

RECURRING ISSUES BASED ON ASSESSMENTS RESULTING FROM CONGRESS MONITORING AND ELECTION OBSERVATION MISSIONS

(REFERENCE PERIOD 2010-2013)

A) Monitoring of the European Charter of Local Self-Government

B) Observation of Local and Regional Elections

Monitoring of the implementation of the European Charter of Local Self-Government

(reports concerned: Albania, Austria, Azerbaijan, Bulgaria, Czech Republic, Denmark, Estonia, Georgia, Germany, Hungary, Ireland, Italy, Lithuania, Malta, Moldova, Montenegro, Portugal, Romania, Serbia, Slovenia, Spain, “The former Yugoslav Republic of Macedonia”, Turkey, Ukraine).

1. Unclear definition and/or allocation of competences

The Congress has indicated in its recommendations, using different formulations, the problems related to:

the limitation of competences devolved or delegated to local authorities – thereby limiting their scope to act and, the quality of service they can deliver in the interest of the citizens;

the lack of precision in defining and allocating powers and responsibilities at central, regional and local level –which can give rise to ambiguity and possible duplication.

Article 3 of the Charter prescribes: “the ability of local authorities to regulate and manage a substantial share of public affairs within the limits of the law”. This indicates what such a definition strives to achieve: clarification of the respective areas of competence of the different levels of governance without, however, limiting their scope of action and leaving them the discretion to develop and improve services.

The Congress makes a point of underlining in nearly all of its recommendations the clarification of areas of competence so as to avoid ambiguity, duplication of effort and waste of public resources.

Reference:

Article 3 of the Charter – Concept of local self-government

1. Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.
2. This right shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them. This provision shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute.

2. Inadequate financial resources for local and regional authorities

Here the following issues have been found, either singly or concomitantly, such as:

- over-centralised system of financing of local authorities;
- low level of own tax revenue;
- inadequacy of financial resources freely available to the local authorities;
- concomitant financing principles not respected;
- non-transparent financial equalisation mechanisms and lack of consultation.

Financial autonomy is vital for local authorities to develop a planned approach to local government. Lack of financial autonomy renders them vulnerable to financial crises and austerity measures or, in certain cases, to political pressure. It is a worrying tendency that in many countries local governments have had to face substantial cuts in grants or equalisation shares but also, more disturbingly, have seen their competences (such as levying or collecting a certain tax) revoked. A tendency for recentralisation in times of crisis - in order to hold the reins of the economy under strict control - is a real risk.

Reference:

Article 9 of the Charter – Financial resources of local authorities

- 1 Local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers.
- 2 Local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the law.
- 3 Part at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate.
- 4 The financial systems on which resources available to local authorities are based shall be of a sufficiently diversified and buoyant nature to enable them to keep pace as far as practically possible with the real evolution of the cost of carrying out their tasks.
- 5 The protection of financially weaker local authorities calls for the institution of financial equalisation procedures or equivalent measures which are designed to correct the effects of the unequal distribution of potential sources of finance and of the financial burden they must support. Such procedures or measures shall not diminish the discretion local authorities may exercise within their own sphere of responsibility.
- 6 Local authorities shall be consulted, in an appropriate manner, on the way in which redistributed resources are to be allocated to them.
- 7 As far as possible, grants to local authorities shall not be earmarked for the financing of specific projects. The provision of grants shall not remove the basic freedom of local authorities to exercise policy discretion within their own jurisdiction.
- 8 For the purpose of borrowing for capital investment, local authorities shall have access to the national capital market within the limits of the law.

3. Lack of consultation

Consultation between local and regional authorities (mostly through their associations) and the central government is often contentious. Problems can occur when:

- the procedures are not clear;
- there is no formal procedure;
- a procedure is not recognised in the law.

Even when a consultation procedure is formally adhered to, it can be rendered de facto ineffectual through:

- the lack a proper mechanism to regulate it or implement it;
- impossibly short deadlines for comments;
- the lack of a systematic approach and lack of transparency of both the process and the results.

Article 4 paragraph 6 of the Charter stipulates that local authorities should “be consulted, insofar as possible, in due time and in an appropriate way in the planning and decision-making processes for all matters that concern them directly”. The interpretation of “due time and appropriate manner” is an issue. The Congress has asked for a formal mechanism to be set up, clarifying the rules, deadlines etc. It has further invited parliamentary committees working on local government issues systematically to include in their discussions on new draft laws, the associations that represent local authorities.

Finally, consultation pre-supposes a representative organisation negotiating with the government on behalf of local authorities - or their associations. Some member States have strong local associations and set the example of what a unified voice can achieve for local authorities. In other countries, counter examples show how ineffectual and uncoordinated local government associations can weaken local democracy. The Congress, through its post monitoring and co-operation activities, contributes to the Council of Europe action plans to provide a negotiation platform and find solutions in such situations.

