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20th Anniversary of the European Charter of Local Self-Government

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EXPLANATORY MEMORANDUM

I. Introduction

1. The European Charter of Local Self-Government was opened for signature on 15 October 1985. As a true international treaty, the Charter is still the only instrument binding on states that defines the essential features of local self-government and how the concept is to be transposed into the institutional sphere. Furthermore, after the fall of the Berlin Wall, the Council of Europe Parliamentary Assembly and Committee of Ministers declared that all new applicants for Council of Europe membership must undertake to sign, then ratify, not only the 1950 Convention on Human Rights, the most emblematic of the Council of Europe's texts, but also the European Charter of Local Self-Government. So the Charter is established as one of the founding documents of democracy in Europe.

2. These facts alone provide sufficient reason to take a look back at the first 20 years of the Charter, but there are others. Firstly, the success enjoyed by the Charter since its fairly modest beginnings as a mere option for member states of the Council of Europe. While it is true that it took almost three years to come into force as the legal framework for relations between states and their local authorities (on 1 September 1988) after receiving its first four ratifications, more than 15 years later the overwhelming majority of members of the Council of Europe have ratified it (40 out of 46). In addition, two states have signed it but, for different reasons, not yet ratified it.

3. Another factor which is certainly worthy of note is the system set up to monitor states' compliance with the Charter principles. The monitoring mechanism regularly subjects Council of Europe member states to a detailed analysis of their legislation and current policies in the light of the provisions and principles of the Charter. In this the rapporteurs appointed by the Congress of Local and Regional Authorities, with political responsibility for reports and recommendations, work in close co-operation with the members of the Group of Independent Experts on the European Charter.

4. Thirdly, mention should be made of the impact of the events marking the 50th anniversary of the European Charter of Municipal Liberties, adopted in 1953 under the aegis of the Council of European Municipalities and Regions (CEMR), including a congress held in the very town where the document was adopted (Versailles). From a strictly legal point of view, this Charter is no more than a political appeal, and the road to a true international treaty in the same field proved to be a long one. But the events marking 50 years of the Versailles Charter, devised to serve a political purpose, represent an important stage in the current discussions about the usefulness of starting to develop the provisions of the European Charter of Local Self-Government.

5. And lastly, some aspects of the Treaty establishing a Constitution for Europe now submitted to EU member states for ratification could provide material for the current discussions.

6. This report is intended to lay the legal foundations for a possible development of the provisions of the European Charter of Local Self-Government. We shall briefly review the main political sources of such a process and go on to summarise the principal issues and proposals which result in relation to the European Charter. Some of the proposals relate to a number of clarifications and refinements of the current text which could be considered (part III of the report); and we shall then raise a number of proposals for reform of both form and substance (part

IV of the report). Together they should be considered as a basis for selection according to political criteria, which is the task of the Congress of Local and Regional Authorities first and foremost.

7. In accordance with the wishes of the Institutional Committee of the Congress of Local and Regional Authorities (meeting of 8 November 2003), the proposals put forward in parts III-V of this report follow the lines traced by the European Charter of Local Self-Government, so they concern only relations between local authorities and the state. Consequently, a number of proposals on relations between local authorities and citizens (residents, users, etc) have not been included. They are important issues, it is true, vis-à-vis the legitimacy of local authorities. However, in contrast with the main aim of the Charter, such proposals would be likely to ask states to impose fresh obligations on their local authorities. It should also be noted that at least some of the proposals that might be considered are already covered by the rules on non-judicial administrative procedure (consultation, justification of action, right of access to administrative documents, absence of discrimination, etc) found in national constitutions or domestic legislation, or by other treaties between the same group of countries (such as the European Convention on Human Rights).

8. The final part of the report (VI) will look at the forms which might perhaps be used for the refinements or reforms envisaged.

II. The main political sources of the process

9. In our effort to gain some idea of the reform potential of the provisions of the European Charter of Local Self-Government, the main source should be the discussions and follow-up activity carried out for almost 20 years now under the aegis of the Council of Europe, particularly by the Congress of Local and Regional Authorities. For the most part the proposals for clarification and reform contained in parts III and IV of this report take their inspiration directly from the recommendations produced by this activity. Unless otherwise stated, the term "Rec" used hereunder refers to a recommendation adopted by the Congress of Local and Regional Authorities.

