or EB's conduct as well as a range of stakeholder groups who will be affected in one way or another by the ERs and EBs' actions.
- 2.4 Accountability is personal and cannot be delegated. Where responsibilities have been delegated to another person or body, the ERs and EBs remains accountable for those matters.
- 2.5 Some aspects of these accountability relationships will be institutionalised or embodied within organisational or political mechanisms: political accountability for the general conduct of policies (before the voters or another body), legal / judicial liability for acts entailing a civil claim or criminal law response (before the courts), managerial accountability for the general administrative and financial management of resources and procedures (through management control, judicial control, external audit etc.).
- 2.6 Openness and transparency of ERs and EBs' actions, and those of the administrations and entities under their responsibility, is instrumental to incentivise accountable conduct as it will put actions in the public spotlight and allow for ongoing scrutiny.
- 2.7 Effective accountability will also rely on a range of elements outside formal institutions and systems, such as an active civil society, informed and politically educated citizens and a free and independent press and media that report on the operation of the political system.

3. Guidelines on an effective accountability framework for elected representatives and elected bodies at the local and regional level

- 3.1 The principle of accountability can be made into a practical reality by putting in place an accountability framework comprising regulations, rules, norms, institutions and practices. These measures should be promoted through training and awareness raising initiatives. An effective accountability framework will identify the following elements of the accountability relationships.

(a) Who is accountable and what they are accountable for

- 3.2 For all ERs and EBs, the accountability framework should clearly identify and document the matters for which they are accountable and the extent to which they are legally and financially responsible.

- 3.3 ERs and EBs entrusted with collegial, deliberative and scrutiny functions (typically local/regional assemblies) are accountable for the manner in which they perform these tasks. ERs and EBs entrusted with executive and managerial tasks (typically local/regional government functions including mayors), should provide an account for the manner in which the public service is delivered, including the implementation of policies and objectives agreed upon with the deliberative body.
- 3.4 Wherever possible, the number of laws, regulations and other rules that local elected representatives are required to apply, particularly ministerial decrees and circulars, should be reduced; the legislation in force in ERs and EBs' main spheres of activity should be presented as consolidated legislation.

(b) How they will be held to account, and to whom they should give that account

- 3.5 Major importance should be attached to enabling citizens and civil society to express opinions, provide feedback on policies, formulate suggestions and voice criticism or concerns. This may include referendums, popular initiatives and various forms of participation and consultation. For the design of such measures, inspiration may be drawn from the Additional Protocol to the Charter, on the right to participate in the affairs of local authorities (CETS No. 207). Particular attention and consideration should be given to those who may experience barriers to participation to enable them to have an equal say in matters affecting them.
- 3.6 The deliberations of local and regional assemblies should be public; the agenda and important documents discussed at the meetings should be made available in a timely manner. The law should provide for limited circumstances in which meetings can be held in private and ERs and EBs must still be prepared to give an appropriate account for decisions taken in such meetings.
- 3.7 All information provided for the purpose of scrutiny should be made available in a format that is accessible and relevant for whom it is intended. Information that is made public should be objective and of high quality, for the purpose of enabling citizens to form their views on the actions of ERs and EBs. Where the potential of new information technology is utilised, careful consideration should be given to ensure accessibility for groups who experience barriers to accessing information online.

- 3.8 The legal framework should provide for a comprehensive system of record-keeping, retention, classification and archiving, including retention periods, concerning official and other documents pertaining to the activity and responsibilities of ERs and EBs, including the activity of bodies under their responsibility. Retention periods should be commensurate with the deadlines and statute of limitations provided for litigation procedures. Policies should also be in place to deal with specific requests for information held by the local and regional authorities. Inspiration may be drawn from the Council of Europe Convention on Access to Official Documents (CETS No. 205) and the Additional Protocol to the Charter, on the right to participate in the affairs of local authorities (CETS No. 207).
- 3.9 The scrutiny process should be governed by adequate rules and regulations which set out the categories, content, and periodicity of accounts to be provided by ERs and EBs, to ensure that up-to-date and meaningful information, including accounts of activity, is made available continuously.
- 3.10 The scrutinising body should be given the necessary means and authority to perform their task, including sufficient time for consideration and seeking the necessary clarification, the possibility of recourse to persons with the necessary degree of expertise to assist them, and access to relevant information and accounts to make an informed assessment. This may also include the power to solicit an independent external audit concerning specific matters that the accounts presented (are meant to) cover.
- 3.11 Political affiliation should not interfere with the scrutiny process which precedes a deliberation or vote on the final conclusions. The same information, within the same deadlines, should be made available to all members of the scrutinising body, irrespective of political considerations. Rules should also guarantee a fair access of members of political groups to specific scrutiny functions (e.g. as a rapporteur or member of a specific review group). The mandatory periodic public audit of local and regional authorities should be organised in such a manner as to ensure the political neutrality.
- 3.12 An ER or EB whose action or management is under scrutiny should have the opportunity to be heard and to provide explanations for its actions and decisions.
- 3.13 Where ERs and EBs are held accountable for their action by other tiers of government or bodies appointed by them in any of the following cases, this should be clearly determined by the law: ensuring compliance with the law and constitutional principles; expediency in respect of tasks which have been delegated to them; a legally required activity which was not undertaken; financial supervision aimed at fostering good accounting practices and effective management, preventing financial imbalances or monitoring the financial rehabilitation of local authorities which encounter financial difficulties.

