

**38th SESSION**

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**A contemporary commentary by the Congress on the Explanatory Report to the European Charter of Local Self-Government**

Committee on the Honouring of Obligations and Commitments by member States of the European Charter of Local Self-Government (Monitoring Committee)

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*Summary*

The present document is a Contemporary Commentary on the explanatory memorandum to the European Charter of Local Self-Government which takes into consideration thirty years of application by member States of the Council of Europe, and which is largely based on the normative and monitoring works carried out by the Council of Europe. It takes into account in particular the monitoring reports and recommendations adopted by the Congress with respect to the situation of local and regional democracy in member States, relevant texts from other bodies and instances of the Council of Europe, in particular, recommendations of the Committee of Ministers, opinions of the European Commission for Democracy through Law (Venice Commission) and recommendations and resolutions of the Parliamentary Assembly, and the case-law issued by domestic courts in Member States when interpreting provisions to the Charter. The Congress considers this contemporary commentary as a practical tool for the Council of Europe and for national and other international stakeholders as well as for academia and researchers.

Consequently, the Congress invites its Committee on the Honouring of Obligations and Commitments by Member States of the European Charter of Local Self-Government (Monitoring Committee) to take systematically into consideration this contemporary commentary in its work; and to pursue a political dialogue with national, regional and local authorities in the framework of post-monitoring activities with all member States concerned, on the basis of this commentary. Moreover, it calls on its members to take ownerships, use and disseminate the contemporary commentary as a relevant tool offering to all levels of governance, updated guidelines that can enable them to consolidate their political and legal culture in the field of local self-government. The Congress also asks its Bureau to make relevant bodies of the Council of Europe aware of this contemporary commentary and to invite them to take it into consideration in their work related to local democracy.

1. L: Chamber of Local Authorities / R: Chamber of Regions.  
EPP/CCE: European People's Party Group in the Congress.  
SOC/G/PD: Group of Socialists, Greens and Progressive Democrats.  
ILDG: Independent Liberal and Democratic Group.  
ECR: European Conservatives & Reformists Group.  
NR: Members not belonging to a political group of the Congress.

## DRAFT RESOLUTION<sup>2</sup>

1. Referring to:

- a. The European Charter of Local Self-Government (ETS No. 122, 1985), hereafter “the Charter”, and in particular its explanatory report;
- b. Statutory Resolution CM/Res(2020)1 relating to the Congress of Local and Regional Authorities of the Council of Europe and the revised Charter adopted by the Committee of Ministers on 15 January 2020, which instructs the Congress to ensure the effective implementation of the principles of the European Charter of Local Self-Government, as part of its monitoring activity;
- c. The monitoring reports and recommendations adopted by the Congress with respect to the situation of local and regional democracy in member States of the Council of Europe;
- d. The relevant texts from other bodies and instances of the Council of Europe, in particular the recommendations of the Committee of Ministers, opinions of the European Commission for Democracy through Law (Venice Commission) and recommendations and resolutions of the Parliamentary Assembly;
- e. The case-law issued by domestic courts in member States when interpreting provisions of the Charter.

2. The Congress of Local and Regional Authorities of the Council of Europe:

- a. welcomes the contemporary commentary on the explanatory report to the European Charter of Local Self-Government, as a reference text, which takes into consideration 30 years of application by member States in Europe, and which is largely based on the normative and monitoring works carried out by the Council of Europe;
- b. is convinced that this commentary will contribute to enhancing the knowledge on and ensuring higher respect for the Charter by making it easily accessible and understood in a contemporary manner;
- c. considers the contemporary commentary as a practical tool not only for the Council of Europe but also for national and other international stakeholders, be they national or local elected representatives or State institutions, administrations, jurisdictions, national associations of local and regional authorities, civil society or other international organisations as well as academia and researchers;

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2 Preliminary draft resolution approved by the Monitoring Committee on 11 February 2020.

Members of the committee: *L. VERBEEK* (Chair); *H. AKGUN*; *L. ANSALA*; *V. ARQUES CORTES*; *N. BARBU*; *C. BAS*; *V. BELIKOV*; *B. BELIN*; *G. BERGMANN*; *H. BERGMANN*; *M. BERNTSSON*; *K. BILLE*; *A. BINDI*; *Z. BROZ*; *M. BUFI*; *T. BUYUKAKIN*; *X. CADORET*; *V. CASIAN*; *M. CAVARA*; *P. CEGONHO*; *G. CHATZIMARKOS*; *M. COOLS*; *J. CROWE*; *V. CRUDU*; *S. DICKSON* (*alternate: S. CHARLES*); *N. DIRGINCIENE*; *A. DISMORE*; *R. DODD*; *S. DOGUCU*; *D. ERAY* (*alternate: L. WEHRLI*); *R. FEJSTAMER*; *M. FENECH ADAMI*; *L. GARLITO BATALLA*; *M. GAUCI*; *G. GEGUZINSKAS*; *A.G. GEORGESCU*; *K. GERMANOVA*; *L.V. GIDEI*; *M. R. GOMES DE ANDRADE*; *B.A. GRAM*; *N. GROZEV*; *I. HANZEK*; *Z. HASSAY*; *G.M. HELGESEN*; *B. HIRS* (*alternate: M. HOLLINGER*); *J. HLINKA*; *B. HORDEJUK*; *M. H. HOURIGAN*; *V. HOVHANNISYAN*; *A. IBRAHIMOV*; *G. ILLES*; *A. JOZIC*; *K. KALADZE*; *A. KALEVA*; *G. KAMINSKIS* (*alternate: H. ROKPELNIJS*); *O. KASURI*; *M. KAUFMANN*; *N. KAVTARADZE*; *B. KERIMOGLU*; *J-P. KLEIN*; *A. KNOBOVA*; *J. KOKKO*; *C. LAMMERSKITTEN*; *A. LEADBETTER*; *F. LEC*; *J-P. LIOUVILLE*; *K. T. MAGNUSSON*; *A. MAGYAR* (*alternate: A. ACSAY*); *P. MANGIN* (*alternate: J-M. BELLiard*); *K. MARCHENKO*; *G. MARSAN*; *O. MELNICHENKO*; *R. MONDORF*; *S. MOSHAROV*; *D. PANTANA*; *V. PASQUA*; *G. PAUK*; *S. PAUNOVIC*; *M-L. PENCHARD*; *V. PREBILIC*; *V. PROKOPIV*; *P. PRYHARA*; *I. RADOJICIC*; *G. RIBA CASAL*; *J. ROCKLIND*; *R. ROHR*; *B. RUDKIN*; *S. SCHUMACHER*; *I. SEREDYUK*; *L. SFIRLOAGA*; *P. SMOLOVIC*; *A-M. SOTIRIADOU*; *R. SPIEGLER*; *Y. SVITLYCHNA*; *T. TAGHIYEV*; *T. TALIASHVILI*; *A. TARNAVSKI* (*alternate: T. BADAN*); *P. THORNTON* (*alternate: L. GILLHAM*); *K. TOLKACHEV*; *F. TRAVAGLINI*; *M. TURCAN*; *S. VAAG*; *V. VARNAVSKIY*; *R. VERGILI*; *D. VLK*; *B. VOEHRINGER*; *A. VYRAS* (*alternate: M. KOUKLIS*); *H. WENINGER*; *E. YERITSYAN*; *J. WIENEN*; *L. ZAIA*; *F. ZIMMERMANN*.

N.B.: The names of members who took part in the vote are in italics.

Secretariat of the committee: *S. POIREL*, Secretary to the Committee and *S. PEREVERTEN*, co-Secretary to the Committee.

*d.* invites its Committee on the Honouring of Obligations and Commitments by member States of the European Charter of Local Self-Government (Monitoring Committee) to:

- take systematically into consideration the contemporary commentary on the explanatory report to the Charter, in its work, particularly in the preparation of monitoring reports when assessing the implementation of the provisions of the Charter and the additional Protocol on the right to participate in the affairs of a local authority, in the Council of Europe member States;
- pursue a political dialogue with national, regional and local authorities in the framework of post-monitoring activities with all the member States concerned on the basis of that contemporary commentary on the explanatory report to the Charter;

*e.* invites other Congress bodies, in particular its Governance Committee, to take into account the contemporary interpretation during their respective activities, when it has to refer to the explanatory report to the Charter;

*f.* calls on its members to take ownership, use and disseminate the contemporary commentary as a relevant tool offering to all levels of governance, and notably national authorities and jurisdictions, updated guidelines that can enable them to consolidate their political and legal culture in the field of local self-government. It also aims to prompt them to adopt mechanisms and procedures to ensure respect for the provisions of the Charter in their law-making and standard setting work reflecting 21st Century challenges and concerns;

*g.* asks its Bureau to make relevant bodies of the Council of Europe aware of this contemporary commentary and to invite them to take it into consideration in their work related to local self-government.

**EXPLANATORY MEMORANDUM**

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## CONTEMPORARY COMMENTARY OF THE CONGRESS ON THE EXPLANATORY REPORT OF THE EUROPEAN CHARTER OF LOCAL SELF-GOVERNMENT

### Preamble

The member States of the Council of Europe, signatory hereto,<sup>3</sup>

1. Considering that the aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage;
2. Considering that one of the methods by which this aim is to be achieved is through agreements in the administrative field;
3. Considering that the local authorities are one of the main foundations of any democratic regime;
4. Considering that the right of citizens to participate in the conduct of public affairs is one of the democratic principles that are shared by all member States of the Council of Europe;
5. Considering that it is at local level that this right can be most directly exercised;
6. Convinced that the existence of local authorities with real responsibilities can provide an administration which is both effective and close to the citizen;
7. Aware that the safeguarding and reinforcement of local self government in the different European countries is an important contribution to the construction of a Europe based on the principles of democracy and the decentralisation of power;
8. Asserting that this entails the existence of local authorities endowed with democratically constituted decision making bodies and possessing a wide degree of autonomy with regard to their responsibilities, the ways and means by which those responsibilities are exercised and the resources required for their fulfilment,

Have agreed as follows:

### Explanatory report

*The preamble provides an opportunity for a statement of the basic premises underlying the Charter. These are, essentially:*

- *the vital contribution of local self-government to democracy, effective administration and the decentralisation of power;*
- *the important role of local authorities in the construction of Europe;*
- *the need for local authorities to be democratically constituted and enjoy wide-ranging autonomy.*

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<sup>3</sup> The paragraphs of the preamble have been numbered for purposes of this commentary only.

## Contemporary commentary

1. Like the preamble to any legal text, the preamble to the Charter forms the introduction to its provisions from the formal point of view. Differences in opinion exist regarding the proper interpretative weight and legal status of treaty preambles, but Article 31 of the Vienna Convention on the Law of Treaties recognises the legal value of the preamble as an integral part of the “context” of a treaty. Consequently, preambles are part of the “texts” of treaties and are frequently cited as evidence of a treaty’s “object and purpose”. The preamble to the Charter therefore cannot be summarily dismissed as a mere formal introduction and must be considered an important source of interpretation of the Charter.

2. Based on its wording, the preamble to the Charter serves three purposes: symbolic, explanatory and legal. From the symbolic point of view, it highlights the values underlying the text, above all democracy. However, the main purpose of the preamble is explanatory: it sets out the reasons for enacting the Charter and stresses its main principles. Only one provision in the preamble is “substantive”, establishing a right not mentioned in the Charter, namely “the right of citizens to participate in the conduct of public affairs”. This dimension has been implemented by the Additional Protocol (see below).

3. The preamble is divided into ten recitals. The first is a statement that can be found in almost any treaty. It points out that (unlike other Council of Europe treaties that are open to non-member States) the signatory States must already be members of the Council of Europe.<sup>4</sup> The second refers to Article 1 of the Statute of the Council of Europe, which entered into force on 5 August 1949, and reiterates the aims of the Council of Europe. It links local government to the aims of the Council itself. This link has been emphasised since the first initiatives aimed at strengthening local government in Europe, soon after the Second World War.<sup>5</sup> At the same time, this recital states that the aim of the Council of Europe is “to achieve a greater unity between its members”.

4. The third recital focuses on the methods by which the “greater unity” sought by the Council can be achieved, namely by the conclusion of “agreements in the administrative field”. The word “agreements” here stands for international treaties or conventions, and local public administration is clearly a matter pertaining to the “administrative field”.<sup>6</sup> As indicated in one of the following paragraphs, the Charter concerns the administrative organisation of the member States, asking them to apply its principles aimed at establishing a decentralised administrative system. The Charter itself is therefore one of those “agreements”.

5. In this connection, the preamble goes on to state that “local authorities are one of the main foundations of any democratic regime”. It points out the link between local government and democracy, which should be considered the “core” of the Charter. Based on an approach guided by the principle of decentralisation, the Charter assumes that local democracy is a cornerstone of democracy, so it once again connects the Charter with the founding aims of the Council of Europe: local authorities are considered to be one of the main foundations of democracy, which is the core mission of the Council of Europe.

6. The fifth recital establishes a right that is not mentioned in the articles of the Charter and is based solely on the preamble: “the right of citizens to participate in the conduct of public affairs”. The Charter itself actually refers only to local authorities, not to local citizens. This “right of citizens” was enshrined at a later date in the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority, which entered into force on 1 June 2012 (see below). Furthermore, the preamble states that, although the right of citizens to participate in the conduct of public affairs can be exercised at any level of government, the local level is the most appropriate.

7. The seventh recital refers to local authorities as administrative institutions (“operating in the administrative field”) with their own responsibilities, as a tool for the provision of an effective administration that is close to citizens. The following recital introduces the expression “local self-government” into the Charter. This expression (like its French equivalent “*autonomie locale*”) focuses on the “autonomy” of local authorities, avoiding any possible confusion with local outposts of State bodies. Accordingly, the concept of

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4 A proposal to open the Charter to accession by non-member States was introduced by Recommendation 218 (2007) *Opening of the European Charter of Local Self-Government to the accession of the European Community and of non-member States of the Council of Europe*. However, it was never implemented.

5 See the 1953 Report of the Committee on Regional Planning and Local Authorities (Doc. 210, of 23 September 1953), Inquiry into the national or international bodies connected with local government and examination of the best means whereby these bodies and the local authorities themselves may help in the propagation of the European idea.

6 This is clearer in the French version: “conclusion d’accords dans le domaine administratif”.

“local self-government”, as set out in the preamble, encompasses the ideas both of local democracy and of decentralisation.

8. The last recital of the preamble again summarises the main principles developed by the Charter: on the one hand, local democracy understood as the existence of local decision-making bodies that are “democratically constituted” (on this principle, see Article 3.2); on the other hand, *local autonomy* as the “discretion” enjoyed by local entities to exercise their responsibilities (see Articles 3.1, 4 and 9). It is worth noting that this is the only point in the entire Charter where the word “autonomy” is used in the English version.

9. The concluding sentence of the preamble (“*Have agreed as follows*”) is closely linked to its first paragraph (“*The member States of the Council of Europe, signatory hereto*”) and points out that the Charter has the status of a binding international convention. The other possible options (a simple declaration of principle or a protocol to the European Convention on Human Rights) were rejected by the framers of the Charter, and the “elaboration of an independent European Charter, similar in many respects to the existing Social Charter” was adopted in Resolution 126 (1981).<sup>7</sup> The question of the legal nature of the Charter was ultimately dealt with by the Conference of Ministers responsible for Local Government held in Rome from 6 to 8 November 1984.<sup>8</sup>

10. As noted above, the participation of citizens in political life at local level is strongly encouraged by the Charter. The preamble mentions it as a right of citizens that “*can be most directly exercised*” at local level. References are also found in Article 3.2, which refers to “*assemblies of citizens, referendums or any other form of direct citizen participation*”. Article 5, which deals with changes in local government boundaries, also refers to the “*prior consultation of the local communities concerned, possibly by means of a referendum*”. This right was reinforced by way of the Additional Protocol to the Charter on the right to participate in the affairs of a local authority, adopted on 16 November 2009 at the Conference of Ministers in Utrecht. It formally entered into force on 1 June 2012, when it had reached eight ratifications.

11. Previous Congress documents had already explored the right of citizens’ participation in local affairs, especially with reference to local referendums.<sup>9</sup> The Explanatory Report to the Additional Protocol points out that it draws on the preamble to the Charter: “... it was felt that the Charter, which commits the Parties to applying basic rules guaranteeing the political, administrative and financial independence of local authorities should also offer (the Parties) the possibility to extend the scope of their international legal obligations to include certain rights for individuals at local level”.

## Article 1

The Parties undertake to consider themselves bound by the following articles in the manner and to the extent prescribed in Article 12 of this Charter.

## Explanatory report

*Article 1 expresses the general undertaking of the parties to observe the principles of local self-government laid down in Part I of the Charter (Articles 2-11), to the extent prescribed by Article 12.*

<sup>7</sup> See Resolution 126 (1981) on principles of local self-government and the Explanatory Memorandum (*Harmegnies Report*), CPL(16)6, 21 September 1981, especially p. 11.

<sup>8</sup> On the question of the legal form that the Charter should take, a majority of ministers spoke in favour of a Convention while only a minority supported the use of a Recommendation.

<sup>9</sup> See Recommendation No. R(96)2 of the Committee of Ministers to member States of the Council of Europe on referendums and popular initiatives at local level; Recommendation (2001)19 of the Committee of Ministers to member States on the participation of citizens in local public life; Recommendation 113 (2002) on relations between the public, the local assembly and the executive in local democracy (the institutional framework of local democracy).

## Contemporary commentary

12. This article expresses the commitment of the Parties to observe the principles of local self-government laid down in Part I of the Charter (Articles 2-11), to the extent prescribed by Article 12. This provision allows for “variable geometry” in the acceptance of the core principles of the Charter (see below). Consequently, there is no general or universal way of ratifying this international treaty. In contrast, Part II must be accepted in its entirety by all the Parties, which are those sovereign countries that are member States of the Council of Europe (see the preamble) and have signed and ratified the Charter.<sup>10</sup> Therefore, States that are not members of the Council of Europe cannot sign or accept the Charter, according to Article 15.1.<sup>11</sup>

13. Beyond the apparently simple wording of this opening article, this provision deals with an important aspect of the Charter. The Parties “*undertake to consider themselves bound*”<sup>12</sup> by the Charter, or at least by some core articles thereof. “Bound” is the key word here. It means that the Parties are required to comply with the Charter, and to implement it faithfully. The Charter is an international treaty of regional scope that is binding like any other treaty. Consequently, the ratifying countries are required to implement it in accordance with the “*pacta sunt servanda*” principle, a long-standing principle of international law, and in the manner laid down by the UN Vienna Convention on the Law of Treaties (1968).

14. The Charter is not just a policy document, a diplomatic recommendation or a political declaration, but a genuine binding multilateral international treaty. The Charter is crystal clear on this and does not use the hortatory language common in other international treaties.<sup>13</sup> This interpretation of the Charter is consistent with the preparatory and approval process: the then “Conference of Local and Regional Powers” (the predecessor of the current Congress) rejected the idea of framing a mere policy document and explicitly embraced the idea of producing a genuine international treaty.<sup>14</sup> This interpretation is reinforced by the preamble to the Charter (see above).

15. The Congress has addressed the key issue of the legal nature of the Charter at various times.<sup>15</sup> For example, in Recommendation 395 (2017)<sup>16</sup> it stressed that “the Charter, ratified by 47 member States of the Council of Europe, as an international treaty has legal force and should be directly applied in member States, each according to its legal tradition”, and regretted “the tendency of the absence of direct applicability of the Charter which constitutes one of the root causes of the recurring problems in member States of the Council of Europe in the field of local and regional democracy”. The Congress went on to recommend that “national authorities ensure the direct applicability of the European Charter of Local Self-Government within their domestic legal systems and in particular, that the Charter be given due consideration in court proceedings”.

16. The binding effect of the Charter, proclaimed in this key provision, is therefore the cornerstone of its legal relevance and effectiveness and has multiple consequences for the Parties. Firstly, upon ratifying the Charter, a Party is required to promote and undertake the necessary legal or institutional amendments and arrangements so that the Charter’s principles are properly enshrined in its legal system (see Article 2). This will entail, among other things, amending its domestic local government legislation, or even (more desirable) amending its constitution in order to introduce the principle of self-government (Article 2).

17. Secondly, once those principles have been properly incorporated into the legal system and the country’s political system, there is an obligation on the State authorities (mainly the legislature and the

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10 The process of signature and ratification of the Charter was formally opened on 15 October 1985 and eventually ended on 23 October 2013, when San Marino deposited its instrument of ratification. Consequently, since 2013, the Charter has been signed and ratified by all the member States of the Council of Europe.

11 See footnote 2.

12 In French: “Les Parties s’engagent à se considérer comme liées...”

13 Such as “the Parties will endeavour, as appropriate or possible, to respect the principles of the Charter”, or any other similar language.

