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APPRAISAL OF THE CONCEPT PAPER AND DRAFT LAW ON THE ADMINISTRATIVE-TERRITORIAL REFORM OF UKRAINE

The present appraisal was prepared by the Council of Europe's Directorate of Democratic Institutions (Directorate General of Democracy and Political Affairs), with the collaboration of CoE experts Professor Gérard Marcou (France) and Dr Adrian Campbell (UK)

In preparing this appraisal, account has been taken of the discussion held on 24 November 2008 at the roundtable in Kyiv on the Concept of Administrative-Territorial Reform and other relevant documents, which were prepared by the Ukrainian Ministry for Regional Development and Construction.

I. OVERVIEW OF THE ENVISAGED ADMINISTRATIVE TERRITORIAL REFORM

A comprehensive administrative territorial reform (ATR) of local government and local state administration has been on the agenda of Ukraine for many years. In autumn 2005, a detailed reform programme, with a strategic document and five draft laws, had already been submitted to the Council of Europe for an opinion. However, this reform project never reached the parliamentary discussion stage.

The 2008 ATR reform project builds on the 2005 project. The documents prepared by the Ukrainian Ministry for Regional Development and Construction are clearer and better developed than the previous drafts, from the viewpoint of both their political scope and implementation strategy.

The proposal is to ***streamline the territorial structure of the country on the basis of three tiers of (self-) governments***: the municipality (*hromada*), the district (*rayon*) and the region (*oblast*), the Autonomous Republic of Crimea and the cities of Kyiv and Sevastopil having special (regional) status. A system of de-concentrated State authorities will remain at the *rayon* and *oblast* levels[1].

The Concept provides guidance as regards the size of *hromadas* and *rayons*, and the characteristics of ATU centres; it also pays attention to the necessary infrastructure, communications and financial basis.

According to information provided at the meeting of 24 November, it is envisaged that the *hromada* will be the first level of self-government (mainly in charge of primary education and primary health care), with no unit having less than 2 500 inhabitants [NB: Article 6 § 6 of the draft law says 1 500] and:

- either an average population of 5 000 (with a radius to the centre of 11 km) embracing 7 localities at the most,
- or an average population of 9 000 (with a radius to the centre of 11 km) embracing 16 localities at the most – this variant being, as far as the experts are concerned, probably more desirable from a functional viewpoint.

The second self-government level would be the *rayon*, with at least 100 000 inhabitants. This means about 170-180 *rayons* only, instead of the current 488 [information provided at the meeting. NB 180 *rayon*s means an average population of around 260 000]. This new intermediate local government level should be vested with functions that exceed the capacities of the (new) *hromadas*. The regional level would remain basically unchanged, except for minor adjustments required by the municipal reform.

The Concept presents an ***implementation strategy in four stages***, to be implemented from 2009 to 2014[2], and pays attention to practical, financial and administrative aspects, as well as

[1] The model designed by the Concept is not dissimilar to the French local government system as it was prior to the reforms of the eighties and the early 2000s, but it is more ambitious regarding the consolidation of the municipal level. Whereas in France the decentralised reforms have reduced the size and the tasks of de-concentrated authorities, these still keep a number of important functions, and local self-government bodies perform mainly own tasks and few delegated tasks.

[2] A time period of 5 years for such a reform seems reasonable. For comparison purposes, the Russian local government of 2003 (different but equally ambitious and complex) also had to be implemented gradually. Transitional periods had to be introduced and modified several times, and it should only enter into force in all its aspects in 2009.

to informing and educating the public regarding the reform. This is very important for ensuring the success of the reform.

In addition to the Concept (which should become an explanatory memorandum to the Draft Law), new laws should be drafted and adopted, the first one being the Law on the Administrative-Territorial Division of Ukraine. Further legislative reforms will include: budget, tax, and land legislation. In addition, a review of the Law on Local Self-Government might be needed, as well as a review of the Constitution in order to make it possible to elect the executive bodies at the *rayon* (district) and *oblast* (region) levels.

Overall, the present reform project is more comprehensive and of greater political scope than the 2005 project. There are, however, issues that need further consideration.

This Report will:
- highlight main steps forward;
- focus on issues that still need to be addressed;
- draw conclusions.