10. A number of points have emerged during these activities about which the text seems imprecise, although it is unlikely that uncertainty was the intention when the Charter was drawn up. Consequently, the text might well appear less relevant and less useful in guiding states' policies vis-à-vis municipalities (than originally intended).

11. An example is the exact meaning of the part of Article 3 (2) which mentions the possibility of elected councils or assemblies having "executive organs responsible to them".

12. In addition, a number of the Charter's provisions are relatively imprecise and – as a result – have little binding force, not because of negligence or bad luck at the drafting stage, but more because the authors of the treaty wished them to be so, in a spirit of compromise, or because there was not the political will to go further. In such cases, initiatives cannot primarily be about how to make the text more precise. Rather the true aim would be not to go beyond the extent to which

current member states wish to progress beyond the threshold their predecessors wanted to cross in 1985 (as also reflected in subsequent ratifications).

13. One often criticised example of this kind of amendment of the provisions of the Charter relates to Article 9, which deals with local authorities' financial resources, particularly paragraph 2 thereof: the precise scope of the principle that financial resources are to be commensurate with local authorities' responsibilities is far from clear, and the result of an ordinary process of interpretation is unlikely to satisfy everyone (or their aspirations) in terms of workability. To what extent has the time come to envisage strengthening local authorities' position in relation to central government where municipalities' tasks and the financial resources available to them to carry out their activities are concerned?

14. Generally speaking, it is appropriate to raise the question of the possibility of identifying new trends or needs to be taken into account if states wished tomorrow to draw up an international instrument on relations between local and central government. Such a process might culminate in either the amendment of certain provisions of the current Charter or the adoption of a number of additional provisions (in an additional or an amendment protocol, for instance, see below).

15. By way of an example in this context, the idea arises of a combination with the previous example of refinement of provisions which have proved to be too vague, such as the concept of "responsibility" in Article 3 (2) of the Charter: what might actually be meant by the concept of the municipal executive being "responsible to" the representative council, when both bodies are directly elected by the local people? In other words, to what extent is it appropriate to codify and make clear, in the provisions of the Charter, the present trend to make more frequent use of direct elections to collegiate or individual executive offices ("mayors").

16. Where possible advances are concerned, it should be pointed out that the writers of the Treaty establishing a Constitution for the European Union, currently being submitted for member states' approval, deemed the contribution made by local self-government to democracy as such to be of sufficiently fundamental importance to be taken into account. The constitutional treaty indeed refers explicitly to local and regional government in member states (Article I-5 (1)), and contains certain specific provisions which can usefully be taken into account during the process which may culminate in a recasting of the pan-European legal guarantees of local self-government offered by the Council of Europe.

III. Possible clarifications and refinements

17. As already stated, a number of points have been identified in the course of the Congress's deliberations and monitoring work where the Charter is more loosely-worded than its authors no doubt intended. To the extent that such defects are likely to hamper application of Charter standards or to render the Charter less effective than hoped, the time may have come to see how this could be remedied, without any need to ask states to move outside their areas of freedom in respect of their municipalities, as defined in the current Charter.

18. On the basis of the various reports and recommendations produced by the Congress of Local and Regional Authorities and – in certain cases – recommendations made by the Committee of

Ministers, the following points are among those which it is worth considering clarifying and refining:

19. It should be stated that, in federal or highly regionalised states, local authorities' guaranteed independence from the central authorities also extends to their independence from the member states of the federation, the regions, etc.

20. Some refinement of the concept of "executive organ" to which Article 3 of the Charter refers might be envisaged, particularly in respect of relations between representative bodies and the municipal authority where an assembly system exists (Rec. 113/2002).

21. Some refinement of the concept of responsibility of the executive organ to the council or representative assembly in pursuance of Article 3 (2) of the Charter deserves to be considered, also in the light of cases in which the executive itself is directly elected by the population concerned (Rec. 113/2002) (also see certain proposals in part 4 of this report).