14 The status of a “Convention” is a result of Resolution 126 (1981). Previous attempts to draft principles of local self-government, such as Resolution 64 (1968) and Recommendation 615 (1970), took the form of mere declarations of principles.

15 See Recommendation 39 (1998) on the incorporation of the European Charter of Local Self-Government into the legal systems of ratifying countries and on the legal protection of local self-government and the report on “The incorporation of the European Charter of Local Self-Government into the legal systems of ratifying countries and on the legal protection of local self-government” – CPL(4)7 Part II; and Resolution 331 (2011): *The European Charter of Local Self-Government in domestic law* – CPL(21)2.

16 Debated and adopted by the Congress on 28 March 2017, 1st sitting (see Document CG32(2017)19, explanatory memorandum), co-rapporteurs: S. Dickson, United Kingdom (R, ILDG) and L. Verbeek, Netherlands (R, SOC).



executive) to respect and implement them, which means they should not abrogate, eliminate or undermine them.

18. Finally, the binding effect of the Charter should be ensured by the existence of an effective system of domestic legal remedies available to local authorities, so that they can properly defend their rights and powers (see Article 11).

## **Article 2 – Constitutional and legal foundation for local self-government**

The principle of local self-government shall be recognised in domestic legislation, and where practicable in the constitution.

### **Explanatory report**

*This article provides that the principle of local self-government should be enshrined in written law.*

*In view of the importance of the principle, it is further desirable that this should be achieved by including it in the fundamental text governing the organisation of the state, that is to say, the constitution. However, it was recognised that, in those countries in which the procedure for amending the constitution required assent by a special majority of the legislature or the assent of the whole population expressed in a referendum, it might not be possible to give a commitment to enshrine the principle of local self-government in the constitution. It was also recognised that countries not having a written constitution but a constitution to be found in various documents and sources might encounter specific difficulties or even be unable to make that commitment.*

*Account must also be taken of the fact that, in federal countries, local government may be regulated by the federated states rather than by the central federal government. For the federal states, this Charter in no way affects the division of powers and responsibilities between the federal state and the federated states.*

### **Contemporary commentary**

19. Article 2 is the opening provision of the substantive part of the Charter (Part I). For this reason, it has a foundational and symbolic value that goes beyond its legal force, as is also recognised by the Parties. In fact, all of them have accepted the article, which is one of the few provisions that cannot be the subject of a reservation (see Article 12). As for its binding nature, this provision requires the principle of local self-government to be expressly recognised at the domestic level, i.e. in written law (legislation). The practical and operational consequences of such recognition can be fully understood in the light of Article 11, according to which “the principles of local self-government as are enshrined in the constitution or domestic legislation” shall be protected by judicial remedies that local authorities can trigger (see below).

20. This article raises three main interpretative issues. The first relates to the meaning of the wording “recognition of the principle of local self-government”. The second has to do with the domestic sources of law in which the principle must be enshrined, and the third has to do with the relationship between those rules and the Charter.

21. To begin with, the expression “local self-government” represents the very core of the Charter. Accordingly, it has to be interpreted in a systematic way, taking particular account of the wording of Article 3 (concept of local self-government) and Article 4 (scope of local self-government). Therefore, local self-government is a multifaceted concept, consisting of all the aspects covered by the Charter.

22. Article 2 requires the Parties to recognise “the principle” of local self-government. This expression introduces into the Charter the difference between “principles” and “rules”, which is well known at the domestic level and developed by legal scholars and constitutional courts. Consequently, in order for a Party to comply with Article 2, it is deemed sufficient to recognise the core elements of local self-government in written rules, without the need for detailed regulation. This raises the question of what those “core elements” are. In this connection, a key role is played by the preamble and by Article 3 of the Charter, both of which refer to the aspects of local self-government that have always been considered the essential

features of this concept in the modern European tradition. As stated in the preamble, these core elements are:

- a. a “local authorities endowed with democratically constituted decision-making bodies”;
- b. “a wide degree of autonomy with regard to their responsibilities”;
- c. “ways and means by which those responsibilities are exercised and the resources required for their fulfilment”.

Therefore, in order to assess compliance with Article 2, it would be necessary to check not only the formal recognition of the principle in domestic legislation, but also whether those core elements are enshrined in that legislation.

23. As for the sources of law where the principle of local autonomy has to be enshrined, the Charter establishes two levels of recognition. The first is “domestic legislation”, a concept that must be construed as equivalent to written parliamentary legislation (“acts” or “statutes”). Legislation must be interpreted in a strict formal sense, as referring to primary sources, enacted by parliament, or equivalent, without the possibility for sub-legislative sources (for instance, administrative regulations), to satisfy the requirements of Article 2. This level of recognition is obligatory. The second level consists in the recognition of the principle of self-government in the constitution. This is considered to be “further desirable” by the Explanatory Report, but it is to be achieved “where practicable”, i.e. where the country has a written constitution and where there is a political consensus about doing so. Among the different forms of written constitutions, the “rigid” type (i.e., constitutions that can be amended only by a special procedure involving qualified majorities) should be considered as the source of law that can better fulfil the purpose of giving stability to the principle of local self-government. However, the Explanatory Report concedes that this may be problematic in some countries and consequently “it might not be possible to give a commitment to enshrine the principle of local self-government in the constitution”.

24. The historical precedents of this provision show that the reference to “domestic legislation” was absent in the draft text of the Charter of 1981, which established that “the principle of local self-government shall be recognised in constitutional law”. The reference to “constitutional law” and not the “constitution” was considered sufficient to take into account those countries whose constitutional law is not based on a single written text and the special position of federal States, where local government is regulated by the constitutions of the federated States.<sup>17</sup>

25. The third and final issue raised by Article 2 is the legal status of the Charter and its relationship with domestic rules. As stated in the preamble and in Article 1, the Charter is a binding document: as an international treaty, it has legal force and should be implemented faithfully by the Parties. This means that all domestic sources of law, including the constitution, must take the Charter into account. Therefore, the Charter should not only be a judicially enforceable legal instrument (Article 11) but also a guide for the legislature and possibly for amending the constitution.

### **Article 3 – 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.

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17 See Article 1 of the draft Charter of 1981 (Resolution 126/1981 of the Conference of Local and Regional Authorities of Europe); also: para. 1 of Parliamentary Assembly Resolution 64 (1968) on a Declaration of Principles on local autonomy, and para. 6.2 of Recommendation 615 (1970) Declaration of Principles on Local Autonomy, according to which “The principle of local autonomy shall be embodied in the constitution of each State”. The reference to the constitution was also included in the European Charter of Municipal Liberties of 1953, which is considered to be a predecessor of the Charter: “Municipal liberties must be defined by the constitution and guaranteed through the right to recourse to independent judicial organs”.

## Explanatory report

*This article lays down the essential characteristics of local self-government as they are to be understood for the purposes of the Charter.*

### Paragraph 1

*The notion of “ability” expresses the idea that the legal right to regulate and manage certain public affairs must be accompanied by the means of doing so effectively. The inclusion of the phrase “within the limits of the law” recognises the fact that this right and ability may be defined more closely by legislation.*

*“Under their own responsibility” stresses that local authorities should not be limited to merely acting as agents of higher authorities.*

*It is not possible to define precisely what affairs local authorities should be entitled to regulate and manage. Expressions such as “local affairs” and “own affairs” were rejected as too vague and difficult to interpret. The traditions of member states as to the affairs which are regarded as belonging to the preserve of local authorities differ greatly. In reality most affairs have both local and national implications and responsibility for them may vary between countries and over time and may even be shared between different levels of government. To limit local authorities to matters which do not have wider implications would risk relegating them to a marginal role. On the other hand, it is accepted that countries will wish to reserve certain functions, such as national defence, for central government. The intention of the Charter is that local authorities should have a broad range of responsibilities which are capable of being carried out at local level. The definition of these responsibilities is the subject of Article 4.*

### Paragraph 2

*The rights of self-government must be exercised by democratically constituted authorities. This principle is in accordance with the importance attached by the Council of Europe to democratic forms of government.*

*This right normally entails a representative assembly with or without executive bodies subordinate thereto, but allowance is also made for the possibility of direct democracy where this is provided for by statute.*

## Contemporary commentary

### Paragraph 1

26. This provision defines the content and the subjects of local self-government. As subjects, the Charter does not mention local citizens but “local authorities”. These are territorial public entities endowed with their own legal personality and having the power to make and enforce decisions. These authorities should have the democratic features described in Article 3.2. The Charter is aimed at various types of local authorities, since they are not confined to the lowest or “local” level of authority and may also encompass “regional” bodies (see Article 13). Therefore, the concept of “local authorities” (mentioned 36 times in the Charter) should be understood and interpreted in a broad sense. It comprises different types of entities such as urban and rural municipalities, county-type cities and capital cities with special status, as well as supra-municipal and provincial entities (*province, counties, Kreise, départements, etc.*).

27. These local authorities (and possibly regional authorities, see below on Article 13) have the legal right of self-government (or “autonomy”), including the power to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population. This legal right is fully protected by the Charter (see Article 11: right of recourse to a judicial remedy). Local authorities should also be able to exercise this legal right to self-government effectively through the proper institutional and regulatory means provided for in other articles of the Charter (Article 9: adequate financial resources; Article 6: organisational and human resources, etc.)

28. However, local autonomy does not necessarily apply to all the local entities present in one country, as the national authorities, on ratifying the Charter, may exclude certain local authorities from local autonomy, or may restrict the enjoyment of local self-government to certain authorities (see below on Article 13a).

29. On the other hand, the right to local self-government is not absolute or limitless: it must be exercised “*within the limits of the law*”, a phrase that was not indicated in the draft Charter of 1981<sup>18</sup> and derives from an amendment proposed by the British delegation. This makes it clear that the legal right and the real ability of local authorities to conduct self-government may be defined more precisely by domestic legislation, in accordance, of course, with the provisions of the Charter.

30. Local authorities should have the right and the ability “to regulate and manage” public affairs. This phrase stipulates that local authorities do not simply manage or take care of those affairs but also “regulate” them, i.e. they also issue local ordinances and by-laws. This does not mean that the Charter prescribes a certain level of regulatory autonomy that should be granted to local authorities, as it is up to the national legislation to define the level of that autonomy and the procedural or/and substantive conditions for primary or delegated legislative powers exercised by local governments. However, the complete deprivation of regulatory powers would be contrary to the Charter.

31. Moreover, local authorities should exercise their powers “under their own responsibility” and “in the interests of the local population”. Therefore, local authorities should not be limited to merely acting as agents of higher authorities. They can set their own political priorities and draw up strategies and public policies for the benefit of the local population. They are not accountable to higher-level authorities for their decisions within the limits of the law, but they are politically accountable to the local citizenry. Therefore, a central task of local authorities is to defend and promote the local public interest.

32. According to the Charter, local governments should regulate and manage a “substantial share of public affairs”. In the course of the drafting process, expressions such as “local affairs” and “own affairs” were rejected as too vague and difficult to interpret. The traditions of the Parties with regard to matters considered to be the natural or inherent preserve of local authorities differ greatly. For instance, in some countries, primary and secondary education as well as parts of public healthcare fall under the responsibility of local government, while in other countries these services are provided by the State or central government. In reality, most matters have both local and national implications and responsibility for them may vary between countries, depending on their traditions and constitutional frameworks.

33. Restricting the sphere of action of local authorities to matters without wider implications would risk relegating them to a marginal role, but it is accepted that the Parties may wish to reserve certain functions (such as national defence or criminal police) to central government. Accordingly, the Charter grants States a certain amount of discretion in terms of setting “the limits of the law” and identifying local authorities’ scope of action. However, it stresses that the share of public affairs managed by local government should be “substantial”, not residual. In other words, local entities should not be limited to secondary tasks or routine duties and should have a range of responsibilities with the possibility of drawing up and implementing appropriate and relevant local public policies for the benefit of the local population (in areas such as environmental protection, culture and education, basic infrastructure, urban development, housing, transport management and the like).

34. In the report on “Recurring issues”<sup>19</sup> adopted in 2017, the Congress expressed concerns about the limited powers conferred on local authorities in several countries, particularly the lack of genuine local government functions, thereby limiting their scope for action and the quality of the services they can deliver in the interests of citizens.

35. In addition, local authorities cannot regulate and manage a “substantial share of local affairs” effectively if the authorities are too small and/or are deprived of the resources necessary to perform their tasks. Such entities would have the legal “right” but would lack the real “ability” to act, as required by the Charter. Mergers of municipalities may therefore be advisable (provided that the rules on boundary changes in Article 5 are complied with). Another possibility is the use of inter-municipal co-operation to achieve joint service provision (Article 10.1).

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18 Resolution 126/1981 on the Principles of Local Self-Government, Conference of Local and Regional Authorities of Europe, Sixteenth Session (27-29 October 1981). Debated by the Conference and adopted on 29 October 1981, 3rd Sitting (see Doc. CPL(16)6, Part I, draft resolution presented by the Committee on Local Structures and Finance, Rapporteur: Mr L. Harmegnies).

19 Monitoring Committee, *Recurring issues based on assessments resulting from Congress monitoring and election observation missions* (reference period 2010-2016), 32nd Session CG32(2017)19final, 28 March 2017.

36. Finally, it should be pointed out that “*the right and the ability of local authorities... to regulate and manage a substantial share*” obviously introduces a corresponding obligation on the State, namely to guarantee that local authorities effectively have:

- a. conditions of service that permit the recruitment of high-quality staff on the basis of merit and competence (Article 6.2);
- b. conditions of office of local elected representatives that “provide for the free exercise of their functions” (Article 7.1);
- c. the right “to adequate financial resources of their own” (Article 9.1), “commensurate with their responsibilities” (Article 9.2), composed “in part at least” of “local taxes and charges of which, within the limits of statute, they have the power to determine the rate” (see Article 9.3).

#### *Paragraph 2*

37. Article 3.2 is the main statement of the democratic principle in the provisions of the Charter. The right of self-government must be exercised by democratically constituted authorities. The concept of local autonomy does not involve the mere transfer of powers and responsibilities from central to local authorities but also requires local government to express, directly or indirectly, the will of the local population. Therefore, the two paragraphs of Article 3 are closely related: “local self-government” is shaped in terms of “local democracy”. Paragraph 2 also indicates how the interests of the local population are determined, i.e. by the local population itself, by way of democratic decision-making.

38. In establishing the principle of local democracy, paragraph 2 is closely linked to Article 7, which refers to the conditions under which local elected representatives exercise their functions. Among those conditions, besides the principle of financial compensation (Article 7.2) and the requirement for legally established rules on incompatibility (Article 7.3), the reference in Article 7.1 to the free exercise of the functions of local elected representatives is of paramount importance.

39. On the basis of joint interpretation of Article 3.2 and Article 7.1 and in the light of the preamble to the Charter, it is possible to infer an important set of principles regarding “local democracy”. First of all, the choice of representative democracy at local level, in which decision-making power is exercised by councils or assemblies directly elected by the people. The representative assembly is the body required to deal with matters of greatest importance to the local community, such as budgetary or tax matters.<sup>20</sup> This principle determines that “the right of citizens to participate in the conduct of public affairs” mentioned in the preamble is mainly exercised at local level by electing local representatives. Local elections therefore play a key role in local democracy: local representatives must be directly elected in free elections, by secret ballot on the basis of direct, equal, universal suffrage.<sup>21</sup> This provision means that indirect or second-degree elections of local councils or assemblies are inconsistent with the Charter. The right to participation has been fleshed out in the Additional Protocol, which takes into account both forms of participation: a) as voters or candidates in local elections; b) direct involvement in consultative processes, local referendums and petitions.

40. Secondly, compared to representative democracy, direct democracy plays a complementary (rather than subsidiary) role. Article 3.2 states that the direct election of local representatives shall in no way affect “recourse to assemblies of citizens, referendums or any other form of direct citizen participation”. Therefore, the Charter explicitly leaves room for direct democracy in countries where it is a part of national identity.

41. Thirdly, as far as the structure of local government is concerned, the Charter does not opt in favour of any specific form of local political organisation and leaves the choice to domestic legislation. It only highlights the central role that must be afforded to elected councils and assemblies.<sup>22</sup> It does not mention a

<sup>20</sup> See Recommendation 113 (2002) on relations between the public, the local assembly and the executive in local democracy (the institutional framework of local democracy).

<sup>21</sup> On this basis, the Congress prepares reports and recommendations following the observation of local and/or regional elections. See Statutory Resolution CM/Res(2020)1,. In the conduct of such observation missions, the Congress applies the Venice Commission’s Code of Good Practice in Electoral Matters, of 25 October 2018.

<sup>22</sup> The reference to “executive organs” was absent in the 1968 and 1970 texts. It was introduced in the 1981 Resolution, para. 2.2 of which corresponds exactly to Article 3.2 of the Charter.

need to have executive bodies, or the way in which they should be appointed, but only states that elected councils or assemblies “may possess executive organs responsible to them”.<sup>23</sup>

42. The main interpretative problem stems from the fact that the executive organs are defined as “responsible” to the elected councils or assemblies. The interpretation of the concept of “responsibility” has important consequences for the form of government at local level. To begin with, it may be said that responsibility does mean the executive body must be elected by the council. Directly elected mayors, a trend that has spread across Europe in recent decades, were not really anticipated in 1985. Therefore, it could be argued that this provision of the Charter is not applicable to directly elected mayors, since they cannot be described as executive organs “of” the local council. In any case, in 2002 and 2004, the Congress stated that Article 3.2 leaves the door open to the direct election of the executive.<sup>24</sup>

43. On the other hand, this “responsibility” raises many concerns about the possibility of the local executive organ being appointed by central or regional government, as happens in some countries on the basis of historical tradition. With specific regard to the responsibility of appointed executive organs, domestic legislation should lay down procedures enabling the assembly to remove the executive organ from office (i.e., bring about its resignation or dismissal).<sup>25</sup>

44. In any case, the primacy of the directly and universally elected council or assembly means that this body takes the most relevant decisions (in some countries there is even an explicit presumption of competence for the council) and that there should be some tools to make the executive body accountable to the council. The concept of “responsibility” does not necessarily mean that the executive must be dismissible by the assembly (with the exception of appointed executives, for which dismissal by the assembly is deemed necessary).<sup>26</sup> Accordingly, a motion of no confidence passed by the elected council requiring the resignation of the executive organ is a possibility that the member States may introduce in domestic legislation.

45. The minimum that is necessary for the “responsibility” requirement to be met is the introduction of a system of effective supervision of the executive by the assembly, allowing for regular scrutiny of the executive’s activities. Congress Recommendation 113 (2002) also refers to the possibility of other means of supervision of the executive by the assembly: granting elected representatives the right to put written or oral questions to the executive; enhancing the opposition’s supervisory capacities by organising a special sitting of the assembly devoted to considering opposition proposals and granting the opposition the possibility of voicing its opinion in official municipal newsletters; or a system whereby the municipality makes it easier for opposition members to perform their duties.

46. Another problematic issue is the possibility of a recall referendum against the local executive as an instrument of political accountability. Based on Article 3.2, the responsibility of the executive (irrespective of how it is appointed) towards the elected council seems to be the main form of “political” accountability, but this does not totally rule out the possibility of the recall of the directly elected executive by the people, as a form of direct political accountability. However, if a motion for dismissal by the people is moved, “these procedures should at the same time carry all the guarantees necessary for stable local government”, as the Congress stated in Recommendation 113 (2002). These guarantees include precise definition of the issues on which the executive can be called to account; qualified majorities for votes of no confidence; reasonable time-limits for implementing the procedure, etc.

47. The European Commission for Democracy through Law (“Venice Commission” of the Council of Europe), in a 2019 report on the recall of mayors and local elected representatives,<sup>27</sup> considered that recall votes of directly elected mayors were consistent with international standards, although it pointed out the risks and dangers. The Venice Commission considered the recall of mayors “an acceptable, though exceptional, tool for political accountability”. The mechanism should only be used “when it is provided for by the national or regional law, if it is regulated very carefully and coupled with adequate and effective

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23 The Charter therefore establishes the general principle that the executive is answerable to the representative bodies, irrespective of the method of the executive’s election or appointment.

24 See Recommendation 113 (2002) on relations between the public, the local assembly and the executive in local democracy (the institutional framework of local democracy). See also: Recommendation 151 (2004) on the advantages and disadvantages of a directly elected local executive in the light of the principles of the Charter.