The experts would also have provided specific comments on the draft Law on ATR, but do not feel that it is appropriate to focus at this stage on technical issues, pending the consideration of more strategic issues which may entail in-depth redrafting of the key provisions of the Draft Law.

II. THE MAIN STEPS FORWARD

1. A reform dealing with structural issues

Since independence, Ukraine's sub-national governance has suffered from overlaps between the different levels of sub-national government (in terms of responsibilities, resources and, in some cases, boundaries), and between local self-government and local state administration. Uncertainty has been concentrated around the institution of the *rayon*, which is a state administration structure (of a size that might be seen as more suitable for a local self-government unit) and with a representative council that has very limited connection to executive power. This has led to a system that might be characterised as over-administered and under-governed, in which lines of accountability are confused. The reform is to be welcomed insofar as it attempts to resolve the anomalies (of status, territory, role, functions) of the *rayon* as an institution.

The reform is to be welcomed for a second reason: it appears to represent a genuine attempt to strengthen the *hromada* by seeking a size of the unit concomitant with its functions or responsibilities[3]. It links consolidation of the existing local communities into larger municipal units and a reduction in the number of *rayons*, so that municipalities can grow to take on more of the functions currently carried out by *rayons*, whilst *rayons*, larger in size and fewer in number than at present, will become more strategic and more oriented to carrying out inter-municipal functions or those functions that genuinely require standardised delivery over a large area, and a higher concentration of professional capacity. This should substantially

[3] One of the biggest problems of local government systems in East European countries was the assumption that decentralisation of power and fragmentation (establishment of small units) were somehow connected, whereas in practice the opposite may be true. There is a trade-off between a) reducing the size of a local government unit to a scale that is accessible to the citizen and b) creating local government units large enough to have the capacity to carry out a wide range of functions for local citizens. Too often local self-government units have been too small to fulfil their functions, which have been *de facto* transferred to local state administration.

improve the efficiency of the system in terms of resource distribution, accountability and efficiency of services.

2. A new notion of "administrative-territorial unit" as a basis for territorial consolidation

As mentioned before, whereas the regional boundaries would probably remain unchanged, a comprehensive territorial reform should take place at the *hromada* and *rayon* levels, in order to upgrade their size and capacity. With this in mind, the adoption of a new notion of "administrative-territorial unit" (ATU) is a core element of the suggested reform.

In the law on local self-government of 1997, a distinction is made between the "territorial community" (*hromada*) and the "administrative-territorial unit":

- The "territorial community" consists of "citizens who permanently reside within the boundaries of a village, settlement, or city, which are independent administrative-territorial units, or voluntary associations of citizens of several villages with one administrative centre".
- The "administrative-territorial unit" is a constituency; the list of ATUs at the lowest level is the following: "city, sub-municipality, settlement and village".

This distinction reflects:

- the enumeration of administrative-territorial units in Article 133 paragraph 1 of the Constitution, i.e.: "cities, city districts, settlements and villages";
- the definition of a territorial community of Article 140 paragraph 1 of the Constitution: "residents of a village or a voluntary association of residents of several villages into one village community, residents of a settlement, and of a city", vested with the right to "independently resolve issues of local character within the limits of the Constitution and the laws of Ukraine".

The draft Law on ATR gives a different definition of the ATU, as part of the territory of Ukraine and the territorial basis for the organisation and activities of local state bodies of the executive power and local self-government bodies (Article 3 of the draft Law). The *hromada* is defined as the ATU of the basic level (Article 6 of the draft Law). Therefore, the city, the settlement and the village, as existing geographical areas characterised by the type of agglomeration (or settlement in a broader sense), would as such no longer be the ATU of the basic level.

This is a fundamental change, since it would allow for implementing a territorial reform designed to correct fragmentation inherited from the past and establish – through a sound merging process – bigger and more viable first-level units on the basis of functional criteria, and not only of historical or geographical ones. Thus, the reform envisaged would help to integrate the *hromadas* into the mainstream of governance in Ukraine, without compromising their autonomy. However, some ambiguity still remains in the use of the term "*hromada*" (see section III.1 below).