22. As the minimum conditions to be met by various forms of appointment of the executive (particularly the mayor) by the central authorities are still likely to give rise to arguments in relation to the basic idea of local democracy as defined in Article 3 and in the Preamble to the Charter (Rec. 113/2002), the need for clarification is still there. However, specific regulations on systems in which an element of appointment remains would be best avoided, given that they could scarcely be drawn up without being interpreted as at least implicitly accepting the maintenance of such an element.

23. It being necessary to intensify relations between citizens and municipalities, consideration could be given to explaining and/or giving a concrete definition of the phrase "any other form of direct … participation" to which Article 3 (2) of the Charter refers, particularly in respect of the existence of advisory councils within the municipality, either for certain categories of residents or users (young people, foreigners, senior citizens, etc.) or for the residents of specific neighbourhoods (Rec. 113/2002).

24. Clarification of the expressions "in due time" and "in an appropriate way" in relation to local authorities' right to be consulted in pursuance of Article 4 (6) of the Charter might be considered.

25. Better coordination of the concepts of "collectivités locales" (French text) and "local communities" (English text) in Article 5 of the Charter (on consultation prior to any changes in local authority boundaries) might be useful, given that the French form seems to refer to the "collectivité" as an entity (*commune*, municipality, etc.), whereas the English form seems more open (the institution, but also the population consulted by referendum, etc.).

26. The status of "local elected representatives" in Articles 7 and 8 of the Charter in relation to administrative supervisory action by central government might be more precisely defined, particularly in respect of supervisory measures other than in cases of repeated violations of the Constitution or the law, outside the law and not respecting the principle of proportionality (Rec. 20/1996), and the importance of an adequate and secure material situation, inter alia in terms of representatives' lost earnings, and extending to financial assistance with elected representatives' return to the ordinary world of work at the end of their term of office.

27. The conformity of administrative supervision of the expediency of the acts of local authorities with Article 8 of the Charter could be made clearer (see in particular Article 8 (2): "normally", and Article 8 (3): "intervention … in proportion …")(Rec. 20/1996) (also see some proposals in part IV of this report).

28. It should be specified that states' obligation under Article 9 (4) of the Charter to ensure that the "financial systems" for funding local authorities are "of a … diversified and buoyant nature" entails the levying of taxes and/or the making of transfers which both guarantee a degree of continuity and predictability and enable local authorities to keep pace with economic changes, and therefore with economic growth (Rec. 79/2000), and ensure at least that local taxes are "reasonably stable so as to make for continuity and foreseeability in public services, and have a certain degree of flexibility, so that tax revenue can be adjusted to changing budget costs" (Rec. 2005(1) of the Committee of Ministers).

IV. Possible reforms affecting relations between local authorities and central government

29. Looking beyond amendments reasonably likely to be regarded as mere clarifications of the existing standard-setting text, mention was also made of the usefulness of a number of real reforms concerning relations between local authorities and central government, including:

30. The responsibility of the executive to the municipal council in pursuance of Article 3 (2) of the Charter having to be viewed as a vital element of the domestic democratic organisation of local authorities (Rec. 113/2002), whereas the use of forms of direct democracy other than council elections is explicitly allowed, the election of the executive (and particularly of the mayor) directly by the population probably even becoming the most widespread form (Rec. 151/2004). Each such reform probably represents an example of democratic progress. But the existence within the community of two poles which in principle enjoy identical levels of democratic legitimacy might well jeopardise the fundamental principle of the pre-eminence of the representative assembly in pursuance of Article 3 (2) of the Charter, and possibly cause blockages within the municipal apparatus. It would therefore be appropriate to envisage introducing a system to minimise this risk, for example by providing for the possibility for the representative council to submit to a referendum a proposal for the dismissal of the executive (the mayor), or a system for submitting the composition of the council itself to the popular vote under certain circumstances.

31. It would be appropriate to envisage strengthening the principles of subsidiarity and proportionality (Articles 4, 9 among others of the Charter), inter alia through the *introduction* of regulations firstly specifying the ways in which local authorities may be involved in central government decisions concerning them, secondly placing states under an obligation to consult local and regional authorities in a suitable manner and at an appropriate time on any proposal which might substantially affect their financial resources, and thirdly obliging states to set up joint central/local authority committees to evaluate the balance between local authorities' resources and obligations (Rec. 79/2000).