25 See Recommendation 113 (2002).

26 See Recommendation 113 (2002).

27 Venice Commission, CDL-AD(2019)011, Report, and Opinion No. 910/2017 on the recall of mayors and local elected representatives.

procedural safeguards to prevent its misuse". The report clearly set out a number of key conditions that should be met by such referendums:

- a. the recall should be permitted "only in respect of mayors who are directly elected, when and if it is prescribed by the Constitution or the national/regional law";
- b. the recall "should be used as an exceptional tool and national or regional legislation should regulate it very carefully and only as a complement to other democratic mechanisms which are available in a representative system";
- c. "legislation should provide for adequate procedural safeguards, ensuring transparency, legitimacy and legality of the recall process"; it should also "clearly identify the actors of the process and define sufficiently high thresholds for initiating (number of signatures or of members of the local council) and validating the recall; provide for a clear and reasonable timeframe; and for judicial review of the different steps and conditions in the process".<sup>28</sup>

48. However, the possibility of a recall referendum against the members of local councils or assemblies should not be allowed, taking into account the right to the free exercise of the functions of local elected representatives (Article 7.1). The Venice Commission pointed out in the above-mentioned report that "the principle of prohibition of the imperative mandate is relevant for individual members of local councils", even in countries in which this principle is normally considered to be applicable only to members of parliament.<sup>29</sup>

#### **Article 4 – 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.

#### **Explanatory report**

*As was explained in the comments on Article 3, it is not possible, nor would it be appropriate to attempt, to enumerate exhaustively the powers and responsibilities which should appertain to local government throughout Europe. However, this article lays down the general principles on which the responsibilities of local authorities and the nature of their powers should be based.*

<sup>28</sup> Paras. 121-123.

<sup>29</sup> See para. 18: "Even if constitutional provisions expressly prohibiting imperative mandate focus on parliamentarians at national level, in a State based on representative and deliberative democracy, the same principles should apply to all representatives, at regional and local level as well as at national level. Revocation and recall of elected representatives therefore appear at odds with the representation principle".

*Paragraph 1*

*Since the nature of local authorities' responsibilities is fundamental to the reality of local self-government, it is in the interests of both clarity and legal certainty that basic responsibilities should not be assigned to them on an ad hoc basis but should be sufficiently rooted in legislation. Normally, responsibilities should be conferred by the constitution or an Act of Parliament. However, notwithstanding the use of the word "statute" in this paragraph, it is acknowledged that in certain countries some delegation by parliament of power to assign specific responsibilities, particularly in respect of details or of matters requiring implementation as a result of European Community directives, may be desirable for the sake of efficiency, provided parliament retains adequate powers of supervision over the use of delegated powers. Furthermore, an exception applies in the case of member states of the European Community insofar as Community Regulations (which under Article 189 of the Treaty of Rome are directly applicable) may stipulate application of a specific measure at a given level of administration.*

*Paragraph 2*

*In addition to the responsibilities assigned by legislation to specific levels of authority, other needs or possibilities for action by public bodies may present themselves. Where these fields of action have local implications and are not excluded from the general competence obtaining in most member states, it is important to the conception of local authorities as political entities acting in their own right to promote the general welfare of their inhabitants that they have the right to exercise their initiative in these matters. The general rules under which they may act in such cases may, however, be laid down by law. In certain member states, however, local authorities must be able to adduce statutory authority for their actions. A wide discretion beyond specific responsibilities can be given to local authorities under such a system, whose existence is to that extent comprehended by Article 4, paragraph 2.*

*Paragraph 3*

*This paragraph articulates the general principle that the exercise of public responsibilities should be decentralised. This principle has been stated on a number of occasions within the context of the Council of Europe and in particular in the Conclusions of the Lisbon Conference of European Ministers responsible for Local Government in 1977. This implies that, unless the size or nature of a task is such that it requires to be treated within a larger territorial area or there are overriding considerations of efficiency or economy, it should generally be entrusted to the most local level of government.*

*This clause does not imply, however, a requirement systematically to decentralise functions to such local authorities which, because of their nature and size, can only accomplish limited tasks.*

*Paragraph 4*

*This paragraph is concerned with the problem of overlapping responsibilities. In the interest of clarity and for the sake of avoiding any tendency towards a progressive dilution of responsibility, powers should normally be full and exclusive. However, complementary action by different levels of authority is required in certain fields and it is important that in these cases the intervention by central or regional authorities takes place in accordance with clear legislative provisions.*

*Paragraph 5*

*The administrative structures of local authorities and their familiarity with local conditions may make them appropriate bodies to implement certain functions, the ultimate responsibility for which falls to supra-local authorities. It is important, however, in order that recourse to such delegation does not excessively impinge on the sphere of independent authority of the local level, that the latter should, when possible, be allowed to take account of local circumstances in exercising delegated powers. It is recognised, however, that in respect of certain functions, for example the issue of identity papers, the need for uniform regulations may leave no scope for local discretion.*

*Paragraph 6*

*Whilst paragraphs 1 to 5 deal with matters which come within the scope of local authorities, 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.*

## Contemporary commentary

### Paragraph 1

49. Article 4.1 requires clarity and legal certainty for the regulation of the “basic powers and responsibilities” of local government bodies. They should be prescribed by the constitution or by statute, so as to ensure predictability, permanence and protection for the benefit of local self-government. Therefore, the tasks of local authorities should not be assigned on an *ad hoc* basis and should be properly enshrined in written parliamentary legislation. Establishing local powers and competences by means of administrative regulation should be avoided and goes against the spirit of the Charter.

50. This general rule is not incompatible with the assignment to local authorities of powers and responsibilities “for specific purposes” in accordance with the law. This exception was included at a later stage in the draft Charter.<sup>30</sup> It allows the assignment of specific tasks not already included in the national legal framework for local government. This can be done by administrative regulation but must in any case be an exceptional mechanism.

51. The requirement for statutory legislation must be read in combination with other procedural safeguards provided by the Charter, such as the general principle of prior consultation of local authorities (Article 4.6.) whenever decisions are taken about local government responsibilities. Parliamentary procedures offer many more possibilities for timely and effective consultation of local authorities before legislative decisions on the assignment of their responsibilities are taken. This is, of course, still more the case when those responsibilities are set out in the constitution. Moreover, regulation by parliament also facilitates the implementation of other Charter safeguards, such as the principle of commensurability (Article 9.2) or the principle of equalisation (Article 9.5), since parliamentary procedures offer sufficient time and resources for accurate calculation of adequate funding for local government tasks.

52. The scope of local government responsibilities is vitally important for local democracy, so Article 3.1 requires a “substantial share of public affairs” to be regulated and managed by local authorities. Local democracy is not only about free and fair elections and should also enable locally elected politicians to draw up local strategies and policies in response to the needs of the local population.

53. In several cases, the competence of local authorities is defined in national legislation mainly as a responsibility for “local”, “home”, or “own” affairs. These are, however, vague and flexible concepts that are difficult to interpret and depend on different national traditions. The actual content of certain local functions and the procedures and instruments involved may differ considerably from one country to another, as can the understanding of their relative importance. Devolution is therefore essentially asymmetrical and evolutionary in nature. Nevertheless, lists of local government powers are found frequently in local government laws.

54. However, just as the perception and the appropriate size of a “substantial share of public affairs” (see Article 3.1 above) may vary dramatically from country to country, the same holds true for the concept of basic “powers and responsibilities”.<sup>31</sup> For instance, while in some countries local bodies have certain police powers, in other countries law and order is not a local responsibility at all. The categories of types of responsibility also differ among the Parties. While most countries distinguish between “own competence” for local affairs and tasks “delegated” by the State or regions (see Article 4.5), some also distinguish between “obligatory” and “voluntary” tasks, or even between “exclusive” and “joint” tasks shared with other authorities. Such distinctions must be made clear in the law, and this is an additional argument in favour of the need to describe and systematise powers and responsibilities in statutes or even in the constitution.

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30 The text of the draft European Charter of Local-Self Government (Resolution 126 (1981)) did not include the exception “for specific purposes”. The text only stated: “*The specific responsibilities of local authorities shall be prescribed by the constitution or by statute*”.

31 The English version of the Charter uses two different words, which could be interpreted as referring to two different things, but this is not confirmed by most language versions. In some language versions of the Charter, the term “powers and responsibilities” has simply been translated as “competences”, which seems to be weaker wording. The French version of the Charter refers to “compétences de base”, as do the German (“die grundlegenden Zuständigkeiten”) and the Italian (“le competenze di base”).

55. National legislation follows different patterns with regard to regulating the assignment of local responsibilities. In some countries, there are general statutory provisions that are broadly worded to describe the “matters” involved or the areas of such responsibilities (e.g. “elementary education”, “green spaces”, etc.). Then, as a second step, sector-specific legislation precisely identifies the concrete tasks or powers assigned to local governments. In other countries, there are no general provisions and local governments’ actual functions and responsibilities are specified in a wide range of sector-specific legislation. In such cases, it is nearly impossible to obtain a comprehensive picture of local authorities’ powers and responsibilities, a situation that could have an adverse effect on transparency and obstruct the proper consultation of local authorities in accordance with Article 4.6.

56. A further question is what powers and responsibilities can be considered to be “basic” and, in principle, require systematic statutory or even constitutional regulation. Taking into consideration the aforementioned plethora of national traditions, the definition of “basic” powers is bound to vary in the various Parties. National authorities have a wide degree of discretion in defining these “basic” powers. However, some quantitative and qualitative criteria may be employed in order to define “basic powers and responsibilities” in a country which is a signatory Party to the Charter. For instance, traditional tasks characterising the operation of local government in a specific country would certainly be included among those basic powers.

### Paragraph 2

57. Local authorities must have the right to exercise their initiative on matters not explicitly excluded from their competence by law. In this area, national legal traditions range from the “ultra vires” principle, which requires a statutory basis for any local government action,<sup>32</sup> to the “general competence” clause for municipalities in France or the “Aufgabenerfindungsrecht” in Germanic legal systems. Many countries have actually adopted the so-called clause of general competence for local authorities, which may also be combined with the subsidiarity principle (see Article 4.3). Others, unfortunately, have abolished it.<sup>33</sup>

58. Apart from trends towards re-centralisation, another threat to the ability of local authorities to exercise their initiative on matters that are not excluded from their competence nor assigned to other authorities is the increasing amount of detailed State or regional regulation for local government activities. Even in countries where local authorities’ status is strong, State or regional practices of overregulation can therefore undermine local autonomy. This danger is, of course, much greater in countries where local authorities can only choose from among a very limited range of activities. This is especially true with some countries that follow the English legal tradition (like the United Kingdom, Ireland and Cyprus), where local governments’ rights are formally restricted by the “ultra vires” principle, which means they can only carry out functions assigned directly to them by law. This approach has spread to several countries.

59. Restrictions on local bodies’ “*full discretion to exercise their initiative*” can also stem from management, fiscal and budgeting rules that require a sound legal basis for spending. This is especially true in countries hit by the financial crisis, where budgetary and financial management rules have become much stricter and less flexible for local bodies. These rules may subordinate local “initiatives” to proof that the local body has enough funds to carry out “new” tasks and that this can be done in a financially sustainable manner.

60. Finally, another area of concern is the existence of matters where responsibility is shared between local and regional/State bodies, or where the description of the respective governmental tasks is unclear. In such cases, Article 4.2 should be interpreted in conjunction with Article 3 and local initiative should be allowed, on the basis of the subsidiarity principle (see below).

### Paragraph 3

61. This paragraph of Article 4 introduces the “subsidiarity principle”, whereby public responsibilities should be exercised “in preference” by those authorities or bodies that are closest to the citizen. In this respect, it is essentially a political principle since its aim is to bring decision-making as close as possible to the citizen. It underlines the unavoidably political character of decentralisation, which can only be understood as granting elected authorities their own powers rather than delegated powers (see Article 4.5). Applied to

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<sup>32</sup> This was the reason why the initial wording of this paragraph in the Draft Charter (Resolution 126 (1981)) was changed and the terms “limits of law” were added. The initial wording was as follows: “*Local authorities shall have a general residual right to act on their own initiative with regard to any matter not expressly assigned to any other authority nor specifically excluded from the competence of local government*”.

<sup>33</sup> In Italy, for instance, the constitutional amendment of 2001 introduced the general competence clause and the subsidiarity principle. By contrast, in Spain the general competence clause was eliminated by a 2013 national statute.

local authorities, the principle of subsidiarity has a dual rationale: on the one hand, it increases (through proximity) the transparency and democratic basis of governmental decision-making; on the other hand, it increases the efficiency of governmental action since local bodies are the best suited to fulfil certain tasks (such as providing social assistance or housing) due to their direct knowledge of citizens' needs.

62. Moreover, this paragraph introduces criteria for the assignment of responsibility to another authority which is less close to the citizen: the distribution of responsibilities should weigh up *"the extent"* (size or scale) and the *"nature"* of the task itself, as well as the requirements of *"efficiency"* (not effectiveness) and *"economy"* (of scale, of scope, etc.). These are, of course, quite general criteria that need further clarification and specification, but subsidiarity is a key guiding principle for the definition of the *"substantial share of public affairs"* that belongs to local authorities (Article 3.1, see above); moreover it means that lawmakers should define *"basic powers"* (Article 4.1) of local authorities under the guidance of this principle.

63. The principle of subsidiarity cuts across all levels of local and regional government and introduces closeness to citizens as a primary criterion for the assignment of responsibilities. Local authorities can also invoke this principle whenever a local function is transferred to the regions. In other words, it is vitally important for the protection of local authorities against trends towards upscaling and re-centralisation that threaten to render local self-government meaningless.

64. The implementation of the principle of subsidiarity may have significant consequences: on the one hand, it can lead to a horizontal division of powers that distinguishes between tasks that must be entrusted to higher levels of government and those that can be performed effectively by local bodies.<sup>34</sup> On the other hand, the principle may lead to a distinction (frequent in federal States) between unity of legislation (adopted at federal or central level) and its implementation, which should be entrusted to regional and local authorities since they are better aware of the situation of society.<sup>35</sup>

65. Moreover, subsidiarity can reduce the rigidity that unity of application may involve and consequently ensure greater efficiency, responsiveness and accountability of government action.

#### Paragraph 4

66. Article 4.4 provides that powers assigned to local authorities *"shall normally"* be *full and exclusive* and that they may not be undermined or limited *"except as provided for by the law"*.<sup>36</sup> The law may certainly introduce limitations on the powers given to local authorities, but such limitations should be exceptional, based on objective reasons and interpreted narrowly.

67. On the other hand, overlapping responsibilities can become a threat to local autonomy. It is clear that higher-level authorities usually have more and better financial, organisational and human resources than local authorities. In practice, these "higher-level" authorities may tend to take control of the most attractive governmental responsibilities, possibly leaving only their implementation (or even just the most awkward part of it) to local authorities. Moreover, State or regional authorities may possibly have greater or even exclusive regulatory powers in various areas, allowing them to define the scope of action of local authorities in depth.

68. According to Recommendation CM/Rec(2007)4 of the Committee of Ministers to member States *"on local and regional public services"*,<sup>37</sup> lawmakers should establish a clear definition of the responsibilities of the various tiers of government and a balanced distribution of roles between these tiers in the field of local services. Such distribution of roles, accepted by the stakeholders concerned, would make it possible to avoid both a power vacuum and the duplication of powers. Moreover, this allocation of responsibilities should promote *predictability* and guarantee *continuity* in the provision of certain local public services that are

34 In France, for instance, there is a distinction between financial social benefits (e.g. pensions), which come under central government, and benefits *in kind* (e.g. housing), which are the responsibility of local government.

35 See *Definition and limits of the principle of subsidiarity*, Report prepared for the Steering Committee on Local and Regional Authorities (CDLR), Local and regional authorities in Europe, No. 55, Strasbourg 1994.

36 The initial version of this paragraph in the draft Charter of 1981 (Resolution 126/1981) was stronger, to the benefit of local authorities, since it included an additional safeguard in their favour. It was as follows: *"iv. Powers given to local government shall normally be full and exclusive. They may not be undermined or limited by administrative action on the part of a central or regional authority. In so far as a central or regional authority is empowered by the constitution or by statute to intervene in matters for which responsibility is shared with local authorities, the latter must retain the right to take initiatives and make decisions."* However, these safeguards were removed in the final version.

37 Adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies.

considered to be essential for the population.

69. In its report on “Recurring issues”,<sup>38</sup> the Congress stated that the imprecise delimitation of competences at the central, regional and local level can give rise to ambiguity and overlapping of responsibilities. Competences of local authorities must normally be full and exclusive and should in principle not be undermined or limited by another, central or regional, authority. The definition of local competences must seek to achieve clarification of the respective areas of competence of the different levels of governance without, however, limiting the local authority’s scope of action and while allowing it the discretion to develop and improve services. The Congress has repeatedly called on national authorities to clarify the areas of competence in line with the principle of subsidiarity so as to avoid ambiguity and overlapping of responsibilities.

70. Moreover, in several Congress monitoring reports, it has been pointed out that confusion and lack of clear demarcation of powers would blur responsibility and lead to a power shift to the benefit of higher-level authorities, especially central government. Due to the lack of resources at lower levels of government, complementary action by higher-level authorities is frequently required, but quite often this does not take place on the basis of parity and partnership and local authorities end up being reduced to mere agents of regional or national authorities

#### Paragraph 5

71. The delegation of powers between different levels of government is a long-standing tradition in many European States. Central government benefits from the territorial network formed by local and regional authorities: they are closer to citizens and offer local knowledge, they reflect local conditions and provide economies of scale. Local bodies and services therefore discharge delegated functions on behalf of higher-level authorities, most commonly on behalf of the State.

72. The delegation of powers and government functions may involve various mechanisms, ranging from legislation to ad hoc government decisions or regulations. Usually, the State or regional authorities retain the actual power and transfer its exercise or application to local entities. At the same time, the delegating bodies (in their capacity as “holders” of the power) continue to have the authority to instruct the local bodies how to implement the delegated tasks and to supervise their execution.

73. According to Recommendation CM/Rec(2007)4 of the Committee of Ministers to member States “*on local and regional public services*”, the proximity to the population of local public services is a fundamental necessity, and local authorities have a vital role to play in the provision of these services. In order to ensure that services are adapted to citizens’ needs and expectations, local entities should benefit from a high degree of decentralisation and a capacity for independent action in the provision of these services. Delegating authorities should adopt minimum standards for the protection of the users of the delegated services and create the necessary machinery for monitoring compliance with them.

74. On the other hand, State interventionism has sometimes led to overregulation and over-delegation, which may undermine the autonomy of local authorities and even divert local government from its elementary role and duties. Article 4.5 does not prohibit this, but Article 9.2 introduces the commensurability principle in order to protect the receiving local authorities from the financial burden of tasks delegated to them (see below). Article 4.5, for its part, aims at protecting local authorities as decision-makers and provides them with a power of discretion in an effort to prevent them from becoming mere “executive” agents of higher-level authorities.

75. In the final version of the Charter, the provision that discretion would be allowed “*insofar as possible*” was added, meaning that local discretion would be the case whenever other considerations and necessities did not override the need for discretion in adapting the exercise of delegated powers and tasks to local needs.<sup>39</sup> On the other hand, when local authorities perform tasks on behalf of higher-level authorities and without exercising their own discretion, they are acting as agents of those authorities. Obviously, if a great deal of local self-government activity is devoted to performing tasks on behalf of higher-level authorities

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38 Monitoring Committee, *Recurring issues based on assessments resulting from Congress monitoring and election observation missions (reference period 2010-2016)*, 32nd Session CG32(2017)19final, 28 March 2017.

39 The initial version of this paragraph in the draft Charter of 1981 (Resolution 126/1981) did not include the phrase “*insofar as possible*”. The initial version was as follows: “*Where powers are delegated to them by a central or regional authority, local authorities shall be given a degree of discretion in adapting the implementation of legislation to local conditions*”.

and this is done without local discretion, then the autonomy of local authorities may be seriously undermined.

#### Paragraph 6

76. The earlier version of this paragraph in the 1981 draft Charter introduced a right of local authorities “to an effective share” of participation at an early stage and for “for all matters exceeding the scope of local authority but which have particular local implications”.<sup>40</sup> This version was radically amended, as it was argued that this right could cover “virtually any matter”. The final version replaced “a right to an effective share” with a relative requirement for consultation (“insofar as possible”) with local authorities, but only “for all matters that concern them directly”, not for matters exceeding the local scope but having “particular local implications”. Consequently, the final version of the Charter introduced a procedural requirement for timely and appropriate consultation of local authorities.

77. Concerning the scope of consultation, a substantial limitation was introduced in that a direct concern is explicitly required, and indirect concerns or implications are ruled out. There is a general understanding, however, that a public body is “directly concerned” when the implementation of a government policy or any legal act directly affects its legal status, powers or financial situation. The requirement that consultations be conducted in an “appropriate way” implies that they should be organised in a way that allows local authorities to formulate and present their own comments and proposals. This does not mean that national and regional authorities will accept those proposals, but it is a requirement that opinions and proposals from local governments be presented, discussed and taken into consideration before a final decision is taken.