3. The separation between local self-government and State functions and the transfer of executive powers to elected bodies at the *oblast* and *rayon* levels

The reform is also designed to achieve the separation between local self-government and State functions. This approach is commended as it should minimise interference in local self-government operation.

The transfer of executive powers to elected bodies is a major change that will require a constitutional review, since the powers of the state administration as executive bodies of the regional council and of the district council, and as well of the cities of Kyiv and Sevastopil, are provided by Article 118 of the Constitution.

This is the first time since discussions in Ukraine on local government reform started that such a major change has been considered by the Government. The constitutional review is part of the legislative framework described in the Concept (see paragraph 4 *in fine*). In the incomplete constitutional review of 2004, the transfer of executive powers to an elected body had been envisaged only at the district level, but not at the regional level.

4. The financial dimension of the reform project

Two other major improvements are foreseen by the Concept.

Firstly, all new *hromadas* will have direct inter-budgetary relations with the State budget (paragraph 3.2**).** At present, only about 700 local authorities are involved in inter-budgetary relations with the State budget: this means that only these local authorities benefit from the equalisation system established by the Budget Code, whereas other local self-government units depend on the district. The proposed reform means that all *hromadas* will have the same degree of financial autonomy, and that they will no longer depend on the authority of the *rayon* for their budgets.

Secondly, the Concept provides for a stronger financial basis of local self-government units, especially through the granting of new tax powers. The introduction of a local property tax should be one of the last steps of the whole reform. New legislation on the taxation of land based on its market value should be the first stage in the introduction of a property tax (paragraph 4 of the Concept). ***The Concept does not state clearly that such a tax would be a local own tax, and this should be clarified***, but this seems to be the only reason for mentioning this issue in the Concept[4].

5. Other positive elements in the proposed approach

The draft Law provides for a bottom-up consolidation process, as the establishment of the new *hromadas* builds on voluntary merging (compulsory decisions being taken only after the one-year deadline for voluntary merging).

[4] With regard to this tax, it was pointed out that, at present, the tax payment is not linked to the location of the tax base. This means that the owner of a piece of land in municipality A, but residing in municipality B, has to pay tax to municipality B. This goes against the logic of local taxation, according to which the tax flow is determined by the location of the tax base. To change this situation would be a pre-condition for the establishment of a property tax as an own local tax.

The draft Law does not sweep off the localities to be integrated in the new municipalities. On the contrary, as soon as they have more than 50 inhabitants, they are entitled to keep a representation, and tasks could be delegated upon them. This was also contemplated in the 2005 reform project, but this time the issue is being taken more seriously: they are qualified as "territorial units" and there is a procedural protection of localities as regards their name and boundaries. This might have drawbacks, but could make the reform easier to accept.

The experts are also pleased that the rules proposed for setting the ATU boundaries will avoid having local authorities included in the territory of a local authority of the same level, and will ensure that the *hromadas* fully cover the Ukrainian territory.

III. ISSUES REQUIRING FURTHER CONSIDERATION

1. Ambiguity in the use of the term "*hromada*"

The issue is whether the term "*hromada*" can be understood purely in physical terms (as a community or populated locality) or also in territorial terms (as a group of communities or localities)[5].

Following the constitutional amendments of 2004, the "*hromada*" should have been defined directly as an administrative-territorial unit and no longer as a settlement. The new Article 133 of the Constitution would have provided that a "*hromada*" could include one or several settlements.

Unfortunately, this amendment never came into force. The question has therefore to be raised whether the adoption of the new definition of the *"hromada"*, which is a legal pre-requirement for a municipal reform, requires as a previous step the final adoption of the new text of Article 133 of the Constitution[6].

2. Uncertainties concerning the *rayon* level and its relationship with the *hromadas*

[5] There may be opposition to a territorial definition of "*hromada*" as this might seem (mistakenly) to imply a dilution of the principle of self-government which, according to an idealistic view, would be the right of all individual localities or communities. Such a view would lead back to the fragmentation that the current reform is seeking to reverse.