32. In the face of current trends in Community law, the economic sphere and administrative sciences, forms of organisation should be chosen which are new or borrowed from private law in order to ensure that public services are extra-"efficient", consideration might be given to explicit recognition of local authorities' right to choose how to provide residents with the public and community services they offer, cf inter alia Article 6 (1) of the Charter, guaranteeing local authorities the power to adapt their own internal administrative structures to local needs and, in this framework, independence in respect of organisation (Rec. 20/1996).

33. In the face of current tendencies to place more emphasis on techniques for evaluation and supervision based on such considerations as efficiency and cost/benefits ratio, a strengthening of the principle in pursuance of Article 8 (2) of the Charter of central government supervision in the field of local authorities' own responsibilities, simply to ensure that the law and constitutional principles are complied with, and the limitation of the monitoring of expediency to the strict minimum in the delegated fields of responsibility may be envisaged (Rec. 20/1996).

34. The introduction of an obligation for states to allow the procedure whereby a superior authority is entitled to act in the place of a subordinate one only under a law which establishes clear substantive and procedural bases, limiting it to the adoption of a municipal act (or activity) in a way which does not affect local organs or elected representatives, and ensuring that the authority concerned has the right to intervene in the procedure concerned.

35. So as better to ensure compliance with the principle under Article 9 (2) of the Charter that local authorities' financial resources shall be commensurate with the responsibilities provided for by the Constitution and the law, consideration might be given to the introduction of an obligation for states to enshrine the "principle of concomitant financing" in their law or Constitution and to ensure that "equivalent" funding is clearly attached to any new transfer of responsibility to local authorities planned by the state (Rec. 79/2000).

36. The strengthening of local authorities' right to have their own resources, including through true local taxation, in accordance with Article 9 (3), a right too frequently ignored in practice, could be considered, inter alia through the introduction of an obligation for states to ensure that a "substantial part" of local authorities' resources comes from their own taxation and levies, the rate of which they may decide within the confines of the law or, where applicable, within a pre-set range (Rec. 79/2000; also see Committee of Ministers Recommendation 2005 (1), according to which they should have "sufficient own resources to fund a significant proportion of the costs incurred in the discharge of their responsibilities").

37. In order to avoid imbalances between the actual cost of the tasks which local authorities are required to carry out (in the social, health, environmental and other spheres) and the financial compensation available to them, not only initial transfers but also the setting of higher quality standards for the execution of such tasks could be subject to the prior use of consultation and transparency measures on the same basis as the transfers of tasks themselves (Rec. 64 (1999), also see Committee of Ministers Recommendation 2005 (1)).

38. In relation to states' obligation in pursuance of Article 9 (5) of the Charter to ensure that financial equalisation procedures or equivalent measures to correct the effects of the unequal distribution of potential funding resources are introduced, it would be appropriate to specify the

need for vertical, and if necessary horizontal, equalisation measures based on clear, objective, transparent and verifiable statutory objectives, and for prior consultation - even better, negotiation - with local authorities' representatives before such criteria are set (Rec. 79/2000 and Committee of Ministers Recommendation 2005 (1)).

39. In relation to Article 9 (7) of the Charter, it would be appropriate to specify states' obligation to make a clearer distinction between "general" and "specific" allocations, to use these only to offset the costs of delegated responsibilities (or services provided on behalf of the state), the variations in cost generated by central government decisions about the quality of local services or exceptional investment expenditure, and to ensure that both general and specific allocations are decided completely transparently on the basis of objective and verifiable criteria (Rec. 79/2000 and Committee of Ministers Recommendation 2005 (1)).