78. With the wording “due time” the Charter seeks to ensure that the form and timing of consultations are such that local authorities have the possibility of influencing the decision-making process and avoid situations where the right of local authorities to be consulted is overridden on such pretexts as urgency and cost-saving. The Charter does not specify any standard timeframe for “due time”, which is something that depends on the situation in each Party. However, as a minimum, this means that consultations should be held at the preparatory stage of drafting decisions and policies, not after their adoption.

79. Consultation is a key principle of the Charter and local authorities should be consulted by State (or regional) bodies in the discussion and approval of laws, regulations, plans and programmes affecting the legal and operational framework of local democracy. This principle ensures the genuine participation of local stakeholders in the decision-making process of State (or regional) government entities having the power to define the rights of local authorities. This also increases democracy insofar as central government politicians have to listen to the voice of local representatives and their associations. Moreover, this is required by the principles of transparency in government action, and by the principle of subsidiarity.

80. The Charter does not define or prescribe the forms of consultation or substantially regulate the consultation process. Since its basic function is to establish the general approach and framework for consultations, it may be concluded that the main process of consultation is dependent on three basic conditions:

- a. local authorities should be able to obtain full information on decisions and policies that concern them directly, and this information should be available at the initial stage of the decision-making process;
- b. local authorities should have the possibility of expressing their opinion on decisions and policies before these become legally binding documents; and
- c. local authorities should have the time and ability to prepare recommendations or alternative drafts and submit them for consideration.

81. In most cases, national legislation does not specify which national government institution is responsible for organising consultations with local government. Usually, the line ministry with the mandate to take a decision on a particular matter should be responsible for organising consultations. Accordingly, the

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<sup>40</sup> The full text in the Appendix “Draft European Charter of Local Self-Government” to Resolution 126 (1981) “on the principles of local self-government” of the Conference of Local and Regional Authorities of Europe (debated and adopted on 29 October 1981) read as follows: “Local authorities shall have the right to an effective share, at a sufficiently early stage, in the study, planning and decision-making processes for all matters exceeding the scope of a local authority but which have particular local implications”.

Congress *Strategy on the right of local authorities to be consulted by other levels of government* stressed the need “to create forms of continuous consultations between ministries and the political representatives of the different political levels”.<sup>41</sup>

82. Consultations are often held during the legislative process in national parliaments, specifically at the committee stage. National legislation rarely requires parliamentary committees to hold consultations. Since governments submit most legal initiatives to the legislature, parliamentary bodies might assume that the necessary consultations have already taken place at the preparatory stage. Nevertheless, parliamentary bodies are key decision-makers with regard to the legal framework for local government.

83. Usually, the national association of local authorities represents local governments in the consultation process (see below, on Article 10). However, this does not exclude the possibility of individual local governments being consulted. If the subject of consultation relates to more than one local government unit, then some co-ordination between local government representatives to protect their common interests is unavoidable.

84. Experience has shown that there are different ways to ensure that local authorities are appropriately consulted by State (or regional) authorities on any matter that affects their interests or statutory rights. The key mechanisms are as follows:

- a. Bilateral bodies and committees composed of representatives of the State and of local authorities (usually through their most relevant associations),
- b. Parliamentary committees,
- c. Specific bodies in the context of State proposals made to the EU (for instance, EU regional policy),
- d. Obligatory consultation established by sectoral legislation (for instance, environmental legislation),
- e. Participation in working groups of line ministries, expert committees, etc.,
- f. Informal negotiations and lobbying.

85. Consultation is a key instrument for the protection and promotion of local government, so the Charter includes other articles on the consultation of local authorities by other levels of government. There are two types of consultation:

- a. consultation on general terms, namely on every matter that has a direct impact on local authorities (Article 4.6); and
- b. special consultation on changes in local authority boundaries (Article 5) and on the distribution and allocation of financial resources to local authorities (Article 9.6).

As both types of consultation have the same legal status, their importance should be recognised equally by all levels of government. Article 4.6 of the Charter should also be applied in conjunction with Article 2.4 of the Additional Protocol to the Charter on the right to participate in the affairs of a local authority.<sup>42</sup>

86. The Congress has adopted several recommendations and resolutions on the right of local authorities to be consulted by other levels of government. In Recommendation 171 (2005),<sup>43</sup> it emphasised that the right of local authorities to be consulted is a fundamental principle of European legal and democratic practice, the aim of which is to contribute to good governance. Consultation must be an essential part of policy-making and administrative processes, enabling the wishes of local authorities to be known in good time and properly taken into account in the decisions of national and regional authorities. In this recommendation, the Congress welcomed the fact that “the consultation process is gradually becoming an essential feature of political negotiation between the State and local authorities” and that associations of local authorities play a very important part in the processes “of advancing common interests and carrying on institutional dialogue either with national government or with the regions”.

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41 Resolution 368 (2014), debated and adopted by the Congress on 27 March 2014, rapporteur: Anders Knape, Sweden (L, EPP/CCE). See also Resolution 437(2018) on the consultation of local authorities by higher levels of government, of 8 November 2018.

42 “In the planning and decision-making processes concerning measures to be undertaken to give effect to the right to participate in the affairs of a local authority, local authorities shall be consulted insofar as possible, in due time and in an appropriate way”.

43 Debated and approved by the Chamber of Local Authorities on 1 June 2005 and adopted by the Standing Committee of the Congress on 2 June 2005 (see Document CPL(12)5).

87. In Recommendation 328 (2012),<sup>44</sup> the Congress stressed that local authorities should have an active role in adopting the decisions on all matters that concern them and in a manner and timing such that they have a real opportunity to formulate and articulate their own views and proposals, in order to exercise influence. The Congress also asked member States to specify the format of consultations; to provide proper, clear and detailed information in writing well before the consultation; to involve local government expertise in drafting policies and legislation; to carefully analyse the implications of strategically important decisions; to make public the results of consultations; and to recognise the right of local authorities to petition and to redress when consultation procedures have not been properly conducted.

88. Finally, in its monitoring reports on local and regional democracy in the 47 member States, the Congress has documented numerous cases where consultation between local and regional authorities (mostly through their associations) and central government was problematic.<sup>45</sup> In this connection, the Congress identified the following issues:

- a. the absence of a formal consultation mechanism;
- b. the inadequate consultation of local and regional authority representatives or the insufficient use in practice of existing consultation mechanisms; and
- c. the weak nature of the means of consultation and the limited timeframe.

#### **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.

#### **Explanatory report**

*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.*

#### **Contemporary commentary**

89. Local and regional government reforms have been implemented in several European countries where the existence of very small and weak municipalities is accompanied by limited capacities leading to inefficiency and non-compliance with Charter requirements. A frequent strategy is the merger of small municipalities (especially in Northern and Central Europe, much less so in Southern Europe, an exception being Greece). On the other hand, inter-municipal co-operation is an alternative or parallel approach chosen by many countries in order to increase local government capacity and promote joint service provision to the local population.

90. In this context, the Charter does not prohibit mergers or impose a specific type of territorial or institutional form. Article 5 also refrains from introducing imperative criteria for the form and implementation of boundary changes, such as the social, demographic or economic criteria often applied in physical planning. However, the Charter does introduce procedural rules for changes in local authority boundaries. It is therefore a mandatory procedural requirement that no change in local boundaries may be adopted without consultation, which must take place at a timely stage before a final decision on the matter is made. This is required in order to promote the efficiency of consultation, in other words, the real possibility for local communities to be heard and to express their views at a time when their influence over merger

<sup>44</sup> Debated and adopted on 18 October 2012 by the Congress (see Document CG(23)II, explanatory memorandum).

<sup>45</sup> See Monitoring Committee, *Recurring issues based on assessments resulting from Congress monitoring and election observation missions (reference period 2010-2016)*, 32nd Session CG32(2017)19final, 28 March 2017.

decisions and their various aspects can actually be exercised and consultation is not merely formal or symbolic. Consequently, a boundary change carried out without consulting the local community would be in breach of Article 5.

91. The question that arises is who must be consulted. The Charter refers to the “local communities” concerned, a concept that clearly includes the local authorities directly affected (and perhaps neighbouring authorities), as well as inter-municipal co-operation organisations of which the municipalities directly affected are members. If the mergers include a considerable part of or the whole country, then the national associations of local and/or regional authorities should also take part in the consultation procedures.

92. The drafting of the Charter in the two official languages has also created linguistic ambiguity. The French version refers to “*collectivités locales*”, a term equivalent to the English “local authorities” (used throughout the Charter), while the English version refers to “local communities”. The latter would include the citizens of the local authorities concerned, in addition to the bodies representing them. The term “local communities” is only used in Article 5, while in other paragraphs of the Charter providing for consultation (Articles 4.6 and 9.6) the term “local authorities” is also used in the English text. Moreover, Article 5 is the only one where consultation can be implemented by means of referendum. Therefore, the term “local communities” should be interpreted in a way that also includes citizens and local civil society in general.

93. In Recommendation Rec(2004)12, the Committee of Ministers established some principles that should be complied with by the Parties when they engage in reforms of the boundaries or structure of local authorities.<sup>46</sup> Moreover, the objectives, methods and results of any process of reform should be fully compatible with the provisions of the Charter. Furthermore, where appropriate, the Signatory Parties should also ensure that the objectives, methods and results of the process of reform comply with their obligations under Article 7.1.b of the European Charter for Regional or Minority Languages and Article 16 of the Framework Convention for the Protection of National Minorities.

94. The aforementioned recommendations may also be applied where reform is undertaken by a higher tier of local government on behalf of a lower tier or where, within a pre-established framework, local authorities engage in reforming themselves, for example when two neighbouring cities or towns decide to merge or amalgamate, creating a new local entity to replace the old ones. Consultation according to the Charter does not rule out obligatory mergers or boundary changes, but the relevant procedures must be laid down by law.

95. In practice, prior consultation with local authorities is formally regulated and is of a binding nature when it comes to changes to local authority boundaries. In most countries, local government legislation clearly defines the consultation forms and procedures with regard to proposals for boundary changes, including the official consent of the local council, as well as a requirement to consult with local communities. It is suggested that these procedures be implemented not only for changing the boundaries of actual local entities but also for any restructuring of the local government system (establishment or abolition of tiers, changes in legislation on local and regional structures, etc.).<sup>47</sup> Article 5 of the Charter applies the principle of consultation in a specific context, namely in the case of changes to local authority boundaries. Among the different ways of conducting such specific consultation, the Charter clearly prefers local referendums, in which all local residents may express their views on the proposed changes or mergers.

#### **Article 6 – Appropriate administrative structures and resources for the tasks of local authorities**

- 1 Without prejudice to more general statutory provisions, local authorities shall be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management.
- 2 The conditions of service of local government employees shall be such as to permit the recruitment of high-quality staff on the basis of merit and competence; to this end adequate training opportunities, remuneration and career prospects shall be provided.

<sup>46</sup> Recommendation Rec(2004)12 of the Committee of Ministers to member States on the processes of reform of boundaries and/or structure of local and regional authorities (adopted by the Committee of Ministers on 20 October 2004 at the 900th meeting of the Ministers’ Deputies).

<sup>47</sup> See Congress Governance Committee, *The consultation of local authorities by higher levels of government*, CG35(2018)20final, 8 November 2018, p. 13.



## Explanatory report

### Paragraph 1

*The text of this paragraph deals not with the general constitution of the local authority and its council but rather with the way in which its administrative services are organised. Whilst central or regional laws may lay down certain general principles for this organisation, local authorities must be able to order their own administrative structures to take account of local circumstances and administrative efficiency. Limited specific requirements in central or regional laws concerning, for example, the establishment of certain committees or the creation of certain administrative posts are acceptable but these should not be so widespread as to impose a rigid organisational structure.*

### Paragraph 2

*In addition to the appropriate management structures, it is essential to the efficiency and effectiveness of a local authority that it is able to recruit and maintain a staff whose quality corresponds to the authority's responsibilities. This clearly depends to a large degree on the local authority's ability to offer sufficiently favourable conditions of service.*

## Contemporary commentary

### Paragraph 1

96. This paragraph states that local authorities have discretion to determine their own internal administrative structures or organisation. The power to organise their own affairs is accordingly a part of the autonomy enjoyed by local entities. This discretion, like the other elements of local autonomy, is not absolute but has to comply with the general statutory framework of government organisation ("without prejudice to more general statutory provisions"). The ultimate goal of the paragraph is to safeguard local autonomy by allowing local authorities to establish internal administrative structures and arrangements that enable them to meet the various needs of local residents and provide a full range of public services.

97. Consequently, domestic local government legislation may lay down fundamental guidelines for the internal administrative organisation of local authorities but must leave local authorities room for discretion so that they can choose and set up their own organisational structure. The power to take decisions in this field will depend on different factors, such as the existence of directly elected mayors or mayors elected by the council. In the former case, both the mayor and the local council may have the power to determine the internal structure of their respective organisational spheres. In the latter case, the power to determine the entire organisational structure of the local authority is usually vested in the council, which approves by-laws, statutes or similar internal rules establishing the different organs, services and divisions of local government. This power may be delegated to the mayor, for the specific organisation of the mayoral office.

98. The power of local entities to organise their affairs must be very broad and should include not only the power to decide on their internal local organisation but also the power to establish independent bodies such as local companies or agencies to improve the delivery of local services, as well as the power to conclude agreements with other local authorities (see remarks on Article 10). Local authorities should also have discretion to establish subordinate units and structures (such as municipal districts) in order to ensure that their responsibilities are discharged as effectively as possible. The article is designed to ensure that local authorities have the freedom to take decisions on the administrative structure that they then use to deliver services.

99. The other factor that determines local authorities' power to organise their affairs is the national tradition regarding local government. In this connection, there are many types of local administrative system in Europe because local administrative systems are unique to each country and reflect its own political, democratic and institutional traditions. Accordingly, the institutional make-up of a local authority may be conditioned by the relationship between its elected representatives, the mayor and the administrative structure. In this context, experience has shown that there are different types of interaction between the mayor/president (the executive organs) and the council, the extreme models being:

- a. the “strong mayor/president” model, where the mayor (or provincial president) is directly elected by the people, holds the most relevant powers and has de facto political pre-eminence over the council; and
- b. the “strong council” model, where the mayor (or president) is elected (or proposed) by the council; and where the local council is the supreme decision-making body, while the mayor has a subordinate position and is merely a kind of executive instrument at the disposal of the council.

Between these two extreme models, different types of internal organisation exist.

100. The power of local entities to organise their affairs should be exercised with due respect for the generally accepted principles of governance, such as effective management, rational structure and good administration; the adoption of decisions in open debate; and policies tailored to achieve results according to long-term planning goals and meeting collective needs and expectations.

#### *Paragraph 2*

101. This paragraph deals with an essential aspect of local government administration, namely the recruitment of personnel. Local bodies need to have human resources to carry out their tasks, as the local entity would otherwise be an empty and powerless government structure.

102. With regard to dealing with human resources at local level, the Charter mentions several essential principles and requirements that must be met by “conditions of service”. This wording means the legal, managerial and factual context in which local employees provide their services (“statut du personnel” in French). These “conditions of service” may be regulated in a general legal standard by the national parliament or government for the entire public sector or there may be specific laws and regulations (either at national or regional level) defining those conditions specifically for local governments. In this area, some countries have applied traditional principles of civil service relations to local employees (“fonction publique”), and local employees are considered full civil servants. Other countries rely on ordinary labour relations in employing staff at the local level. A combination of both models is not unusual.

103. With due respect for the general laws and regulations on the civil service, local authorities should have the discretion and the freedom to determine in particular the conditions of service of their own employees, as this is another dimension of local government. For this reason, this paragraph is closely connected with the previous one. Consequently, the conditions of service may also be determined independently by each local authority, by means of local by-laws or regulations, collective agreements and the like. In this way, local authorities are supposed to be capable of defining and implementing their own human resources policy to attract, recruit and retain skilled administrative staff. This has to be done in the context of the national (or regional) approach to public sector employment. The Congress has noted in its monitoring exercises that in many countries the national and/or regional authorities comprehensively regulate the status of local government staff, thus limiting the discretion of local authorities.

104. The power to hire their own staff and set employee remuneration is a relevant factor highlighting the organisational and institutional autonomy of local governments.

105. The Charter also lists the general goals that must be achieved by the “conditions of service” of local government employees: firstly, they must allow the recruitment of high-quality staff, on the basis of merit and competence. Therefore, each local authority should be empowered to recruit their own employees, with due respect for those paramount principles. Secondly, local authority employees should be offered adequate training opportunities, something that is done in many countries through specific national or regional schools of government or by the local authorities themselves. In this connection, training is a fundamental aspect of any human resources policy since it enables employees to update their knowledge and skills. Thirdly, local authority employees should also have adequate career prospects, that is to say, the possibility of upgrading their posts or being promoted within their professional field. These possibilities will, of course, largely depend on the size and resources of each local entity. Finally, local staff should receive proper remuneration for their work. Unfortunately, the Congress has noted that this is not the case where some member States are concerned owing to the very low level of remuneration offered to local employees, which prevents local authorities from hiring qualified staff.

106. Finally, local authority employees should at least be entitled to training opportunities, remuneration and career opportunities similar to employees at other levels of government, which is, unfortunately, not the rule in all countries. Accordingly, the paragraph is fully implemented when local authorities enjoy autonomy in the field of human resources, have discretion to decide on the remuneration of their staff according to the principles set out by regional or national government and can establish a sound and efficient staff policy.

#### **Article 7 – Conditions under which responsibilities at local level are exercised**

- 1 The conditions of office of local elected representatives shall provide for free exercise of their functions.
- 2 They shall allow for appropriate financial compensation for expenses incurred in the exercise of the office in question as well as, where appropriate, compensation for loss of earnings or remuneration for work done and corresponding social welfare protection.
- 3 Any functions and activities which are deemed incompatible with the holding of local elective office shall be determined by statute or fundamental legal principles.

#### **Explanatory report**

*This article aims at ensuring both that elected representatives may not be prevented by the action of a third party from carrying out their functions and that some categories of persons may not be prevented by purely material considerations from standing for office. The material considerations include appropriate financial compensation for expenses flowing from the exercise of functions and, as appropriate, compensation for loss of earnings and, particularly in the case of councillors elected to full-time executive responsibilities, remuneration and corresponding social welfare protection. In the spirit of this article, it would also be reasonable to expect provision to be made for the reintegration of those taking on a full-time post into normal working life at the end of their term of office.*

##### *Paragraph 3*

*This paragraph provides that disqualification from the holding of local elective office should only be based on objective legal criteria and not on ad hoc decisions. Normally this means that cases of incompatibility will be laid down by statute. However, cases have been noted of firmly entrenched, unwritten legal principles which seem to provide adequate guarantees.*

#### **Contemporary commentary**

##### *Paragraph 1*

107. Article 7.1 seeks to ensure that citizens are free to serve as elected representatives and are not prevented from holding political office owing to financial or material considerations. Nobody should be deterred from standing for election at local level; once elected, local councillors should not be prevented from discharging their duties effectively.<sup>48</sup> This paragraph is therefore closely linked to paragraph 2, which deals with financial compensation (see below). By “local elected representatives”, the Charter means any person holding political office (“mandat” in French) on the basis of an election (basically, local/provincial council members, mayors, etc.). This provision thus only covers the “democratically elected” level of the local authority, while professional bureaucracy is dealt with in Article 6 (see above).

108. The tendency across Europe is for most elected representatives to be employed part-time by local authorities, except, of course, when they discharge top-management or political functions (especially in medium-sized and large cities). The time devoted to performing the tasks of elected representative office ranges from a few hours a month to full-time employment. This affects the future career prospects of elected representatives, since political office is more attractive for those who have the time and financial

<sup>48</sup> On this question, see *Conditions of office of elected representatives*. 29th Session Strasbourg, 20-22 October 2015. CG/2015(29)15Final 22 October 2015. See also Resolution 393 (2015) and Recommendation 383 (2015).

means to live independently of local authority pay. Moreover, the skills and knowledge of elected representatives have an impact on the quality of local decisions since an elected office should be discharged professionally according to principles of good governance.

109. The conditions of office of local elected representatives may be regulated by national or regional laws, but, in any case, room should be left for each local authority to take its own discretionary decisions concerning the precise “conditions of office” that will apply to its own elected representatives. These conditions may be included in a general “human resources policy” on elected representatives or be adopted in a non-systematic way. The ultimate aim would be to ensure that elected representatives are an integral part of the human resources. Accordingly, local elected representatives’ duties should be suitably recognised in monetary terms and the representatives should be provided with the necessary material support (facilities, infrastructure, office space, etc.) to perform their tasks and duties properly. For instance, as teleworking is becoming more frequent, it is recommended that elected representatives be supported with suitable ICT to enable them to reconcile the performance of their duties as local councillors with their main professional or economic activity. At the same time, and for the purpose of balancing the public and private lives of elected representatives (when they are not employed full-time by the local authority), it is suggested that local authorities establish flexible planning of council meetings and other related local events.