[6] At the meeting of 24 November, the Ukrainian authorities indicated that this question was not relevant and that Articles 133 and 140 of the Constitution had to be read together. Indeed, the interpretation of Article 140 paragraph 1 given by the Constitutional Court in its sentence of 18 June 2002 (rp12/2002) has slightly opened the door to the territorial reform. According to the Court, a "territorial hromada" is not only a village, settlement or a city but equally a voluntary association of the residents of several neighbouring villages. Furthermore, questions of the organisation of local self-government that are not ruled by the Constitution may be ruled by legislation, as provided by Article 146 and, among these "the conditions and ways of the association or of the division of territorial *hromadas*, villages, settlements, cities" *("умови та порядок об'єднання або роз'єднання територіальних громад, сіл, селищ, міст"*).

However, for the experts, this ruling remains unclear on whether a "territorial hromada" could be formed from the association, for example, of villages with a city. In addition, the sentence opens the way only to voluntary associations. On the contrary, the definition of the "hromada" directly as the "administrative-territorial unit of the basic level", independently of cities, villages, settlements considered as "administrative-territorial units" would overcome this difficulty and give more discretion to the parliament as to the scope of the territorial reform. Therefore, the final adoption of the new Article 133 of the Constitution, as voted in 2004, would be more adequate.

The Concept states that the district is "an additional (subsidiary) level of local self-government and it fulfils tasks that cannot be fulfilled, efficiently or at all, at the municipal level" (paragraph 3.8 of the Concept). This definition of the intermediate local level does not raise any objections. However, the Concept indicates that the reform should result in fewer and larger *rayons* than at present.

Currently, there are 488 *rayons*, but additionally 170 cities of regional or republican importance are not subordinated to the *rayon* authority and have direct access to the inter-budgetary relations for the application of the Budget Code[7].

The Concept does not indicate whether, in the future, the main cities should have the rights of a district authority, or be included in the new larger districts (following a model that would be closer to the French *département* or Italian *provinces* one). At the roundtable of 24 November 2008, the Ukrainian authorities confirmed that, in the future, all cities would be included in the new enlarged districts.

Both options are possible and have their advantages and drawbacks, depending very much on the type of functions to be performed at the district level. Demographical and geographical aspects also have to be considered. However, to bring towns and cities within the scope of the new larger *rayon*s would provide an additional area of complication for the reform, whereas it might be more practical to maintain a single tier of local government in the urban areas and a two-tier system in the rural areas.

The vagueness regarding the future of the *rayon* is also due to other elements. The whole question of *rayon* state administration and the relationship between *rayons* and *hromadas* has been left uncertain. Would the *rayons*' rationale and functions under the new system be primarily state administration or inter-municipal in character? Would they have an inter-municipal coordinating role or merely a set of services to deliver? Would *rayon* councils of the new type be directly or indirectly elected and what influence would the municipal councils have on them regarding any delegated or inter-municipal functions? Clear responses to these questions are required to build up a sound reform.

Instead, the *rayon*, as described in Article 7 of the draft Law, retains a hybrid character, being both a state administrative body and a kind of inter-municipal body. What is not entirely clear from the draft Law is how far the *rayon*, although clearly a separate ATU, represents a genuinely different level of self-government from that of the *hromadas*, i.e. whether it funds and delivers services "of inter-communal significance" without reference or accountability downwards to the *hromadas*[8]. There is potential for a clash between the political mandates of the *hromada* and the *rayon*, unless the distinction between their functions is very clear.

[7] In terms of territorial organisation, this makes the Ukrainian *raion* comparable to the German *kreis*, the Polish *powiat*, or the Russian municipal district.

[8] This was a major issue in the 2003 reform in the Russian Federation, which attempted to make the new municipal raions answerable to the municipalities they were seen to represent.

3. The need to reconsider the appropriateness of establishing the existing *rayons* as the new *hromadas*

Given the difficulties that may be encountered in amalgamating localities – as well as the complexity of the issues surrounding the transfer of staff between *rayon*s and ATUs – and the degree to which this may slow down the pace of reform, the architects of the reform should better consider the simpler option of converting the *rayons* into proper "municipal" local self-governments[9].

The *rayons* have the advantage of being based around medium-sized towns, or at least the economic centre of their territory. They have the advantage that the necessary infrastructure is already there and the public are used to dealing with the rayons. As an alternative to changing the administrative structure over several years, the reformers might consider improving transport access between villages and rayon centres.