- 3.14 Where appropriate, mechanisms for a political response to ERs and EBs may include: petitions calling for action on a specific issue, interpellation requiring a response, procedural questions requiring an answer, motion of confidence/no-confidence on whether a person is fit for the position of responsibility, motion of censure or suspension, popular dismissal through a referendum.
- 3.15 Channels should be in place for employees and stakeholders to disclose suspicions of malfeasance, together with measures to protect whistleblowers, drawing inspiration from Recommendation CM/Rec(2014)7 on the protection of whistleblowers.
- 3.16 All forms of violence against representatives and candidates should be clearly condemned and where possible should attract dissuasive sanctions. Where ERs and members of EBs (including their relatives) may be at risk of physical violence, hate speech including sexist hate, on-line intimidation and abuse, degradation of property etc, victims should have the possibility to benefit from rapid and effective protection, for instance by means of restraining orders. The responsible use of social networks as regards local / regional politics and public affairs, both by ERs and EBs and the public, should be encouraged.

(c) Consequences

- 3.17 The process of giving and holding to account, through scrutiny and other mechanisms, will highlight both good and weak performance. This will incentivise accountable behaviours and build an accountable culture focused on learning and developing better public services for the future.
- 3.18 The use of procedures aimed at the early termination of a mandate should be exceptional, and strictly and precisely regulated in law. The legislation should define procedural guarantees of transparency, legitimacy and legality of the recall process, clearly identify its actors, set the thresholds for launching the procedure and for validating the recall. Clear and reasonable time limits should be set after a previous election or before a future election, as well as a jurisdictional control of the steps and conditions of the process.
- 3.19 Administrative measures entailing a suspension, removal or dismissal of local government or the dissolution of local councils at the initiative of a higher territorial level or the State authorities should be exceptional and clearly provided for by law in a very limited number of circumstances. These circumstances, which should be defined by criteria set in law, should include when the functioning of the institution is seriously hindered and/or when its course of action is not pursuing the public interest of the local / regional constituents.
- 3.20 The early termination of a mandate should allow, if necessary, for new elections to be held without delay and avoid the need to appoint a manager where the rules or the situation do not allow an elected substitute or deputy to carry out required functions.

3.21 In particular:

- a) popular recall should only complement the other mechanisms available in a representative democracy; it should be subject to legal limitations, for example: in respect of the timing, the number of signatures that are required, the quorum for decisions on recall, and the required majority for decisions on recall. These limitations are important in order to avoid transforming a representative mandate into an imperative mandate;
- b) popular recall should be possible only for those elected to local and regional government functions by direct universal suffrage and prohibited for individual members of elected councils;
- c) in principle, local and regional assemblies should have no authority to dismiss mayors and other heads of local government who are elected directly unless the dismissal is the unavoidable consequence of a collective resignation of the assembly or results in the dissolution of the assembly itself.

3.22 Legal, civil, criminal or disciplinary consequences should be regulated by law, in a clear, predictable and consistent manner, with appropriate safeguards in place to prevent their misuse.

3.23 In principle, ERs should not be held personally liable when acting within the scope of their duties and in good faith. Specific criminal provisions may provide for situations where such ERs' action entails liability in case of serious negligence. The question of the individual liability of an ER, or of an EB with legal personality, should be appraised by a court of law which shall determine any possible sanctions applicable. It might be advisable to set up specialised sections within the civil or administrative courts to deal with issues of financial liability, or independent specialist bodies to provide opinions on such matters, before judgements are made by the courts.

3.24 Local and regional authorities should be allowed to take out insurance covering their financial liabilities, and pecuniary liability insurance on behalf of their ERs to protect them from lawsuits engaged as a result of damage or loss suffered by citizens in the course of the normal activities of ERs and EBs carried out in the public interest and provided that the damage or loss does not result from gross negligence or tortious intent. Local and regional authorities or their elected representatives should also be allowed to set up mutual insurance bodies to cover the risks mentioned above.

3.25 In the case of unlawful decisions taken by a collegiate body deliberating in public, it is advisable to exclude the personal liability of those having formally justified their opposition to these decisions, provided it is possible to know how each member of the collegiate body voted.

- 3.26 The application of any kind of automatic pecuniary sanction mechanism to ERs should only be possible following an adversarial hearing, either judicial or opening a right to judicial proceedings, and the finding of serious negligence or deliberate tortious intent.
- 3.27 Criminal acts committed by local and regional ERs in the course of their duties, should attract proportionate and dissuasive sanctions. An additional measure of ineligibility following a conviction must be limited in time (not perpetual). Immunity from criminal prosecution, including where it is enjoyed by the elected representative by virtue of an additional mandate held at another tier of government should not prevent prosecution in the case of serious criminal conduct involving the interests of the local or regional authority.