40. It would be appropriate to strengthen the principle that the setting by the state of limits on local authorities' expenditure, in order to guarantee certain budgetary balances, and the coordination of public finances in general do not lead to local authorities being subjected to supervision which restricts their standard-setting, organisational and political independence in the exercise of their own responsibilities in pursuance of Article 9 (7) of the Charter (Rec. 20/1996), particularly through the introduction of a priori supervision of local authorities' budgetary decisions (Rec. 79/2000), and also to specify that the restrictions imposed on local authorities' financial independence should not be excessive in the light of the aims pursued, should be discussed with the authorities concerned or their associations and should be enshrined in law and lifted as soon as possible (Committee of Ministers Recommendation (2005) 1).

41. Local authorities' right to own municipal property being regarded as a substantial element of local self-government under Articles 3 and 9 and the Preamble of the Charter (Rec. 132/2003), it would be appropriate to introduce an obligation for states to adopt in their Constitution, or at least in domestic legislation, guarantees in relation to municipal property in the form of a right to own property for the performance of tasks of local public interest, including local authorities' right to fair compensation in the event of expropriation of municipal property, to the extent provided for by law for the public benefit, the elementary principles of procedure and the right of remedy being complied with, and the right of municipalities to expropriate subject to the same conditions, the supervision exercised over municipal property being restricted to lawfulness and complying with the principle of proportionality.

42. It would be appropriate to envisage the introduction of an obligation for states to facilitate co-operation between local authorities on an equal footing and, where applicable, with regional authorities, in so far as the local authorities concerned consider that their residents' interests so require (Article 10 (1) of the Charter), including through recognition of local authorities' right to transfer the property and the management of some municipal assets to associations also involving other local or regional authorities, completely transparently and subject to democratic supervision (Rec. 132/2003).

43. States' recognition of the associations which represent local and regional authorities (cf Article 10 (2) of the Charter) with a view to their right to participate in consultation, negotiation and co-operation processes could be envisaged.

44. It would be appropriate to envisage strengthening the right of access to the courts in pursuance of Article 11 of the Charter by introducing a power to set aside provisions of domestic law which violate the Charter (Rec. 2/1994).

45. It would be appropriate to envisage the introduction of an obligation for states actively to incorporate the Charter into their domestic law and, consequently, better to guarantee local authorities' right of access to the courts (cf Article 11) on the grounds of violation of the Charter (Recs. 2/1994 and 39/1998).

46. Codification of the current system for monitoring compliance with the Charter and, if applicable, its development through formalisation of a non-judicial system of redress could be envisaged (cf Resolution 189 (2004)).

47. Given that ever-decreasing use seems to be made of states' freedom under Article 12 of the Charter to agree to be bound only by a limited number of its provisions, and that certain states do not effectively use the freedom allowed them in principle through their reservations, some restriction of the freedom to choose which remains in Article 12 could be envisaged, at least in the form of recommendations adopted following monitoring missions.

48. Now that the Treaty establishing a Constitution for Europe has acknowledged the importance of democracy at the local level (see paragraphs 5 and 13 above), the question of the ratification of the European Charter of Local Self-Government by the European Union, by virtue of the latter's legal personality under Article I-7 of the Treaty, merits attention.

V. The possibility of reorganising the selected proposals according to substance or to the forms to be adopted for any clarifications and reforms

49. In parts III and IV of this report, the various proposals likely to be envisaged have been arranged according to their innovative or less innovative nature in relation to Charter law ("reforms" or "clarifications"). The use of this distinction between the two categories of proposals may inter alia help with the initial selection of proposals likely or less likely to encounter political opposition. This classification is not always obvious, and it would be appropriate subsequently to consider the usefulness of other criteria. One possibility would be to group the proposals according to their substance (see § 37); another would be to classify them according to the form in which the Congress of Local and Regional Authorities decided to implement them.

50. The proposals listed in parts III and IV of this report might usefully be grouped together according to their content. Even if this solution were adopted, however, it would be difficult to produce a perfectly clear-cut classification. In the following breakdown, for example, this difficulty arises in respect of "finances" (part c.), because finances are also central to relations between central and local authorities (part d.), and also because aims related to substance (subsidiarity, finances, etc) could be achieved using measures more closely related to procedure (consultation, etc):

a. Proposals concerning local authorities' responsibilities and independence in terms of standard-setting (a number of the paragraphs mentioned in connection with b to e below are also relevant to this field);
b. Proposals concerning the institutional organisation of local authorities (see §§ 17, 18, (19), 20, 27, (29), 39, (40) above);
c. Proposals concerning municipal finances and property (see §§ 25, (28), (29), 32-38, (29) above);
d. Proposals concerning relations between central and local authorities (see §§ 16, 19, 21-24, 28-31, (32-38), 40 above);
e. Proposals concerning the legal protection of local self-government and the incorporation of the Charter into member states' domestic law (see §§ 41-44, 45 above).