110. Local authorities are thus required to provide all elected officials with the facilities, equipment and technical support needed to carry out their tasks. This has to be done irrespective of the officials’ political affiliation, so local authorities must not discriminate, on material grounds, against the different political factions or groupings forming part of the council.

111. Training is another important aspect for ensuring that local representatives perform their duties efficiently. As there are frequent changes in the legal situation of local government, local authorities are expected to provide elected representatives, especially newly elected councillors, with training programmes on the role, tasks, duties and limitations of local elected politicians. Such programmes are expected to provide insights into matters to do with the functioning of local authorities, such as finances, transparency, openness, codes of ethics, conflicts of interest, public consultation and accountability. Adopting the same approach, assistance might be provided for the vocational reintegration of officials who are not re-elected.

112. Apart from these aspects, the “free exercise” of the functions of local elected representatives may be affected by other features of social or political life. For instance, local elected representatives should be protected by law against threats from social media or against infringements of their privacy. Another example could be mentioned where the laws in a given country favour the “judicialisation” of local life, or where local elected representatives are *de facto* threatened with the prospect of being prosecuted even on trivial charges. In this connection, the fight against corruption should be balanced against the need to ensure that local politicians are not unduly threatened by the prospect of arbitrary prosecutions.

## *Paragraph 2*

113. This paragraph again refers to the conditions of office of local elected representatives and focuses on the financial aspect of their work. The aim of the paragraph is to ensure that local elected representatives receive “appropriate financial compensation” and to avoid the conditions of office preventing, limiting or even excluding potential local candidates from standing for office because of financial considerations.

114. By “appropriate financial compensation”, the Charter means the combination of several elements: firstly, “appropriate compensation for expenses incurred in the exercise of the office”; secondly, if this is the case (“where appropriate”), compensation for loss of earnings incurred by the local representative in discharging his/her duties for the local authority; thirdly, “remuneration for work done”, that is to say, a proper “salary” for the job; and, finally, social welfare protection.

115. Holding a political office involves not only attending local or regional council meetings but many other tasks, such as drafting documents and maintaining contacts and communications with constituents. Compensation schemes should therefore not be limited to fees for attending council meetings but also include such matters as travel expenses, compensation for loss of earnings and fees for a fixed period or recurring tasks. All in all, local bodies should provide adequate remuneration for work done by elected representatives and that remuneration should realistically reflect the workload of their office. In this connection, remuneration schemes for elected council members usually differ from those for mayors (or presidents), who are often employed full-time. In order to ensure full compliance with the paragraph, financial compensation schemes are expected to be part of a local authority’s human resources policy.

116. Local authorities are encouraged to design remuneration and compensation schemes in line with the country's public sector remuneration practices. Most countries have national or regional legislation on the remuneration of local elected representatives that leaves it more or less up to each local authority to determine the actual remuneration or salary of its political leaders. Authorities are advised to set a minimum and maximum threshold for remunerating local elected officials, in accordance with the principles of transparency and good governance. This would provide flexibility for local budgets with regard to financial compensation for elected representatives. At the same time, it allows local authorities some leeway in determining the actual remuneration for their mayors/presidents as well as the members of the local council.

117. Compensation schemes should also avoid disparities between authorities where financially stronger authorities are more attractive for potential candidates. If decisions on compensation schemes are made locally, they should be determined on the basis of local conditions, size and the responsibilities of the tasks discharged.

118. When elected representatives have a full-time position in the local entity, it is expected that remuneration schemes will include remuneration as well as social insurance (e.g., health insurance, pension fund contributions) based on the same principles as for elected representatives at the national level. Finally, costs related to the discharge of tasks directly incurred in conducting elected duties (i.e. reimbursables and allowances) should not be subject to taxation.

### *Paragraph 3*

119. This paragraph deals with compatibility between the holding of a representative position at local level and other activities, either public or private. In this case, it should be noted that there is some discrepancy between the English and French versions of the Explanatory Report. While the French version is in line with the wording of Article 7.3 of the Charter, the English version refers to "disqualification" from local elective office, which is a broader and different issue. The second sentence mentions the issue actually addressed by this paragraph, namely the incompatibility between the holding of local elected office and "any functions and activities". The Charter therefore does not refer to personal or factual circumstances preventing a person from becoming a candidate for a local office but deals with the "functions" and "activities" that cannot be made compatible with holding a local position once the candidate has been elected. This interpretation is reinforced by the title of Article 7: "Conditions under which responsibilities at local level *are exercised*", which implies that the local candidate has actually become a local representative.

120. Restrictions on holding elected office should be as limited as possible and set out in national laws, which means they apply to all levels of government. The main restrictions on holding office should be related to potential conflicts of interest or involve a commitment that prevents the local representative from discharging his or her duties for the local authority in a professional way.

121. In many countries, the holding of a local office is compatible with professional or economic activities if the employment at the local authority is marginal or part-time. The reverse applies if the work is full-time. In addition, many countries allow a person to be a mayor or local councillor and a member of parliament (or at least of the Senate or Upper House) at the same time. This gives local government a stronger voice in the decision-making process of the legislature.

122. In the light of this paragraph, the Parties are encouraged to prevent the simultaneous holding of more than one office (in French: "cumul de mandats"), where local elected representatives (mainly mayors/presidents) at the same time hold another position at local level or in regional or national government or in State or municipally-owned enterprises. It is commonly held that this practice of simultaneous office-holding might adversely affect the work of the elected representative, might create a conflict of interest and would not satisfy the principles of good governance.

### **Article 8 – Administrative supervision of local authorities' activities**

- 1 Any administrative supervision of local authorities may only be exercised according to such procedures and in such cases as are provided for by the constitution or by statute.

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| 2 | Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities. |
| 3 | Administrative supervision of local authorities shall be exercised in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect.  |

## Explanatory report

*This article deals with supervision of local authorities' activities by other levels of government. It is not concerned with enabling individuals to bring court actions against local authorities nor is it concerned with the appointment and activities of an ombudsman or other official body having an investigatory role. The provisions are above all relevant to the philosophy of supervision normally associated with the contrôles de tutelle which have long been the tradition in a number of countries. They thus concern such practices as requirements of prior authorisation to act or of confirmation for acts to take effect, power to annul a local authority's decisions, accounting controls, etc.*

### Paragraph 1

*Paragraph 1 provides that there should be an adequate legislative basis for supervision and thus rules out ad hoc supervisory procedures.*

### Paragraph 2

*Administrative supervision should normally be confined to the question of the legality of local authority action and not its expediency. One particular but not the sole exception is made in the case of delegated tasks, where the authority delegating its powers may wish to exercise some supervision over the way in which the task is carried out. This should not, however, result in preventing the local authority from exercising a certain discretion as provided for in Article 4, paragraph 5.*

### Paragraph 3

*The text draws its inspiration from the principle of "proportionality", whereby the controlling authority, in exercising its prerogatives, is obliged to use the method which affects local autonomy the least whilst at the same time achieving the desired result.*

*Since access to judicial remedies against the improper exercise of supervision and control is covered by Article 11, precise provisions on the conditions and manner of intervention in specific situations have not been felt to be essential.*

## Contemporary commentary

### Paragraph 1

123. Article 8 of the Charter deals with the "administrative" supervision of the activities of local authorities. It does not apply to any form of supervision or control exercised by the Ombudsman, by criminal prosecutors or by the legislature. The Explanatory Report limits the subject matter of this provision to the supervision that is carried out "by other levels of government", that is to say, by central authorities or bodies (line ministries, Ministry of the Interior, etc.) or regional authorities. However, it might be considered to include administrative supervision exercised by other authorities, for instance the supervision of a municipality by a province, county or island authority.

124. As for the matters that can be "supervised", the Charter refers to the broad concept of *activities*, which covers all types of plans, projects, rules, decisions or strategies approved at local level.

125. The interpretation of the concept of *supervision* employed in Article 8.1 should take into account possible differences in the two official language versions of the Charter. The English version uses the word "supervision", while the French employs the term "contrôle". The two words do not mean exactly the same

thing: in layman's terms, the word "supervision" may include simply taking a look at the activities of local authorities by means of "monitoring", "oversight" or "follow-up", while "contrôle" in French refers to clear and explicit participation in the decision-making process of the local body (in the French administrative tradition, this technique is known as "tutelle"). A systematic reading of Article 8 and the explanatory report leads to the conclusion that the word "supervision" is used with this latter meaning. Consequently, in Article 8 "supervision" means any form of intervention in the decision-making process of a local entity by which a higher administrative level explicitly or tacitly approves, clears, agrees, suspends or annuls a proposal or a final decision, rule or plan approved by a local entity. Examples of such supervision are, inter alia, reporting the decisions of local authorities to the supervising authority, requirements to obtain prior authorisation to act; confirmations for decisions to take effect, the power to annul a local authority's decision, accounting controls, etc.

126. From the perspective of local self-government, Article 8 is probably one of the most relevant, since "supervision" is the very opposite of autonomy, to the same extent as control is the very opposite of freedom or self-administration. The greater the supervisory powers of the higher levels of government are, the smaller the actual scope of local self-government will be.

127. The administrative supervision of the activities of local authorities may take on different forms and procedures. It may be "a priori", where the local authority has to obtain from the State or region prior approval or clearance for a particular decision, plan or project which the local entity intends adopting, or "ex post" ("a posteriori"), where the State or region has the power to annul, reverse or suspend a decision, plan or rule that has already been approved by the local authority.

128. The Charter establishes an important principle here in the area of inter-governmental supervision of local authorities: any form of such supervision must be provided for by the constitution or by statute, i.e., the Charter introduces the legality principle into the supervision of a local authority. This very important principle has various consequences: firstly, all forms of supervision must have a basis in law, which means that *ad hoc* procedures (instances of supervision that are not regulated) are prohibited. Supervision cannot be improvised or ordered by the higher level without a clear legal basis. This means, as a corollary, that the higher levels of government do not have a general or inherent power to supervise local authorities and can only employ methods of supervision that are strictly regulated by law.

129. At the same time, supervisory authorities must strictly comply with the procedures established by law for the exercise of such supervision (time, manner, competence, etc.), as the supervision would otherwise be void and could be challenged by the local entity supervised (including in the courts, see remarks below on Article 11).

130. In its seminal 2019 Recommendation to member States on supervision of local authorities' activities,<sup>49</sup> the Committee of Ministers of the Council of Europe underlined some key principles and guidelines in the area of supervision. Firstly, the Committee of Ministers declared that the 12 Principles of Good Democratic Governance are applicable to supervision. These principles include openness and transparency, the rule of law and competence and capacity. The Committee of Ministers also set out three different types of supervision: administrative, financial and democratic, only the first of which falls within the ambit of Article 8 of the Charter. The existence of administrative supervision is justified by the need to comply "with the principles of the rule of law and with the defined roles of various public authorities, as well as the protection of citizens' rights and the effective management of public property". Lastly, administrative supervision should be governed by a set of principles and guidelines, which include:

- i. the activities subject to supervision should be clearly specified by law;
- ii. compulsory automatic administrative supervision should be limited to activities of a certain significance;
- iii. administrative supervision should normally take place after the exercise of the competences (a posteriori);
- iv. a priori administrative supervision should be kept to a minimum and normally be reserved for delegated competences;

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<sup>49</sup> Recommendation CM/Rec(2019)3 of the Committee of Ministers to member States on supervision of local authorities' activities (adopted by the Committee of Ministers on 4 April 2019 at the 1343rd meeting of the Ministers' Deputies). This recommendation includes an appendix with *Guidelines on the improvement of the systems of supervision of local authorities' activities*.

- v. the law should define the time limit or period granted for the supervisory authority to perform the supervision; in the case of a priori supervision, absence of a decision by the supervisory authority within a specified time should mean that the planned activity may take effect.

## *Paragraph 2*

131. Depending on its scope, administrative supervision may consist in checks on legality or checks on expediency. Checks on legality are the type of checks by which the supervisory authority may only determine whether the local authority has complied with the applicable laws and regulations (on the substance or the procedure) in adopting its decisions. As far as checks on expediency are concerned, the supervisory body may rule or decide differently on the merits, that is to say, it can change the import of local decisions for reasons of expediency or policy assessment.

132. With regard to these two types of checks, the Charter is clear in laying down the general rule that they will (“normally”) aim only at ensuring compliance with the law and with constitutional principles. It thus proclaims a general preference for checks on legality over checks on expediency, the former being the only checks that in general comply with the Charter. With checks on legality, the supervisory body may verify, for instance, whether the local authority has acted within its powers, whether substantive regulatory standards or requirements have been met and whether powers have been exercised in accordance with legal procedures and within applicable time-limits, etc. In the case of checks on legality, the supervisory body cannot replace the local authority’s power of discretion with its own. In several European countries, local authorities have a general obligation to report all their decisions and ordinances to the higher level of government. This obligation is not in breach of the Charter, as it is a necessary step for the supervisory authority to discharge its own duties and powers and it forestalls any adverse effect of the local authority’s decision.

133. Checks on legality may assume different institutional and procedural forms. In some countries, the higher administrative body may address a petition or request to the local authority, asking it to modify or annul the decision challenged. If this request is disregarded, the higher administrative body may lodge a judicial appeal against the local authority, which means that the appropriateness of the check on legality must ultimately be determined independently by a court. In some countries, the supervisory body has the injunctive power to suspend the local decision until the lawsuit is adjudicated by the courts, although this possibility is usually restricted to serious breaches of the law or to matters of national or overriding interest. In any case, a mechanism by which national or regional bodies may reverse or annul decisions adopted by local authorities (of their own motion or by way of administrative appeal) is incompatible with Article 8 of the Charter.

134. Checks on expediency are not prohibited by the Charter but are severely restricted, for they are held to be in contradiction with the very meaning of local self-government. Administrative supervision based on expediency should be limited to the tasks that higher-level authorities (the supervisory bodies) have delegated to local authorities. Therefore, the type of local power is highly relevant for determining the nature and scope of the administrative supervision that may be exercised by higher administrative bodies in conformity with the Charter.

135. A different situation from “pure” administrative supervision is where a higher administrative authority may modify decisions, plans or projects initially approved at local level on the grounds that this is necessary in order to co-ordinate the activities of several local authorities, a power that is usually conferred on second-tier local authorities (provinces, counties, *départements*) or on regional/State authorities. In those cases, the power to co-ordinate measures (for instance, the planning of local infrastructure) is a legitimate one assigned to the higher level to ensure the more rational use of public monies or more harmonious spatial planning.

136. Other mechanisms may have an impact on decisions, plans and projects approved at local level: on the one hand, co-operation schemes among different tiers of government, which may involve a supervisory authority on the part of the “higher” level (for instance, co-funding of local projects); on the other, the power of regional (or State) bodies to decide on “supra-municipal” interests, when this power conflicts with the position of local authorities. In those cases, the competence of the higher authority is considered to be of greater institutional importance, and such an authority may reverse or modify a decision adopted by the



local authority.<sup>50</sup> When monitoring the Charter in member States, the Congress should be careful to check whether the mechanisms and powers of higher tiers of government described above do not conceal illegitimate checks on expediency over local authorities.

### Paragraph 3

137. This provision enshrines the principle of proportionality in the administrative supervision of local authorities' activities by higher-tier bodies. This principle is well known and applies to many different legal contexts. Here it stands for the premise that the intervention of the supervisory authority should be proportionate to the importance of the interests it intends to protect. In this connection, in 2019, the Committee of Ministers recommended that the governments of member States adopt appropriate measures to "put in place an appropriate legal, institutional and regulatory framework for supervision of local authorities' activities which is proportionate, in law and in practice, to the interests which it is intended to protect".<sup>51</sup>

138. Apparently, this principle is applicable to any form of inter-governmental supervision, whether *a priori* or *a posteriori* checks on legality or expediency. It is a generally worded principle that can only be tested in the precise context of an actual dispute, but it could be explained in simple terms by pointing out that in ensuring compliance with the law, the regional/State body should not "use a sledgehammer to crack a nut".<sup>52</sup>

139. Consequently, under the principle of proportionality, the regional or State body should intervene only to the extent necessary, taking into account the relevance of the public interest at stake, or the seriousness of the legal violation allegedly committed by the local authority. It should first consider the possibility of "de minimis" action (warnings, requests, negotiations) before using more intrusive powers, such as annulling or suspending a decision, plan or project adopted at local level. On the other hand, a system under which local authorities must obtain prior approval from regional or State bodies for minor or even trivial decisions would not comply with the principle of proportionality.

140. Notwithstanding its broad, theoretical parameters, the principle of proportionality is, of course, enforceable in the courts. The local authority concerned can bring an appropriate action alleging that the supervisory body failed to comply with the principle of proportionality when exercising its supervisory powers. The core aspects of local powers will thus be protected by the courts.

### Article 9 – 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.

<sup>50</sup> For instance, the Ministry of Defence wants to build a shooting range, relevant for national defence, in the territory of a local authority but the local council has declared the town "shooting-range free".

<sup>51</sup> Recommendation CM/Rec(2019)3 of the Committee of Ministers to member States on supervision of local authorities' activities.

<sup>52</sup> For instance, the dissolution or the suspension of a local council by a regional body, just because the local council approved a spatial plan that the region deems illegal, would be a clear violation of the principle of proportionality.

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| 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.   |

### **Explanatory report**

*The legal authority to perform certain functions is meaningless if local authorities are deprived of the financial resources to carry them out.*

#### *Paragraph 1*

*This paragraph seeks to ensure that local authorities shall not be deprived of their freedom to determine expenditure priorities.*

#### *Paragraph 2*

*The principle in question is that there should be an adequate relationship between the financial resources available to a local authority and the tasks it performs. This relationship is particularly strong for functions which have been specifically assigned to it.*

#### *Paragraph 3*

*The exercise of a political choice in weighing the benefit of services provided against the cost to the local taxpayer or the user is a fundamental duty of local elected representatives. It is accepted that central or regional statutes may set overall limits to local authorities' powers of taxation; however, they must not prevent the effective functioning of the process of local accountability.*

#### *Paragraph 4*

*Certain taxes or sources of local authority finance are, by their nature or for practical reasons, relatively unresponsive to the effects of inflation and other economic factors. Excessive reliance on such taxes or sources can bring local authorities into difficulties since the costs of providing services are directly influenced by the evolution of economic factors. It is recognised, however, that even in the case of relatively dynamic sources of revenue there can be no automatic link between costs and resource movements.*

#### *Paragraph 6*

*Where redistributed resources are allocated according to specific criteria set out in legislation, the provisions of this paragraph will be met if the local authorities are consulted during the preparation of the relevant legislation.*

#### *Paragraph 7*

*Block grants or even sector-specific grants are preferable, from the point of view of local authority freedom of action, to grants earmarked for specific projects. It would be unrealistic to expect all specific project grants to be replaced by general grants, particularly for major capital investments, but excessive recourse to such grants will severely restrict a local authority's freedom to exercise its discretion with regard to expenditure priorities. However, the part of total resources represented by grants varies considerably*

*between countries, and a higher ratio of project-specific grants to more general grants may be considered reasonable where grants as a whole represent a relatively insignificant proportion of total revenue.*

*The second sentence of Article 9, paragraph 7, seeks to ensure that a grant for a specific purpose does not undermine a local authority's freedom to exercise discretion within its own sphere of competence.*

#### *Paragraph 8*

*It is important for local authorities that they have access to loan finance for capital investment. The possible sources of such finance will, however, inevitably depend on the structure of each country's capital markets; procedures and conditions for access to these sources may be laid down by legislation.*

### **Contemporary commentary**

#### *Paragraph 1*

141. This paragraph is the opening provision of Article 9, which regulates a key dimension of local government, i.e. the financial resources of local authorities. It establishes two basic principles in the area of finance: first, local authorities should have their *own* financial resources; second, they should be free to decide how to spend those resources.

142. As far as the first dimension is concerned, local authorities should be “entitled” to their own resources. This is not just an expectation but a genuine “right”, an interpretation that is reinforced by the French version of the Charter, which speaks of a “right” (*les collectivités locales ont droit...*). This is accordingly another dimension of the concept of “local self-government” defined as a right – a right that should be protected by the means set out in Article 11 (see below). Typically, local entities’ own resources are made up of various components, such as local taxes, charges, fees, profits under private and commercial law, interest on their bank accounts and deposits. In many countries, penalties and fines (for traffic or environmental offences) form an important and ever-growing source of local entities’ own resources.

143. Local authorities’ own resources should be “adequate”, so this paragraph is closely linked with the following one (principle of commensurability of local finances, see below) and with paragraph 4 (which requires local finances to be diversified and buoyant).