It would be easy to imagine the basic ATU ending up very much as another version of the *rayon*. It is far easier to work with and improve what is there than to re-create it (possibly in a more chaotic form) at great expense in terms of time and resources.

If *rayon* councils are properly elected, if state and local functions are clearly distinguished, if accountability to local electors – rather than to the *oblast* or to the central government – is strengthened, if resources under the control of the local authority are sufficient to deliver its core functions, then the *rayons* can become a proper local self-government authority.

It would then be possible to tidy up the outstanding issues – what size of town can be outside the *rayon* (i.e. single-tier) and whether mergers of villages and/or small town communes could create units to which the *rayons* could then delegate some of their functions. One could then look again at which strategic functions could be given to the oblast council level, once this structure has been democratised further.

In other words, the system could be rationalised more easily and effectively by taking *rayons* as local government institutions as the starting point of the reform. This is clearly not an alternative which the architects of the reform are likely to favour, but it should not be ruled out as an alternative strategy.

4. A too complex and potentially misleading description of the system of administrative territorial division

The draft Law includes a series of provisions which list (and provide definitions for):

- the various components of the system of administrative territorial division (Article 1.2)
- the populated areas (Article 2.1)
- the administrative territorial units (ATUs) (Article 3, plus detailed provisions in Article 6 to 9)
- the territorial units (TUs) (Article 5)

[9] Once the principle of a territorial municipality is accepted, the possibility that the existing *raions* become the territorial municipalities might be considered, as in the reform draft of 2005. This proposal was widely supported at a Presidential Foundation for Local Self-Government conference attended by the Council of Europe experts in 2003. Other countries, including Georgia, have democratised the raion level as a means of strengthening local government.

The system overall appears too complex and difficult to understand. The basic idea is apparently that there will be a distinction between, on the one hand, the Administrative Territorial Units (ATUs) and, on the other hand, the sub-municipal Territorial Units (TUs), the latter being purely representational or managerial divisions within the *hromadas*. This idea is somewhat clouded by the inclusion in the draft Law of detailed provisions on the "populated areas".

The following table gives an overview of the elements mentioned in the law.

COMPONENTS OF THE SYSTEM OF A.T. DIVISION IN UKRAINE (Article 1.2)	POPULATED AREAS (Article 2.1)	ADMINISTRATIVE TERRITORIAL UNITS (Article 3)	TERRITORIAL UNITS (Article 5)
Autonomous Republic of Crimea		**Autonomous Republic of Crimea (Article 8)**	
oblasts		**oblasts (Article 8)**	
cities with a special status Kyiv and Sevastopol		**cities with a special status Kyiv and Sevastopil (Article 9)**	
***rayon*s**		***Rayon*s (Article 7)**	
		Hromadas (Article 6)	
cities	**cities**		**cities**
***rayon*s in cities**		***rayon*s in cities with a special status Kyiv and Sevastopil (art 9)**	***rayon*s in cities**
settlements	**settlements**		**settlements**
villages	**villages**		**villages**
	khutirs		

Given that the aim of the reform is to create and strengthen the *hromadas* as the basic ATUs (which may be constituted either by a single population centre or an amalgamation of smaller population centres) the attention given to definitional distinctions between various types of what will be sub-municipal entities is potentially misleading.