VI. What forms could the selected refinements and reforms take?

51. There are three main forms for turning the planned clarifications or reforms into legal reality. The Congress would of course be free to use them at their discretion, for example earmarking certain proposals for additional or amendment protocols, while at the same time opting for a less binding solution for other proposals for clarification or reform. These three main forms should also be considered as elements of a larger reality comprising other processes too (more systematic exploitation of the fruit of the deliberations and monitoring work of the Congress (see 52 below), the establishment of a more universal political instrument called “European Code of Subsidiarity” (see 53 below), and so on).

52. The most radical option would involve amending the text of the European Charter of Local Self-Government itself, but this possibility would scarcely be advisable for reasons both political ("leave the very basis of international legal protection of local self-government alone") and practical (it might well take too long to obtain the necessary unanimous consent of member states).

53. The second possible form would be the use of one or more additional protocols or amendment protocols to the Charter (or perhaps several). A number of other international instruments have adopted this tried-and-tested solution, among them, of course, the European Convention on Human Rights, to which about 15 protocols exist, so this is a well-oiled process.

54. Without presenting the same disadvantages as the use of amendments to the actual text of the Charter, the result of using the protocol formula would also be texts enjoying the same legal status as the Charter itself. Another distinctive feature of this method is its relative flexibility, for the ratification process could be spread over several years without affecting the legal position already acquired by the Charter itself (see 2 above).

55. On the other hand, use of such a procedure might well result in a loss of simplicity and clarity of the whole international text applicable to member states. And in any case, the protocol solution is clearly not really suitable where provisions conflict with those of the present Charter or make the system as a whole less coherent. So the amendment protocol stands out as being the only type of protocol envisageable in so far as genuine reforms which go beyond mere additions to the existing Charter system are called for.

56. A third possibility would be to add to the explanatory report on the Charter. The revised version would be submitted for appraisal by the Congress, which would forward it to the Committee of Ministers of the Council of Europe. This path would have the advantage of being far more accessible than the other two just referred to, but only if the Committee of Ministers were ready to go along with this procedure. Furthermore, it is an appropriate solution only for refining the text of the Charter, not for carrying out true reforms of its existing scope. And even then, "refinements" not coinciding fairly closely with the general meaning of the explanatory report would be difficult to envisage.

57. It should also be said that possible use of the explanatory report would entail the major drawback of adding only indications not binding on member states, the report itself not even constituting "an instrument providing an authoritative interpretation of the text of the Charter" (taken from paragraph II of the introduction to the explanatory report). The scope of the aspiration to reform will therefore determine the extent to which it would suffice to use a text which may merely "facilitate the understanding of its (existing) provisions" (same source).

58. Amongst the processes parallel to the 20th anniversary of the Charter that might be, or already have been envisaged, the first one worth mentioning is the need to make more systematic use of the fruit of the deliberations and monitoring work of the Congress of Local and Regional Authorities, in the form of recommendations, etc of a general nature or relating to specific countries. First, such a “data base” could facilitate the compiling of information concerning the interpretation and updating of the Charter. Political authorities, Council of Europe experts, governments and local authorities could use it to make their efforts to define and promote the values of local self-government more effective.

59. Another parallel process would involve drafting a more global policy instrument called “European Code of Subsidiarity and Local and Regional Self-government” (Resolution 189 (2004) § 14 a) explaining and summarising a number of vital elements of the current text in the light of present-day possibilities and challenges. From the strictly legal point of view, such an instrument will have no effect on the law established by the Charter itself and through all the associated "authoritative" interpretations. And its political influence will inevitably depend on the succinctness or otherwise of the text and on the forms in which it is finally adopted.