144. The right to “adequate” resources is not absolute but has to be exercised “within national economic policy”. This is understandable because local government finances are just one component of the broader picture of the national public sector. Consequently, local finances are likely to follow the fluctuations of the national public sector as a whole and cannot be regarded as an area insulated from trends in economic growth or stagnation. This, incidentally, was the case in the recent economic crisis, which had a significant negative impact on many national public sectors and, by extension, on local finances.

145. Article 9 is designed to ensure local authorities’ fiscal capacity to implement the policies they are entitled to. There are several ways in which this may be achieved. One is to incorporate the principle of adequate financial resources in the constitution or the law. Such an approach protects local authorities from statutory changes and involves a formalised decision-making process for amending legal provisions. Another way is to rely on inclusive consultation procedures between associations of local authorities and central government based on memorandums of understanding.

146. The wording “adequate financial resources” incorporates the requirement to ensure proportionality between mandatory functions of local authorities and the funding available. Even if the principle of adequate finance has been legally recognised in domestic law, its implementation is crucial. The national economic context should allow financial resources for local authorities to be allocated or redistributed within the framework of national expenditure. Whatever the case, local authorities are expected to be duly consulted on how resources are allocated or redistributed to them and what principles will be involved in determining the amounts (see remarks on Article 9.6 below).

147. As noted above, this paragraph includes a second dimension, that of the freedom of local authorities to dispose of (at least) their “own resources” within the framework of their powers. Consequently, Article 9.1 enshrines both a right (to have their own resources) and the freedom (to freely spend those resources). This freedom takes the form of various spending decisions, the most important being the

adoption of an annual budget. Consequently, local authorities should be free to adopt their own budget. No supervision or preventive monitoring of the local budget should be carried out by other levels of government as far as decisions on spending the authority's own local resources are concerned. In this connection, Article 9.1 is linked to Article 8. The principle of adequate resources also includes local authorities' sound financial management in accordance with the legal framework for national public finances, budgetary planning and accountability. Any limits and restrictions imposed by higher authorities on local authorities should be specified and justified and aim at ensuring macroeconomic stability and sound financial management.

148. Quite a number of monitoring reports adopted so far by the Congress have underlined the fact that Article 9 is often poorly implemented in the countries monitored. In nearly all its recommendations on the subject, the Congress has identified the following concerns: over-centralised system of financing of local authorities; limited level of own income; inadequacy of financial resources freely available; lack of concomitant financing for delegated tasks; lack of transparent and predictable financial equalisation mechanisms; and lack of appropriate consultation on local finance matters.<sup>53</sup> Given the importance of this issue, the Congress has approved several resolutions and recommendations on the question of local authorities' finances.<sup>54</sup>

### *Paragraph 2*

149. This paragraph enshrines the so-called "principle of commensurability" of local authorities' financial resources. This means that the resources available to local authorities should be sufficient and commensurate with their functions and tasks. It does not mean that all these tasks should be financed with their own revenues. This paragraph states that the revenues and mandatory tasks of local authorities should be balanced to ensure that the financial resources available to those authorities are satisfactory in comparison to the tasks assigned to them by law.

150. According to the commensurability principle, any new task assigned or transferred to local authorities must be accompanied by the corresponding funding or source of income to cover the extra expenditure. Accordingly, and in order to safeguard the interests and the autonomy of local authorities, it is recommended that any transfer of powers and tasks be based on careful calculation of the actual service delivery costs to be met by local authorities. The costs of mandatory and delegated tasks might include several factors (such as the socioeconomic structure of residents) in order to produce more precise calculations and avoid arbitrary political decisions.

151. The principle of commensurability also entails evaluating an appropriate relationship between the financial resources available to a local authority and the tasks it performs. Consequently, the cost of local services should be regularly checked and updated, as the costs estimated when a function is transferred may differ from those incurred in the actual delivery of services and the development of a service.

152. At the same time, this paragraph emphasises the need for balance between local governments' total revenues and mandatory functions. This balance is particularly relevant for functions that have been specifically assigned to local authorities as delegated responsibilities or special ad hoc assignments. This principle assumes that the different types of local functions and the financial resources available should be assessed in the wider context of the delivery of those functions (e.g., population density, remote areas, demographic challenges). As it is difficult to draw a line between revenues and mandatory functions, it is recommended that local authorities' responsibilities and mandatory functions be appropriately assessed so that precise calculation of local authorities' actual operating costs ensures both transparency and the predictability of local finances.

### *Paragraph 3*

153. This paragraph deals with local taxes and charges, which are usually considered public-law resources of the public administration. This tax-levying power is a key part of the financial autonomy of local authorities. Here, the Charter regulates two different aspects, although in some jurisdictions the differences between the two may be blurred or even unclear. On the one hand, there are "true" taxes, which are levied by local authorities on different sources such as real-estate property, motor vehicles or professional activities (in some countries, even personal income). Their collection helps to finance the local body's

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<sup>53</sup> See Monitoring Committee, *Recurring issues based on assessments resulting from Congress monitoring and election observation missions (reference period 2010-2016)*, 32<sup>nd</sup> Session CG32(2017)19final, 28 March 2017.

<sup>54</sup> See Congress Resolution 372(2014), Recommendation 362(2014) and Resolution 438(2018), and the report: *Coping with the debt burden: local authorities in financial difficulty*.

entire operation. On the other hand, there are charges (or fees) that may be levied by the local entity as payment for the delivery of certain compulsory local services (such as rubbish collection) or as compensation for the use of local government facilities or properties. However, local taxes still remain local authorities' main source of income, whether collected directly or shared with other tiers of government.

154. The power to levy local taxes is direct evidence of local financial autonomy. However, local taxation systems differ from one country to another and reflect respective national traditions. Local taxation creates a basis for local revenues to finance local services, so it is a critical indicator for measuring local autonomy, together with the proportion of an authority's own income and the proportion of central government transfers in the total local budget. Accordingly, local authorities with a large share of local revenues in their budget and the consequent ability to finance their mandatory tasks have greater financial autonomy.

155. The Charter does not state that a local authority's own resources must contain a uniform proportion of local taxes, but it does make it mandatory for "at least" part to derive from local taxes and charges. This part should be large enough to ensure the greatest possible financial independence of local authorities.

156. In the Charter, local taxes are understood to be taxes levied by the local authority itself. It is not necessary for the tax to be "created" or "established" by the local body. Usually, local taxes are (subject to constitutional constraints) established and created by national or regional law, and the same law may define the tax as "local". Some local authorities (especially larger ones) are able to collect their own taxes with their own means or may have recourse to inter-municipal associations or service contracts. Medium-sized and small authorities, on the other hand, usually have their own taxes collected by other authorities, a method that may be close to "shared taxes". However, it is deemed that centrally collected local taxes and shared taxes undermine the extent of local autonomy.

157. In the light of Article 9.3, a tax is a genuine local tax only if the local authority is entitled to determine the rate, "within the limits of statute". Consequently, the applicable tax legislation may determine a band of tax rates, within which the local entity may freely determine the actual rate. Moreover, local authorities should also have the power to approve internal by-laws or regulations for determining the technical and operational aspects of tax collection (types of rate, deductions, tax relief programmes, etc.), so that the general provisions of the law are suited to local circumstances and needs.

158. Article 9.3 and Article 9.1 explicitly state the relevance of a local tax policy and the power to decide on rates as a precondition for local decentralisation. These two paragraphs deal with the issue of adequate financing and consequently with fiscal autonomy, where local authorities enjoy two substantial powers: the power to have enough resources and the power to raise revenues according to the local situation (i.e., the socio-demographic and socioeconomic conditions).

159. Local taxes are not only an important source of funding for local authorities. They are also a tool for making political choices, influencing the behaviour of local residents and companies and fostering local economic development. It is local voters who are affected by a tax, but they are also its main beneficiaries. This opens the way for political accountability.

160. In many countries, local fiscal autonomy is linked to a system of government monitoring of macroeconomic indicators. This system may lay down similar performance standards and indicators for local authorities, thus pushing local authorities towards the unification or standardisation of public services. Moreover, the economic crisis of 2009 led to austerity regimes in several countries, resulting in tax reforms and financial management restrictions with a tendency to grant central government more control over local taxation. However, those controls should be aimed solely at preventing excessive debt among local authorities and helping them to cope with their difficult financial situation.

#### *Paragraph 4*

161. This paragraph refers to two important features of the financial systems on which local authorities' resources are based: they must be diversified, and they must be "buoyant". Firstly, the principle of diversification: the diversification of income sources is crucial if local authorities are to maintain their autonomy during fluctuation in economic cycles. At the same time, income sources should be diverse to ensure local authorities' resilience to external economic factors. Consequently, local authorities' finances should not be based solely on taxes or transfers and should be bolstered by all possible sources of local income: transfers, local taxes, charges, fees, profits under private law, interest on bank accounts and deposits, penalties and fines, sales of property or goods and services offered to the private sector, etc.

162. The understanding in the Charter is that the diversification of local income helps local authorities to react promptly to changes in costs of local services and protects them from inflation or unexpected economic difficulties. In practice, local authorities' revenues are directly linked to their expenditure and to their power to take decisions on it, so the diversification of revenues is a key aspect of financial autonomy, reflecting the ability to generate or adjust revenues. In this way, even though the different sources of local authorities' income may be shaped by national economic policy, municipalities will have room for manoeuvre to offset the economic difficulties resulting from one specific source of income. For instance, if the local tax intake goes down for general economic reasons, the local authority may decide to increase local fees and charges paid by local service users (especially in urban areas) as a way to offset the decline. Consequently, the principle of diversification also implies leeway to adopt decisions on various sources of income and is a further dimension of local self-government.

163. Unlike the principle that a local authority's own resources must be sufficient, the principle of diversification is difficult to put in black-or-white terms, so assessment of compliance with it needs to take account of a complex range of factors and nuances.

164. The other point mentioned in this paragraph is that the systems of local finance should be "buoyant". This means that they should allow local finances to rise to meet the costs of the delivery of services, i.e. local finances should be able to adapt to new circumstances, needs and macroeconomic scenarios and be sufficient to cover service delivery. There are many manifestations of this principle. Firstly, transfers from regional or national bodies should be updated and possibly increased over the years in order to take account of price increases, or factors involved in the delivery of services.<sup>55</sup> Secondly, local authorities should also be allowed to increase their tax rates where such a decision is necessary owing to inflation. Finally, any decision by higher-level authorities to impose additional costs on local authorities should ensure that these costs are covered by new financial resources (i.e., new financial transfers, grants, etc.) or by an increase in existing resources. Accordingly, any delegation of tasks that does not indicate the source of funding to meet the cost of the new responsibility is not compatible with the principle of buoyancy.

#### *Paragraph 5*

165. This provision addresses the question of the financial situation of municipalities that are financially disadvantaged due to their being located in economically or geographically weak areas (transition, mountain or island regions), or simply because they are too small to obtain the amount of resources needed to perform their tasks. Asymmetries between the tasks and abilities of some municipalities are greater when the administrative arrangements in a given country are characterised by extreme differences in the size of municipalities, especially when local authorities of different sizes and abilities are required to carry out the same tasks. A system of financial equalisation for the benefit of financially weaker authorities is therefore necessary in all countries and is certainly essential in those where there are extreme asymmetries between local authorities.

166. Article 9.5 introduces a rule for the protection of financially weaker local authorities. The Charter mentions financial equalisation as the conventional method of assistance for weaker local authorities, as this is a well-known redistribution mechanism in the context of fiscal federalism. According to the OECD, "fiscal equalization is a transfer of fiscal resources across jurisdictions with the aim of offsetting differences in revenue raising capacity or public service cost."<sup>56</sup> Fiscal equalisation is country-specific since it is shaped by the wider institutional framework such as the size, number and geographical distribution of local governments and the responsibilities and fiscal resources allocated to each type of authority. Some equalisation arrangements involve the simple redistribution of fiscal resources while others help central governments closely shape and adapt public service delivery at the local level. The Charter therefore uses the term "*financial equalisation procedures or equivalent measures*", with the aim of including a range of different institutions, mechanisms and arrangements designed to redress the effects of the uneven distribution of funding.

167. According to Recommendation Rec (2005) 1 of the Committee of Ministers to member States concerning the financial resources of local and regional authorities,<sup>57</sup> "equalisation may be achieved by means of grants from a higher authority (vertical equalisation) or the redistribution of local tax revenues,

55 On compensation for local authorities, see Recommendation CM/Rec(2011)11 of the Committee of Ministers to member States *on the funding by higher-level authorities of new competences for local authorities* (adopted by the Committee of Ministers on 12 October 2011 at the 1123rd meeting of the Ministers' Deputies).

56 OECD Network on Fiscal Relations Across Levels of Government: *Fiscal Equalisation in OECD countries*, 2007.

57 Adopted by the Committee of Ministers on 19 January 2005 at the 912th meeting of the Ministers' Deputies.

particularly if they are collected by central government departments (horizontal equalisation) or a combination of both. Vertical equalisation generally lessens the risk of resentment among local authorities. Horizontal equalisation has the advantage of strengthening inter-municipal solidarity and giving local authorities greater independence from the central authority”.

168. Financial equalisation may take different forms, usually involving a system of transfers to the poorer authorities. A system of polynomial calculation is usually employed, under which different variables and quantitative and statistical data are harmonised. For the purpose of reducing financial disparities between local authorities, the Charter also calls for transparent and predictable financial equalisation mechanisms that must respond to changes in the economic climate. Monitoring reports have, however, often pointed out a lack of transparent and predictable financial equalisation mechanisms.<sup>58</sup>

169. Fiscal equalisation is a redistributive mechanism that must comply with a number of principles, such as fairness, stability, efficiency and transparency. In this context, arrangements tend to be complex. At the same time, the Charter stresses that equalisation procedures or equivalent measures should not “*diminish the discretion local authorities may exercise within their own sphere of responsibilities*”. This means that equalisation should not be subject to the same conditions as earmarked grants or produce the same effects, ultimately reducing the discretion that can be exercised by the receiving local authorities.

170. Article 9.5 is closely linked to Article 3.1 (see above). Given the need for the corresponding “effective capacity” of local authorities, it is therefore necessary for State authorities not only to encourage local entities to fully exploit their own resources but also to provide those bodies with the funds they need, which includes setting up a financial equalisation system. In this regard, Article 9.5 provides a supplementary safeguard for the “ability” to carry out local government functions referred to in Article 3.1. Article 9.5 aims to ensure sufficient financial resources, allowing local authorities not only to cover the expenses relating to their own and delegated functions but also those relating to the political and administrative apparatus necessary to carry out the tasks assigned to them. Without a sound financial base, the provisions of Article 3 of the Charter would be meaningless.

171. With reference to the opening words of Article 9.1 of the Charter, equalisation transfers must be regarded as local authorities’ own resources, “*of which they may freely dispose in the exercise of their powers*”. Although the methods in domestic legislation for calculating financial equalisation frequently employ expenditure parameters in specific sectors (for example, educational needs and environmental liabilities), municipalities must be free to use them according to their own discretion (see also Article 9.5). Classifying equalisation transfers as “own resources” implies that these funds cover only the costs incurred in performing local and mandatory tasks; they do not cover those incurred in the exercise of delegated powers. For these delegated tasks, a separate – vertical – mechanism for transferring funds must be put in place in accordance with Article 9.2.

172. Under Article 9.5, the Parties are required to protect financially weaker local authorities and must introduce a system of financial support for specific local authorities under certain conditions. With the establishment of such a corrective mechanism, the Parties also fulfil their obligation under Article 9.2 to ensure that local authorities’ financial resources are commensurate with the responsibilities provided for by the constitution or the law.

#### *Paragraph 6*

173. Article 9.6 of the Charter refers to a general principle of consultation, as enshrined at Article 4.6. In this case, consultation is required on the way in which redistributed resources are to be allocated to local authorities by other levels of government. No distinction is made between equalisation funds or other grants, or between general and earmarked grants. The legal form of the allocation decision is not specified. It may be an act of parliament, a decree, a ministerial order or a decision by another body belonging to a higher level of government (e.g., a regional or provincial assembly or executive committee). The usual bodies covered by this consultation requirement are the State or regional authorities in countries where local authority finances partly or totally depend on the regions. The method of allocating redistributed resources includes temporal aspects (for instance, the timing of financial transfers) and substantive aspects such as the different types and degrees of importance of criteria for such allocation. Therefore, under Article 9.6, consultation is not merely a compulsory procedure that has to take place in a timely

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<sup>58</sup> Monitoring Committee: *Recurring issues based on assessments resulting from Congress monitoring and election observation missions (reference period 2010-2016)*, 32nd Session CG32(2017)19final, 28 March 2017.

manner before a final decision is made. It must also cover the manner in which a decision is made and the criteria for doing so, not only the decision itself.

174. Local authorities should be consulted “in an appropriate manner”, which means that sufficient time must be available for consultation based on adequate information provided to local authorities. Since consultation will be about the allocation of resources, procedures must ensure openness, transparency and fairness. Regional or national associations of local authorities would be the appropriate bodies to consult regarding resource allocation since consultations with individual municipalities or small groups of local authorities would raise doubts about transparency and fairness.

175. National and regional authorities should also ensure that the form and timing of consultations are such that local authorities and their associations have the possibility, other than in exceptional circumstances, of properly informing and consulting their members, preparing and submitting constructive proposals and expressing their interests and opinions in time for them to be taken into account when drafting policies and legislation. The Charter does not specify any legal timeframe for consultation, as this will depend on the conditions and situation in each Party. The complexity of the issue must, however, always be considered so that the parties being heard have time to give a proper response. Creating favourable conditions and mechanisms for the effective consultation of local authorities by higher levels of government is in the interests of both parties, as it can increase mutual understanding of the challenges and realities faced, the division of responsibilities and the objectives and priorities of both parties.<sup>59</sup> As the Congress has stated, efficient consultation of local authorities by other levels of government rests on two pillars: a well-defined national regulatory framework and an appropriate institutional setting. The right of local authorities to be consulted should be enshrined in national legislation.

176. Domestic legislation should also specifically recognise the role of national associations of local authorities in the process of consultation of local authorities on financial matters by higher levels of government (see also Article 10 of the Charter). That legislation should also guarantee the right of complaint or petition of local authorities if they believe that necessary consultations have not been conducted properly or conducted at all (see Article 11).

177. The way in which financial consultations are carried out varies from country to country. Although there are cases where the national government discusses the whole system of local government finance with the national associations, regular consultations are usually held on specific financial issues, such as the criteria for the allocation of equalisation grants, changes in local taxation or local loans and debt. In some countries, the finance ministry sets up a special advisory board to discuss draft decisions and public finance policy. Advisory boards, policy meetings and round tables serve the purpose of reaching a political consensus on the allocation of resources to local authorities. Taking into consideration issues recurring in monitoring reports, the Congress has called for greater involvement of local authorities or their representatives in financial matters, including estimating the costs involved with any new State legislation that must be implemented at local level.<sup>60</sup>

#### *Paragraph 7*

178. This paragraph is concerned with grants to local authorities from higher levels of government, basically the State or the regions. In most European countries, grants are a very important resource for local authorities for performing their functions, and in some countries still the most important resource. They are a key tool for intergovernmental financial assistance. Local authorities receive centrally allocated grants for specific projects as well as general grants (transfers). The allocation of specific grants should be based on objective, transparent criteria justified by spending needs, and criteria for the allocation of general grants should be specified by law to enable local authorities to know in advance how much they are to receive in transfers – key information for them in developing sound financial planning and budgeting practices.

179. There are basically two types of grants to local authorities: “earmarked” and “non-earmarked”. The former are grants for specific local projects and infrastructure (roads and schools, environmental facilities, etc.) that the local entity cannot finance with its own funds. The latter are grants not linked to specific capital investments. From the perspective of local self-government, the Charter stresses a preference for

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<sup>59</sup> See Congress Governance Committee, *The consultation of local authorities by higher levels of government*, CG35(2018)20final, 8 November 2018, p. 4 and 6.

<sup>60</sup> Monitoring Committee, *Recurring issues based on assessments resulting from Congress monitoring and election observation missions* (reference period 2010-2016), 32nd Session CG32(2017)19final, 28 March 2017.



non-earmarked grants for the simple reason that with them the local authority enjoys greater discretion to decide how to spend the money received, while in the case of earmarked grants it is required to spend the funds on the projects concerned.

180. Despite this preference expressed in the Charter, in most countries it has not been possible to eliminate earmarked grants and replace them with general-purpose grants that allow local authorities to decide on the use of the funds on the basis of strategic decisions and expenditure preferences. However, the trend towards earmarked grants might limit local authorities' ability to exercise policy discretion. Unfortunately, in some countries, earmarked grants are awarded not only for the completion of specific projects (usually in the case of joint-financing schemes) but also even for financing specific operating costs (such as paying the salaries of primary school teachers). In those cases, the scope of local self-government is severely reduced. The approach involving fewer earmarked grants is therefore supported and encouraged by the Charter as the one that best complies with the principle of local self-government.