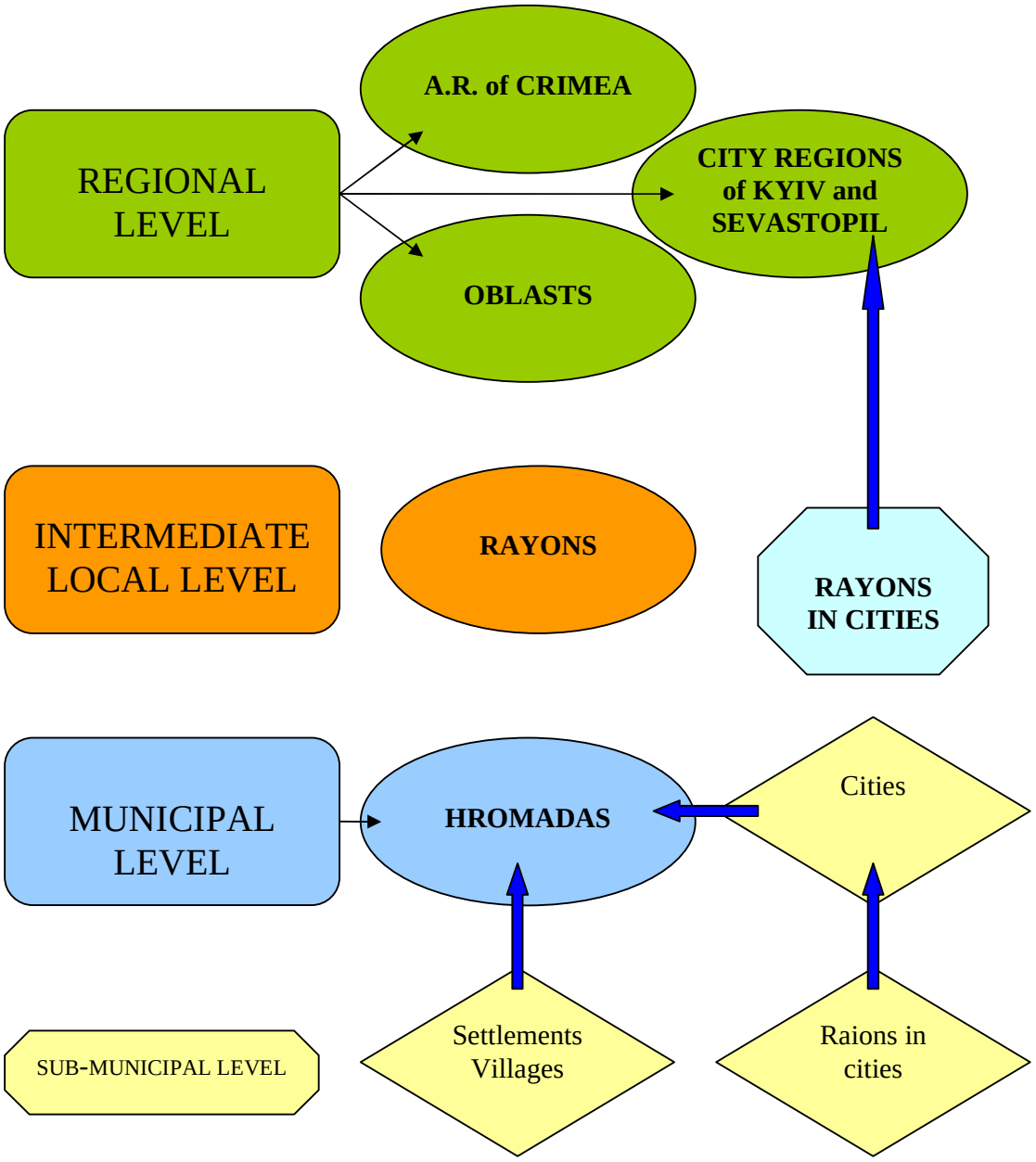
Similarly, the persistence (in Article 6.2) of different categories of *hromadas* "depending on the status of the administrative centre" (i.e. the survival of the traditional distinction between urban and village *hromadas*) seems unnecessary[10] and is also confusing. Surely the point of the reform is that all *hromadas* will have the same status, regardless of the population of the administrative centre. Of course, the population of a purely rural *hromada* is likely to be much lower than the population of an urban one and there may be issues of statistical comparability, but these should not imply a distinct status, unless the idea is that there is a possibility of entrusting urban *hromadas* with more functions (which should then be explicitly stated).

Incidentally, it might be better to have a system of municipalities that contain an inter-dependent mix of urban and rural settlements which would reinforce each other (people in villages helped to find work in the town, towns providing services for the villages).

The following chart shows how the systems would look like with some simplifications.