Reference:

Article 4 of the Charter – Scope of local self-government

1. The basic powers and responsibilities of local authorities shall be prescribed by the constitution or by statute. However, this provision shall not prevent the attribution to local authorities of powers and responsibilities for specific purposes in accordance with the law.
2. Local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority.
3. 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.
4. Powers given to local authorities shall normally be full and exclusive. They may not be undermined or limited by another, central or regional, authority except as provided for by the law.
5. Where powers are delegated to them by a central or regional authority, local authorities shall, insofar as possible, be allowed discretion in adapting their exercise to local conditions.
6. 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.

4. Inexistence or ineffectiveness of legal remedies

In most cases, member states provide judicial tools in their Constitutions or primary legislation for the protection of local autonomy. Mostly, the legislative basis is in compliance with the Charter but the existing remedies either take too long - so that local authorities are discouraged from using them - or the conditions for admissibility are so strict that the outcome is uncertain.

However there are some examples where domestic legislation does not guarantee local and regional authorities the right to appeal to the courts to ensure respect for their competences. There are other cases where municipalities are simply state bodies and such questions therefore cannot arise.

A further case occurred where a member state had declared itself not bound by Article 11 although, in practice, those provisions were respected. In this case, the Congress recommended the national authorities to ratify Article 11 forthwith so that the country's commitments match its actual situation.

Reference:

Article 11 of the Charter – Legal protection of local self-government
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Local authorities shall have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation.

Observation of local and regional elections in Council of Europe member states

(reports concerned: Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Moldova)

1. Electoral lists and voters residing *de facto* abroad

The accuracy of electoral lists and the situation of voters living *de facto* abroad has been a recurring issue for the Congress during its missions. Aware of the differences in electoral legislation in member states (at national and, in federalist states, also at regional level) and of the complexity of the subject, (which is also due to the absence of a common definition of the concept of residence), the Congress has repeatedly made reference to the problem of voters who live *de facto* abroad but remain registered as residents, stay on the electoral lists in their country of origin and thus may exercise their right to vote in this country.

Against the specific importance of this issue for local and regional self-government bodies, the Congress has made clear that local questions should be decided by the electorate actually living in a specific community. There is also the issue of possible fraud – particularly in regard to the question of whether such voters were actually in their country of origin on Election Day.

As a consequence, the Congress considers entrusting its Monitoring Committee with this matter and will also contribute to the drawing up of a possible comparative study by the Venice Commission (Council for Democratic Elections) on electoral rights of voters residing *de facto* abroad, from the specific angle of local and regional self-government bodies.

Reference:

Code of Good Practice in Electoral Matters (Venice Commission) - the principle of universal suffrage

This principle includes certain conditions with regard to the right to vote and to stand for elections such as age, nationality and residence requirements. Residence in this case means habitual residence. A length of residence requirement may be imposed on nationals solely for local and regional elections. The requisite period of residence should not exceed six months, a longer period may be required only to protect national minorities. The right to vote and to be elected may be accorded to citizens residing abroad.

2. Public confidence in electoral processes

The freedom of voters to cast their votes according to their wishes has been an issue closely followed by the Congress during observation missions. According to the Venice Commission's Code, electors must be protected from threats or constraints liable to prevent them from casting their votes or from casting them as they wish, whether such threats come from the authorities or from individuals; the state is obliged to prevent and penalise such practices.

Voters' freedom to form an opinion may also be infringed by individuals, for example when they attempt to buy votes, also a practice which the state is obliged to prevent or punish effectively. As is the case in vote-buying, it is difficult for international election observers such as Congress members to translate the rather abstract term of "freedom of voters to express their wish" into concrete observations.

This also applies to the phenomenon of controlled votes, the so-called corporate-pressure vote, and to intimidation. Therefore, Congress recommendations to authorities of member states often include measures to increase public confidence in free and fair elections. To increase the trust of citizens in elections, allegations of pressure on voters and vote-buying – whether this is reality or perception – should be avoided. Legal provisions, in particular with regard to penalisation of financial incentives and the exertion of voting rights, need to be introduced or - where already existing - effectively implemented by the state authorities.

Reference:

Code of Good Practice in Electoral Matters (Venice Commission) – the principle of free suffrage

This principle comprises two different aspects –free formation of the elector's opinion and free expression of this opinion (the freedom of the voting procedure and the accurate assessment of the result). State authorities must observe neutrality (e.g. concerning media, billposting, demonstration rights, funding of parties and candidates) and have a number of positive obligations concerning candidatures, lists of candidates, national minorities etc.