181. The ratio of conditional (earmarked) and unconditional (general) grants is considered a relevant indicator for measuring the financial autonomy of local authorities. Earmarked grants limit local autonomy, but conditionality might be part of the policy tools applied by central government to achieve nationwide policy goals. Earmarked grants are subject to tighter government control, which is why they have been favoured in recent years as a tool for implementing austerity measures.

#### *Paragraph 8*

182. Access to national capital markets is important for local authorities to finance investment projects necessary for the further development of the local area because in many cases the amount of their own "ordinary" resources is not sufficient to cover all the projects and plans decided on by local authorities to satisfy local needs. Consequently, the Charter refers to that access in a rather peremptory way: "local authorities *shall have access...*", implying that it is a right. However, like other rights enshrined in the Charter, this is not absolute and must be reconciled with the general policy on public sector spending and debt. This is why the Charter says that the access must take place "within the limits of the law".

183. Consequently, the law may establish requirements, procedures, criteria, limits or ceilings concerning local authorities' financial activities but in any event those standards should not deter them from borrowing on the national capital market or make it extremely difficult in practice. Moreover, as a result of the recent economic crisis, many countries have introduced austerity measures to deal effectively with public deficits, so access to the national capital market should be analysed in the context of national fiscal policy and the governance of public debt.

184. Countries' experience of access to national capital markets varies. Most countries accept that local authorities may borrow private capital for the implementation of long-term investment projects but not for covering operating costs. As a rule, this is prohibited by the principles of sound public financial management. Borrowing is an opportunity to increase resources in addition to local taxes, fees and transfers. Article 9.8 therefore regards borrowing as a tool to finance local policies and services.

185. Borrowing and possible restrictions on it are another dimension of local government, so the exclusion of local authorities from the national capital market may limit their autonomy. Most countries allow local authorities to raise loans freely for capital investment subject to certain regulatory limits or caps, while explicit authorisation is needed from regional or national bodies if those caps are exceeded. The recent economic crisis has increased the supervision and control of local finances, so the caps have been lowered and the need for authorisation has increased, in the context of efforts to address the public debt and the need to ensure macroeconomic stability.

186. The restrictions imposed by national (or regional) governments on borrowing by local authorities aim to prevent excessive debt among those authorities and ensure their financial viability and liquidity. Public entities with low debts and high revenues have greater capacity to carry out mandatory and even voluntary tasks, while municipalities with high debts and low incomes are less viable in the long run. It remains to be seen, however, how many of those restrictions are proportionate and justified, and which are now being used as a disguised form of control of local government.

## **Article 10 – Local authorities' right to associate**

- 1 Local authorities shall be entitled, in exercising their powers, to co-operate and, within the framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest.
- 2 The entitlement of local authorities to belong to an association for the protection and promotion of their common interests and to belong to an international association of local authorities shall be recognised in each State.
- 3 Local authorities shall be entitled, under such conditions as may be provided for by the law, to co-operate with their counterparts in other States.

### **Explanatory report**

#### *Paragraph 1*

*This paragraph covers co-operation between local authorities on a functional basis with a view in particular to seeking greater efficiency through joint projects or carrying out tasks which are beyond the capacity of a single authority. Such co-operation may take the form of the creation of consortia or federations of authorities, although a legal framework for the creation of such bodies may be laid down by legislation.*

#### *Paragraph 2*

*Paragraph 2 is concerned with associations whose objectives are much more general than the functional considerations of paragraph 1 and which normally seek to represent all local authorities of a particular kind or kinds on a regional or national basis. The right to belong to associations of this type does not however imply central government recognition of any individual association as a valid interlocutor.*

*In a Council of Europe instrument of this type, it is normal that the right to belong to associations at national level should be accompanied by a parallel right to belong to international associations, a number of which are active in the promotion of European unity along lines which accord with the aims laid down in the statute of the Council of Europe.*

*However, Article 10.2 leaves to individual member states the choice of means, legislative or otherwise, whereby the principle is given effect.*

#### *Paragraph 3*

*Direct co-operation with individual local authorities of other countries should also be permitted, although the manner of such co-operation must respect such legal rules as may exist in each country and take place within the framework of the powers of the authorities in question.*

*The provisions of the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (21 May 1980, ETS No. 106) are particularly relevant in this respect, although some forms of co-operation need not be restricted to frontier areas.*

### **Contemporary commentary**

#### *Paragraph 1*

187. Here the Charter sets out the “entitlement” (“droit” in the French version) of local authorities to co-operate with other local authorities in order to exercise their powers and carry out tasks of common interest. This is another fully-fledged right conferred on local authorities by the Charter. In fact, each of the three paragraphs in Article 10 recognises and sets out a specific and different right for local authorities, so local self-government is not only a general principle but a set of concrete rights.

188. In this and the other paragraphs of Article 10, the Charter uses clear language avoiding conditional or broadly drafted wording, so these provisions are directly applicable – a point which should be stressed given a certain current tendency to see the Charter as a weak or non-directly applicable treaty. A systematic interpretation of Article 10 indicates that the right set out in Article 10.1 is confined to local

authorities in a given country, since co-operation with local authorities in the territory of another State is specifically dealt with in Article 10.3.

189. Under Article 10.1, local authorities firstly have a general right to co-operate with one another in order to deliver local services or discharge their responsibilities. Inter-municipal co-operation (or co-operation at other levels of local government) is a fundamental tool for local authorities in terms of delivering services, in view of the fact that many of them are too small or too weak (financially speaking) to deliver all the services they are supposed to or to carry out any meaningful local strategy or policy.

190. Local co-operation is another manifestation of local government because it is one of the many ways in which local authorities may choose to overcome their lack of resources or small size. The decision on whether to co-operate or not or to devise a distinct strategy is accordingly a reflection of the functional autonomy of local authorities.

191. Co-operation allows greater efficiency and economies of scale for the entities involved, so that they are capable of undertaking joint projects or carrying out tasks that exceed the capacity of each of the partners. For this reason, different local authorities, usually within the same area, may wish to co-operate among themselves to implement their plans in partnership and to deliver services (such as rubbish collection, school transport, etc.) jointly. Local co-operation may take different forms: from “de facto” mutual assistance or simple bilateral agreements to the establishment of separate, joint administrative organisations.

192. This general entitlement to co-operate with other local entities is supplemented by a more specific right, namely the right to “form consortia”, i.e. to create separate organisations. At this point, the French version differs in that it refers simply to the right to associate (“le droit de s’associer”). This discrepancy between the two official language versions of the Charter is in a way resolved by the explanatory report, since the English version says that co-operation “may take the form of consortia or federations of authorities” while the French version states that the co-operation may take the form of an association or federation of authorities. The two language versions of the explanatory report therefore concur.

193. Although the Charter only mentions “consortia”, the specific right to create joint institutional structures, separate from the participating local authorities, may take various forms, for instance, the establishment of private-law foundations and companies or public-law bodies such as agencies, consortia, unions of federations or pools. In each case, the new joint organisation has its own legal personality which is separate from the participating local authorities. The procedures, requirements and steps that must be followed for the establishment of these organisations should be regulated by national (or regional) legislation, which is why the Charter states “within the limits of the law”.

194. The establishment of separate institutional structures for the joint delivery of local services is a positive strategy that saves money while increasing efficiency and generating economies of scale for all the partners. However, this option should not result in the responsibility of the participating local authorities being diluted or in the establishment of a body that is not transparent and where there is no political accountability for the decisions taken.

#### *Paragraph 2*

195. In this paragraph the Charter clearly recognises and sets out another right of local authorities: that to belong to

- a. a national association for the protection and promotion of their common interests; and
- b. an international association of local authorities.

At this point, the Charter is unusually categorical: that right “shall be recognised in each State” (having ratified the Charter and not having made a reservation to this paragraph). This is the only passage in the Charter where this wording is used, which reinforces the directly enforceable nature of the paragraph. The recognition of such a right in a given Party will usually be achieved by including it in the general legal framework for local government.

196. Although the Charter only speaks of the right to “belong” to or join an (already existing) association, it is clear that this should also be seen as recognising the inherent right to set up such associations. Otherwise, the very possibility of setting them up would be seriously hampered.

197. In the light of the experience after more than 30 years of application of the Charter, this right is almost universally upheld in the Parties. Consequently, in most countries, a major or predominant national association of local authorities (sometimes, the only such association) has been set up, on the initiative of the local authorities themselves. In federal or highly decentralised countries, *regional* associations of local authorities have also been established.

198. The “associations” referred to in paragraph 2 are different from those mentioned in paragraph 1. Those mentioned in Article 10.1 are set up for the delivery of local services, plans or projects and are instruments for discharging duties and responsibilities. Conversely, those referred to in Article 10.2 are instruments for the promotion of common interests. These associations play a fundamental role in representing and defending the rights, powers and interests of local authorities and they carry out many activities on behalf of them all (not only in favour of their members). Firstly, they carry out lobbying activities in national/regional governments or parliaments. Secondly, they are instrumental in the proper application of several articles of the Charter, such as Articles 9.6 and 4.6, since the consultation of local authorities, as required by those provisions, is usually conducted through the relevant associations. Thirdly, they may promote activities and initiatives for the benefit of all local authorities, such as training programmes, publications and studies, awareness-raising campaigns, etc. Moreover, in some countries, these associations are entitled to bring legal proceedings for the protection of the local authorities’ rights and interests, which means they are also instrumental in the proper implementation of Article 11 of the Charter.

199. The Congress has underlined the significant contribution that a unified national association of local authorities can make in discussions with the government on behalf of local governments or their local and regional associations. It has asked national authorities to develop more institutionalised and legally guaranteed consultation mechanisms – within a uniform timescale – so as to allow local authorities and their representative associations to provide input into those decisions taken at State level which might limit the autonomy of territorial authorities.<sup>61</sup>

200. Article 10.2 also recognises the right of local authorities to join international associations of local authorities, for the promotion and defence of their own interests and goals at global or international level. It should be noted here that, at European level, various such international organisations have been established, the oldest being the Council of European Municipalities and Regions (CEMR), which brings together the national associations of local and regional governments from most European countries.

### *Paragraph 3*

201. This paragraph reiterates the right of local authorities to co-operate, but it does so with a specific dimension: local authorities in one country are entitled to co-operate with local authorities in another country, so this paragraph sets out the right to engage in transnational, or transfrontier, co-operation, which is another form of inter-local co-operation.

202. Transfrontier co-operation may take different forms, from more or less symbolic town twinnings between distant local authorities to far-reaching co-operation agreements between local authorities that are located on either side of an international border but are confronted with the same problems, share a common cultural heritage, protect common natural resources or want to carry out projects of mutual interest. It is important to note that, although the official name of this co-operative activity is “transfrontier co-operation”, international co-operation is not restricted to local authorities located in border areas.

203. Although transfrontier co-operation is presented as a right of local authorities, this is not incompatible with two specific aspects. The first is that domestic local government legislation may establish steps, procedures or requirements concerning the exercise of such a right (such as the duty to report any planned co-operation with foreign local bodies). These requirements may be considered legitimate unless they seriously hamper the possibility of fruitful transfrontier co-operation. The second aspect is that this local activity may possibly overlap or conflict with the conduct of foreign affairs, which is a central government responsibility. In this case, the exercise of State powers and responsibilities should not mean arbitrary restriction of this right of local authorities, and in any case dialogue and negotiation mechanisms should be established to resolve any possible disputes.

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<sup>61</sup> See Congress Governance Committee, *The consultation of local authorities by higher levels of government*, CG35(2018)20final, 8 November 2018 (rapporteur: A. Knapé).

204. In the area of international or transfrontier co-operation between local authorities belonging to different States, the Council of Europe has elaborated several international instruments:

- The European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (ETS No. 106), which was opened for signature on 25 May 1980 and entered into force on 22 December 1981.
- The Additional Protocol to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (ETS No. 159), which was opened for signature on 9 November 1995 and entered into force on 1 December 1998.
- Protocol No. 2 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning interterritorial co-operation (ETS No. 169), which was opened for signature on 5 May 1998 and entered into force on 1 February 2001.
- Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euro-regional Co-operation Groupings (ETS No. 206), which was opened for signature on 16 November 2009 and entered into force on 1 March 2013.

205. Consequently, the Congress should monitor how those conventions have been implemented in the Signatory Parties when it conducts its periodic monitoring missions in the organisation's member States.

#### **Article 11 – Legal protection of local self-government**

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.

#### **Explanatory report**

*By recourse to a judicial remedy is meant access by a local authority to:*

- a. *a properly constituted court of law, or*
- b. *an equivalent, independent, statutory body having the power to rule and advise on the ruling respectively, as to whether any action, omission, decision or other administrative act is in accordance with the law.*

*An instance has been noted in one country where, although administrative decisions are not subject to an ordinary appeal to a court, it is possible to have recourse to an extraordinary remedy called an application for reopening of proceedings. This judicial remedy, which is available if the decision is based on a manifestly incorrect application of the law, is in accordance with the requirements of this article.*

#### **Contemporary commentary**

206. This article is of key importance in the internal structure of the Charter and should accordingly be examined by the Congress in depth in its regular monitoring activities. It stresses the requirement that local authorities should have the right to invoke and to defend in the courts the principles of local self-government, especially in the context of lawsuits in which their rights and powers are challenged or curtailed, or when those rights are endangered by the higher (central or regional) levels of government. "Recourse to a judicial remedy" means access by a local authority to either a properly constituted court of law or an equivalent, independent, statutory body.

207. This is therefore a crucial and instrumental device for ensuring that local autonomy is actually recognised and protected in a particular country. If this point is not recognised by national law, the domestic courts will in many cases not be able to ensure compliance with the principles of local self-government. If local autonomy is deprived of effective judicial safeguards, its substance and implementation will be largely left to the will or discretion of the political branches of government, i.e. the legislature and the executive, so this article may have significant repercussions in countries where intergovernmental disputes are

considered to be beyond the jurisdiction of courts and should instead be resolved by the political branches of government.

208. The aspects that ought to be protected in the courts are two-fold: on the one hand, the “free exercise” of the powers of local authorities; on the other hand, the principles of local self-government “as are enshrined in the constitution or domestic legislation”. As far as the former is concerned, “free exercise” here is equivalent to the “autonomous” or “full” implementation of the powers and responsibilities of local authorities. This is another way to describe discharging of powers that is free from governmental interference by regional or national bodies and authorities, an idea that ties in with Article 3.1 and Article 4.4 of the Charter. The latter aspect involves the principles of local self-government “as are enshrined in the constitution or domestic legislation”. This means that local authorities may invoke the recognition and protection of the principles of local government in the way provided for in domestic laws and regulations. However, a country that has ratified the Charter will normally have “transposed” or “incorporated” the Charter into national law, so by invoking those domestic laws and regulations, local authorities will be indirectly invoking the Charter itself.

209. On the other hand, technically speaking, this article does not allow local authorities to invoke each and every provision of the Charter in the courts, but only those accepted by the Signatory Party when it ratified the Charter, or at a later stage (see Article 12.3). Consequently, local authorities may not ask the courts to order compliance with those principles of self-government enshrined in the articles of the Charter which the State has not undertaken to accept (see Article 13).

210. According to Article 11, local authorities are supposed to have a “right”, not just an expectation or an interest. This article addresses a crucial aspect in the area of legal remedies, which is the right to bring legal action (*locus standi*).<sup>62</sup> Domestic legislation should grant local authorities the right to bring legal actions seeking to protect their rights and powers as governmental entities.

211. It is therefore not enough if, in a given member State, local authorities are granted the right to bring legal actions in a court of law in the same manner as any other legal entity (for instance, a business) in order to defend its private rights or property. The Charter refers to the ability of local authorities (as cogs in the wheels of public administration) to bring actions under public law against other levels of government (inter-governmental litigation). This may be necessary in a number of scenarios:

- a. for instance, the national or regional parliament approves a piece of legislation that reduces local authorities’ responsibilities or powers or significantly reduces local autonomy;
- b. central or regional governments approve a regulation introducing additional mechanisms of supervision over local authorities, etc.

212. With regard to the types of law courts in which local authorities should be able to bring actions, Article 11 must first be invoked in constitutional litigation. In the light of practical experience, legal recourse in Constitutional Courts is clearly the remedy that best protects local self-government against any reduction in its scope brought about by parliamentary legislation, so this is the best mechanism for ensuring that there are “abstract checks” on the conformity of domestic laws with the Charter. In this connection, the Congress has noted during its monitoring exercises that local authorities in some countries have the right to lodge appeals with the Constitutional Court alleging that a certain piece of legislation disregards or violates the principle of local self-government, while in other countries this is not possible either because there is no Constitutional Court at all,<sup>63</sup> or because domestic law does not give local authorities *locus standi*.<sup>64</sup>

213. The procedural capacity to bring actions in Constitutional Courts may take various forms, depending on national legal and constitutional traditions. For instance, in some countries the law requires a minimum number of local authorities to act collectively in order to qualify as applicants (Spain) while in other jurisdictions any local authority may appeal to the Constitutional Court (Latvia, Republic of Moldova). Allowing major national or regional associations of local authorities to bring actions in national Constitutional Courts is another positive approach.

214. Apart from litigation in Constitutional Courts (where such courts exist), local authorities should also have standing to bring lawsuits – as government entities – in Supreme Courts, Councils of State or

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62 “Droit à agir” in French.

63 United Kingdom, the Netherlands.

64 In Italy, for instance, only regions (not provinces or the municipalities) have the right to commence proceedings in the Constitutional Court.

equivalent courts of last resort. In these “ordinary courts”, local authorities may bring proceedings to challenge administrative regulations or decisions adopted by national or regional agencies and bodies if those decisions or regulations disregard or violate the principles of local self-government.

215. Various Congress monitoring reports have shown that, in several countries, local authorities (or a specific tier thereof) lack appropriate legal remedies, and that the judicial protection of local self-government is incomplete or even non-existent.<sup>65</sup>

216. Finally, in those member States that made reservations to this article at the time of ratifying the Charter, local authorities will not be able to assert this right in domestic courts, at least under the Charter itself. The number of member States that have not signed up to this provision is in any case very small.<sup>66</sup>

### Article 12 – Undertakings

- 1 Each Party undertakes to consider itself bound by at least twenty paragraphs of Part I of the Charter, at least ten of which shall be selected from among the following paragraphs:
  - Article 2,
  - Article 3, paragraphs 1 and 2,
  - Article 4, paragraphs 1, 2 and 4,
  - Article 5,
  - Article 7, paragraph 1,
  - Article 8, paragraph 2,
  - Article 9, paragraphs 1, 2 and 3,
  - Article 10, paragraph 1,
  - Article 11.
- 2 Each Contracting State, when depositing its instrument of ratification, acceptance or approval, shall notify to the Secretary General of the Council of Europe of the paragraphs selected in accordance with the provisions of paragraph 1 of this article.
- 3 Any Party may, at any later time, notify the Secretary General that it considers itself bound by any paragraphs of this Charter which it has not already accepted under the terms of paragraph 1 of this article. Such undertakings subsequently given shall be deemed to be an integral part of the ratification, acceptance or approval of the Party so notifying, and shall have the same effect as from the first day of the month following the expiration of a period of three months after the date of the receipt of the notification by the Secretary General.

### Explanatory report

*The formulation of the principles of local self-government laid down in Part I of the Charter had to try to reconcile the wide diversity of legal systems and local government structures existing in the member states of the Council of Europe. Nevertheless, it is recognised that individual governments may still face constitutional or practical impediments to subscribing to particular provisions of the Charter.*

*This article accordingly adopts “the compulsory nucleus” system first established by the European Social Charter, by providing that the Parties to the European Charter of Local Self-Government are required to subscribe to at least twenty of the thirty paragraphs of Part I of the Charter, including at least ten from a nucleus of fourteen basic principles. However, as the ultimate aim remains compliance with all the provisions of the Charter, the Parties are specifically enabled to add to their undertakings as and when this becomes possible.*

<sup>65</sup> See *Comparative analysis on the implementation of the European Charter of Local Self-Government in 47 member States*, Rapporteurs: X. Cadoret & K. Van Overmeire, CG32(2017)22final, of 28 March 2017, page 30.

<sup>66</sup> In July 2019, this group included only three Parties: Austria, the Netherlands and Turkey.