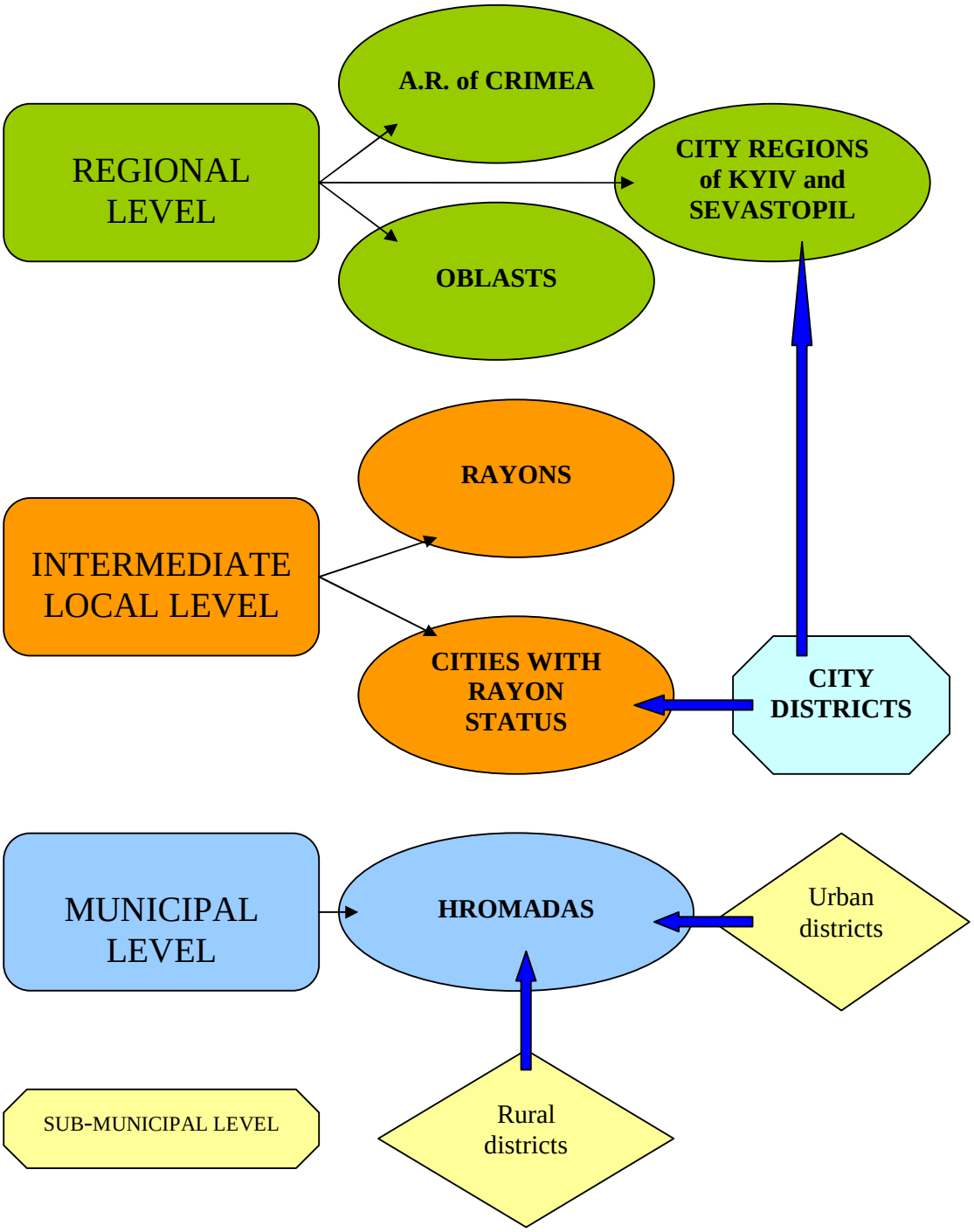
[10] Given that, also according to section 3.9 of the Concept, even the smallest villages will retain the status and powers of a Territorial Unit, there seems to be no reason to maintain village community as a separate category at the municipal level.