## Contemporary commentary

### *Paragraph 1*

217. This provision specifies the level, extent and form of ratification of the Charter by the member States of the Council of Europe. As noted above, the Charter allows for different degrees of ratification by the Parties. Ratification of the Charter is not a matter of “black-or-white” acceptance. On the contrary, the Charter allows for different forms of ratification: either full and complete acceptance from the outset or gradual acceptance by making subsequent declarations. This is because, as the Explanatory Report states, at the time the Charter was drafted, the idea was that the formulation of the principles of local self-government (laid down in Part I of the Charter) should try to reconcile the great diversity of legal systems and local government structures in existence at the time in the member States of the Council of Europe.

218. At the same time, this is the opening provision of Part II, the part of the Charter that cannot be subject to reservations by any State upon ratification of the treaty.

219. To better understand how this provision works, it is worth briefly describing the Charter’s structure. The Charter is composed of the preamble and a total of 18 articles. Articles 2 to 18 are set out in three parts, while Article 1 is excluded from these parts and stands as a key initial provision of its own. The remaining 17 articles are included in Part I, Part II or Part III. Part I sets out the “hard core” of the Charter and lists the various principles and component elements of local self-government. Part II contains “miscellaneous provisions” (Articles 12-14) and must be accepted by the member States when ratifying the Charter. The same applies to Part III (Articles 15 to 18), which reiterates standard international law clauses for conventions and agreements concluded at the Council of Europe (signature, ratification, denunciation, etc.). These articles must also be accepted by any ratifying State.

220. As noted above, Part I represents the “hard core” of local self-government, which is reflected in 13 articles, some of which contain only one paragraph while others have two or more, making a total of 30 paragraphs. Any country wishing to ratify the Charter must undertake to consider itself bound by at least 20 paragraphs. In addition, at least 10 of the latter must be selected from the list in Article 12.1, which is why those paragraphs are considered to be the minimum “compulsory nucleus” of the Charter.

221. It could therefore be said that the Charter contains two types of commitments: “obligatory” and “optional”. The obligatory or minimum commitments are listed in detail here in Article 12.1. The optional commitments are at the States’ political discretion and may vary from country to country. The overall picture in terms of ratification of the Charter is therefore characterised by variable geometry.

### *Paragraph 2*

222. This provision is a technical addition to the previous paragraph. Each contracting State is required to specify which paragraphs of the Charter have been selected for ratification, from the list in Article 12.1, and this must be done when it deposits its instrument of ratification (the usual practice), although provision was made for States to join the Charter through acceptance or approval (see Article 15). This acceptance must be formalised by means of notification to the Secretary General of the Council of Europe.

223. This provision is also important and unusual in the context of ordinary international law because the Charter, unlike many international instruments, does not explicitly provide for the possibility of countries making genuine reservations (in the technical sense) upon ratifying the Charter. There is no specific provision in the Charter that allows this.

224. It could be argued (at least theoretically) that a country could still make reservations to the Charter under general provisions of international law because the Charter does not prohibit such reservations.<sup>67</sup> However, and against the background of more than 30 years’ experience in applying the Charter, the idea has clearly taken hold that the Charter does not allow “genuine” reservations but only “ratified” or “non-ratified” provisions and that the latter can only apply under Part I of the Charter, while Parts II and III are compulsory for every country in all cases.<sup>68</sup>

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67 On reservations in ordinary international law, see, in general, Article 19 of the 1969 Vienna Convention on the Law of Treaties.

68 See the Congress report on *Reservations and declarations to the European Charter of Local Self-Government* of 28 September 2011. See also Congress Resolution 220 (2011) and Recommendation 314 (2011), both adopted on 20 October 2011.



225. When a member State, upon ratifying the Charter, does not intend to make reservations regarding its application, it may include a short sentence or declaration in its instrument of ratification to the effect that it has ratified the Charter in full;<sup>69</sup> or it may simply say nothing and not include any statement at all, which is also a way of accepting the Charter in full.<sup>70</sup>

### Paragraph 3

226. The framers of the Charter hoped that the commitments undertaken by the signatory Parties would not remain immutable over time and that their sets of obligations would be enlarged and deepened at a later stage, when their institutional and political circumstances enabled them to do so. This is why there is provision for any Party, after its ratification of the Charter, to declare itself bound by those paragraphs of Part I that were excluded from its original commitment.

227. As the ultimate aim of the Congress was to ensure compliance with all the provisions of the Charter, the Parties are specifically able to add to their undertakings as and when this becomes possible. As the history of the Charter shows, this option has been taken up extensively by the member States of the Council of Europe and many of them have gradually expanded their commitments to include the entire Charter.<sup>71</sup> The fact that 20 member States had ratified all the provisions of the Charter in full as of the end of July 2019 provides good evidence of the successful implementation of this mechanism.<sup>72</sup>

228. It is worthwhile stressing that it is expected and desirable that the possibility of a member State “modifying” the extent and scope of its commitments under the Charter may go in only one direction, namely that of adding to those commitments or reducing the number of exceptions previously declared by a Party. This has actually been member States’ usual practice since 1985, and it could be concluded from this past and present pattern that there has, at least de facto, been a kind of “non-regression” in acceptance of the Charter obligations. However, it should not be forgotten that, given the nature of this intergovernmental treaty, the Signatory Parties retain the ultimate option of reducing their commitments under the Charter, which must be done through the “denunciation” of previously accepted paragraphs (see Article 17.2) or even the denunciation of the treaty as a whole (see Article 17.1).

### Article 13 – Authorities to which the Charter applies

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. However, each Party may, when depositing its instrument of ratification, acceptance or approval, specify the categories of local or regional authorities to which it intends to confine the scope of the Charter or which it intends to exclude from its scope. It may also include further categories of local or regional authorities within the scope of the Charter by subsequent notification to the Secretary General of the Council of Europe.

### Explanatory report

*In principle, the requirements set forth in Part I of the Charter relate to all categories or levels of local authority in each member state. They potentially apply also to regional authorities where these exist. However, the special legal form or constitutional status of certain regions (in particular the member states of federations) may preclude their being made subject to the same requirements as local authorities. Furthermore, in one or two member states there exists a category of local authorities which, because of their small size, have only minor or consultative functions. To take account of such exceptional cases, Article 13 permits the Parties to exclude certain categories of authorities from the scope of the Charter.*

69 There are different formats for such statements. For example, the United Kingdom considered itself to be “bound by all the paragraphs of Part 1 of the Charter”; Slovenia declared “its willingness to fulfil the provisions of the Charter”; and the Republic of Estonia declared that it would “comply with all the Articles of the Charter in the territory under its jurisdiction”.

70 This was the case of Finland and Iceland.

71 This has been the case, among others, of Armenia, Croatia and Denmark.

72 Albania, Armenia, Bosnia and Herzegovina, Croatia, Denmark, Finland, Hungary, Iceland, Ireland, Italy, Lithuania, Luxembourg, Norway, Poland, Portugal, Moldova, the Russian Federation, Sweden, Ukraine and the United Kingdom.

## Contemporary commentary

229. This provision is another example of the Charter's flexible approach with regard to its ratification. In principle, the requirements set out in Part I relate to all categories or levels of local authorities present in each member State. The Charter does not define the concept of "local authorities" because this depends largely on each Party's political and constitutional traditions and on its legislation on the subject. Despite the Charter's silence here, the term "local authority" is commonly understood to be any form of unit of public administration that is different from State, federate or regional authorities and is closest to the citizen (see Article 3.1). The diversity of domestic situations means that there may be different types of local authority depending on their size, settlement patterns, population and territorial or non-territorial nature (municipalities, metropolitan cities, villages, islands, counties, provinces, inter-municipal associations, *Kreise*, *freguesias*, *comunità montane*, etc.).

230. If a State does not make any explicit declaration at the time of ratification, the Charter will apply to all different types of local authority present in its territory. However, and as another example of the Charter's flexibility, Article 13 permits the Parties to determine the scope of application of the treaty in respect of their different types of local authority. Consequently, a country may exclude a certain type of local authority from application of the Charter or confine application to other types of local authority. For example, if in a given country there are four different types (A, B, C and D), the State may declare that local authorities of type A will not be covered by the Charter (declaration of exclusion) or, conversely, that application of the Charter will be confined to authorities of types A and B (declaration of confinement).<sup>73</sup>

231. Practice in implementing the Charter has also shown that a member State may exclude a certain type of local authority from a certain article or paragraph (that is fully applicable to other local authorities) rather than from all its Charter commitments. In this case, there is a combination of Article 12.2 and Article 13.<sup>74</sup> Again in this area, another example of the Charter's flexibility can be found in Article 16 ("territorial clause", see remarks on that article).

232. Another interesting aspect of Article 13 is the Charter's possible application to regional authorities. The question of the applicability of the Charter to regional authorities needs to take several factors into consideration. Firstly, the wording of the Charter: it is true that the title and content of the Charter make constant reference to "local authorities" but it is also clear that Article 13 explicitly opens up the Charter's application to "regions", including by means of a declaration of exclusion or declaration of confinement.

233. Secondly, the Charter's predecessors are relevant, too. It is acknowledged that the approach behind the drafts of the Charter was to cover both local and regional bodies.<sup>75</sup> The understanding that the Charter would apply *by analogy* to regional authorities has for the most part been an undisputed assumption, which has been reinforced by the practice of the Congress and the Parties. Accordingly, several Statutory Resolutions relating to the Congress have given it powers to monitor the situation of local *and regional* democracy, watching over the effective application of the Charter.<sup>76</sup> Its monitoring missions and reports analyse the situation of local *and regional* democracy from the perspective of the Charter, and the Congress regularly makes recommendations on local *and regional* democracy, based on the Charter and on the Reference Framework for Regional Democracy.<sup>77</sup>

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73 For instance, Sweden made a declaration in its instrument of ratification that "Sweden intends to confine the scope of the Charter to the following local and regional authorities in accordance with the provisions of Article 13: municipalities ("Kommuner") and county councils ("Landstingskommuner"). For its part, the Netherlands confined the application of the Charter to provinces and municipalities; and Spain confined it to provinces, municipalities and islands.

74 For instance, Spain made a declaration in its instrument of ratification that the Kingdom "does not consider itself bound by paragraph 2 of Article 3 of the Charter to the extent that the system of direct suffrage foreseen therein should be implemented in all local authorities falling within the scope of the Charter". This declaration was made because provincial councils in the country are not elected directly by voters.

75 For instance, in Resolution 126 (1981) on the principles of local self-government (the direct predecessor of the Charter), it was stipulated that "*The principles of local self-government contained in the present Charter .... also apply, mutatis mutandis, to territorial units at an intermediate or regional level*".

76 See Article 2.3 of (Revised) Statutory Resolution 2000(1) of the Committee of Ministers, on the Congress of Local and Regional Authorities of Europe; Article 2.3 of Statutory Resolution 2007(6), Article 2.3 of Statutory Resolution 2011(2) and Article 1-2 of Statutory Resolution 2020(1).

77 The Reference Framework was approved by the Congress in 2007 and subsequently by the Conference of Ministers responsible for Local and Regional Government, during the session held in Utrecht (Netherlands) from 16 to 17 November 2009.

#### Article 14 – Provision of information

Each Party shall forward to the Secretary General of the Council of Europe all relevant information concerning legislative provisions and other measures taken by it for the purposes of complying with the terms of this Charter.

#### Explanatory report

*This article is intended to facilitate the monitoring of the application of the Charter, by the individual Parties, by creating an obligation for the latter to supply relevant information to the Secretary General of the Council of Europe. Especially in the absence of a specific body responsible for supervising the implementation of the Charter, it is particularly important that information should be available to the Secretary General concerning any changes of legislation or other measures which have a significant impact on local autonomy as defined in the Charter.*

#### Contemporary commentary

234. The initial aim of this provision was to facilitate the monitoring of the application of the Charter in the individual Parties. This provision also underlines the binding nature of the Charter (see Article 1) since the purpose of the requirement to forward “all relevant information” is to help the Council of Europe check how the Parties are “complying” with the terms of the Charter. There is, then, an implicit authorisation to check or follow up on the fulfilment of the obligations accepted by the member States. This provision also implies that the main obligation of the ratifying Party *vis-à-vis* the Charter consists in bringing its domestic legislation into line with the requirements and principles of the Charter.

235. The mechanism devised in Article 14 was especially useful in the light of the fact that the Charter did not set up a specific organisation or body responsible for “supervising” or monitoring the implementation of the Charter (for instance, a Conference of the Parties, a standard mechanism in international law). It was therefore thought that it would be particularly important for information concerning any changes in legislation or other measures in ratifying countries and having an impact on local government to be available to the Secretary General. This requirement to forward information would include, *inter alia*:

- Constitutional amendments, pieces of legislation or relevant regulations on local government at national or regional level.
- Other measures having a decisive political impact on the domestic local government landscape, such as plans, programmes, decentralisation strategies and the like.

236. This provision is not part of the “hard core” of the Charter (Part I) but is included in Part II thereof, so the Parties may not exclude it from their commitments.

237. Since the Charter’s entry into force, this provision has not been implemented in practice, for various reasons. However, the fact that it is also a requirement to be met by the Parties opens the door to the possibility of the Secretary General (or, by a specific mandate, the Congress) asking for its application. Apart from this possible scenario, the Congress has for many years kept track of the most relevant legal and political developments concerning local self-government that have taken place in the member States of the Council of Europe through the regular monitoring visits and reports conducted by the Congress in those jurisdictions.<sup>78</sup>

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<sup>78</sup> The current basis for which is Article 1-2 of Statutory Resolution (2020) 1. according which: “The Congress shall prepare on a regular basis country-by-country reports on the situation of local and regional democracy in all member States and in States which have applied to join the Council of Europe and shall ensure the effective implementation of the principles of the European Charter of Local Self-Government.”

#### **Article 15 – Signature, ratification and entry into force**

- 1 This Charter shall be open for signature by the member States of the Council of Europe. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.
- 2 This Charter shall enter into force on the first day of the month following the expiration of a period of three months after the date on which four member States of the Council of Europe have expressed their consent to be bound by the Charter in accordance with the provisions of the preceding paragraph.
- 3 In respect of any member State which subsequently expresses its consent to be bound by it, the Charter shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

#### **Article 16 – Territorial clause**

- 1 Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Charter shall apply.
- 2 Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Charter to any other territory specified in the declaration. In respect of such territory the Charter shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.
- 3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of such notification by the Secretary General.

#### **Article 17 – Denunciation**

- 1 Any Party may denounce this Charter at any time after the expiration of a period of five years from the date on which the Charter entered into force for it. Six months' notice shall be given to the Secretary General of the Council of Europe. Such denunciation shall not affect the validity of the Charter in respect of the other Parties provided that at all times there are not less than four such Parties.
- 2 Any Party may, in accordance with the provisions set out in the preceding paragraph, denounce any paragraph of Part I of the Charter accepted by it provided that the Party remains bound by the number and type of paragraphs stipulated in Article 12, paragraph 1. Any Party which, upon denouncing a paragraph, no longer meets the requirements of Article 12, paragraph 1, shall be considered as also having denounced the Charter itself.

#### **Article 18 – Notifications**

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe of:

- a any signature;
- b the deposit of any instrument of ratification, acceptance or approval;
- c any date of entry into force of this Charter in accordance with Article 15;
- d any notification received in application of the provisions of Article 12, paragraphs 2 and 3;
- e any notification received in application of the provisions of Article 13;
- f any other act, notification or communication relating to this Charter.

#### **Explanatory report**

*Articles 15 to 18*

*The final clauses contained in Articles 15 to 18 are based on the model final clauses for conventions and agreements concluded within the Council of Europe.*

## Contemporary commentary

238. These four articles form Part III of the Charter, which cannot be the subject of reservations when the Parties ratify the Charter. For the most part, these provisions are based on the standard final clauses usual in many international treaties. They do not have a direct substantive connection to the principles and elements of local self-government and the Congress has not produced any recommendations or studies on them. For this reason and owing to their clear wording, these provisions should not require any in-depth analysis or specific commentary. However, there are some relevant comments that are worth making in summary form:

- **Article 15.1:** The fact that the Charter is open for signature by the member States of the Council of Europe has already been mentioned above (see commentary on the preamble and footnote 2). Once the Charter has been signed, the State has to deposit its instrument of ratification, although there was provision was made for States to join the Charter through acceptance or approval. This acceptance must be formalised by means of notification to the Secretary General of the Council of Europe. However, the usual practice has been ratification. All the Parties have committed to the Charter by means of ratification and none has done so through an instrument of acceptance or approval.

- **Article 15.2:** This is a standard provision in multilateral international treaties and provides a very relevant rule for determining the exact date on which the Charter actually entered into force. The Charter required the deposit of four instruments of ratification. The first member State to ratify was Luxembourg (on 15 May 1987), followed by other countries such as Austria (23 September 1987), Liechtenstein (11 May 1988), Cyprus (16 May 1988) and Germany (17 May 1988). Consequently, by application of Article 15.2, the Charter entered into force on 1 September 1988 for the Parties that had ratified it.

- **Article 15.3:** This is usual practice in the case of multilateral international treaties. After the initial entry into force of the Charter on 1 September 1988, the treaty entered into force at different times for each Party, depending on the date of deposit of its instrument of ratification. It was the first day of the month following expiry of a three-month period after the deposit of the instrument of ratification. For instance, Turkey ratified on 9 December 1992, so the Charter entered into force for the country on 1 April 1993.

- **Article 16:** This provision is another example of the Charter's flexibility and of the differing scope of the commitments that may be undertaken by the Parties. Under Article 16.1, "*Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Charter shall apply*". Usually, when the member States have ratified the Charter, they have undertaken to apply it in the entire territory under their jurisdiction.<sup>79</sup> However, by means of this provision, some Parties have expressed their desire to confine the application of the Charter to specific parts of their territories. For example, a Party may restrict the application of the Charter to the local authorities located in the European territory of that State<sup>80</sup> or it may exclude distant areas or authorities from application.<sup>81</sup> This must be done by means of a declaration.

Once a Party has made such a declaration, it may extend the application of the Charter to any other territory previously excluded. Conversely, it may withdraw the declaration made at the time of ratification. In both cases, this must once again be done by "declaration". The Charter will then enter into force in respect of such a "new" territory on the first day of the month following a three-month period after the date of receipt of the relevant declaration by the Secretary General of the Council of Europe.

- **Article 17:** This provision deals with the "denunciation" of the Charter. In international law, unilateral denunciation of a treaty is a sovereign State's explicit declaration by which it withdraws from a previously ratified international treaty. By means of denunciation, the Party terminates its obligations under the treaty without the need to obtain the prior consent of the other Parties. Denunciation is a valid and lawful means of withdrawing from international treaties and is different from such concepts as termination or obsolescence. From the perspective of denunciations, there are two types of international treaty: those which contain specific provisions on denunciation and those which do not (general international law applies). The Charter belongs to the former type. Accordingly, Article 17 governs two different situations in

<sup>79</sup> For instance, this was the case of Estonia.

<sup>80</sup> This was the case of the Netherlands.

<sup>81</sup> Denmark decided that the Charter would not apply to Greenland or the Faroe Islands.

each of its constituent paragraphs: Article 17.1 deals with full denunciation of the Charter in its entirety, while Article 17.2 covers denunciation of a given paragraph of the Charter previously accepted by the Party. In both cases, such denunciations must comply strictly with the requirements of the Charter:

a. Denunciation of the full Charter: (Article 17.1):

This can only be done after the expiry of a period of five years from the date on which the Charter entered into force for the Party. However, the Party must give six months' notice to the Secretary General of the Council of Europe, which means that the denunciation will not be valid until after that six-month period has expired. In any case, such denunciation does not affect the validity of the Charter in respect of the other Parties, provided that there are no fewer than four such Parties, a provision that seems far from coming into play in view of the fact that the Charter, as noted above, has been ratified by all member States of the Council of Europe.

b. Denunciation of specific paragraphs of the Charter (Article 17.2):

After the ratification of the Charter, a Party may want to withdraw from a specific paragraph that it has previously accepted, thus reducing or restricting the previous commitments it has solemnly entered into. In any case, it is worth noting that such withdrawal can only affect Part I of the Charter, since Parts II and III are mandatory (see Article 12).

Such denunciation can only take place after the expiry of a period of five years from the date on which the Charter entered into force for the Party, and the Party must also give six months' notice, which means that the denunciation will not be valid until after that six-month period has expired. Another important requirement must be met: the denouncing Party must remain bound by the number and type of paragraphs stipulated in Article 12.1 (see above) or it will otherwise be deemed also to have denounced the Charter in its entirety.

In both cases, the denunciation must be addressed to the Secretary General of the Council of Europe. It is important to stress that, since the entry into force of the Charter, no Party has ever denounced either the Charter or any of its articles, which is evidence of its recognition as a universally accepted common European standard for local self-government.

- **Article 18:** This is only an operational provision, common to most international treaties, and does not call for any specific remarks in this contemporary commentary.

In witness whereof the undersigned, being duly authorised thereto, have signed this Charter.

Done at Strasbourg, this 15th day of October 1985, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.