ADMINISTRATIVE TERRITORIAL STRUCTURE OF UKRAINE - 1



However, if the experts' proposals on having cities with *rayon* status – thus maintaining a single tier of local government in the urban areas and a two-tier system in the rural areas – (see paragraphs 2 above) were retained, it would be possible to build-up a system with the following structure:

ADMINISTRATIVE TERRITORIAL STRUCTURE OF UKRAINE - 2



It should be noted that in drawing this second chart the experts have used the terms "city districts" (with ATU status) and "urban districts" (sub-municipal TUs) instead" of "*rayon*s in cities", and they have used "rural districts" instead of "settlement and villages". They have also foreseen the possibility to establish "city districts" (with ATU status) in major cities with *rayon* status (e.g.: with a population of not less than 500 000) and not only in Kyiv and Sevastopil.

5. The need to reduce complexity and rigidity, and to distinguish between the initial reform process and subsequent changes

Three issues should be considered:

i. the requirements for the establishment of the ATU and for territorial changes;
ii. the role of the Parliament;
iii. the appropriateness of regional variation in the implementation of the system.

i. The requirements for the establishment of the ATUs and for territorial changes

The draft Law makes detailed provisions on the conditions for the establishment of the ATUs (Article 4) and for the territorial changes (Articles 6 and 7). In addition to doubts that some of these conditions raise, it is important to stress the following.

The criteria for the overall reform and the conditions for subsequent individual adjustments should be better distinguished and are not necessarily the same (although coherency should be sought). One possibility could be to limit the scope of the present draft Law to the establishment of the basic criteria and procedural rules for the implementation of the territorial reform, and leave the establishment of the requirements and procedural rules for the subsequent territorial changes to a separate law.

Some requirements, which may be deemed appropriate for many individual cases, would however make the overall reform process too strict: **sound guidelines should not be transformed into rigid (and therefore dangerous) binding rules.** As an example, the stipulation (in Article 4.6) that the administrative centre should be located as close as possible to the geographical centre might seem logical but could be misleading in practice: if the villages are well connected in transport terms to the largest town in a proposed ATU, even if the town in question were not the geographical centre, it would be absurd to move the administrative centre to a smaller settlement simply because it was more central geographically. This would be particularly true in border areas or areas where rivers or mountains affect transport routes. Similarly, the principle that municipal ATUs should have the personnel to carry out their functions (Article 4.7) or comply with sectoral norms regarding the number of consumers for public services (Article 4.10) is designed to ensure that municipalities are not unworkably small or poorly resourced. However, variations will be necessary in practice; for example some services may be delegated to other municipalities, a normal practice which would however be ruled out if this clause were contained in the law.

In the same way, **it could be better to avoid writing into the law statistical thresholds**[11]**.** In the parliamentary discussion and the public debate in the country, many people will focus on this from the viewpoint of their own locality, instead of discussing more important issues, and this will provoke numerous disputes.

Service standards and economic considerations (as they are referred to by the draft Law and the other documents) **are potentially competing criteria, which will need to be weighed against each other** in making decisions. Further clarification is therefore required in the Concept paper, the draft Law and the other related documents. As examples:

- The Concept paper (*section 3.4*) refers to distances between the community centre and its localities, and this seems to imply a focus on one small urban centre and a very limited

[11] However, this could be justified sometimes, e.g.: in the case of the larger cities where division into inner city districts could be adopted.

rural hinterland. On the other hand, to have sufficient capacity, a *hromada* might better encompass an urban centre and several satellite villages, which might be more than 15 minutes drive away. The service response times (15 minutes, 20 minutes) are welcome as indicators (in that they are encouraging a focus on the needs of service users) but would need to be applied flexibly, if there are not to be too many small municipalities[12].

- The guidelines in the *Methodological Recommendations paper* on formation of *hromadas* on the basis of "centres of economic activity" seem sensible, but are at variance within the service response times criteria set out in Article 6 of the draft law. Presumably some compromise between what might be termed "the economic principle for municipal formation" and the "service principle" will have to be worked out in practice, as the principles are both valid but are at least partially in mutual contradiction[13].

Summing up: **it is necessary to establish the principles by which the new territorial structure must be drawn up** (and on which individual decisions will be based), **but codifying specific rules and standards could make the law unworkable in practice**. Statistical thresholds and other specific criteria for designing new *hromadas* and *rayons* could be part of the implementation programme to be established by the Government according to the law. Then they will be applied with due pragmatism, since it is always necessary to take local factors into consideration. **Of course, it is necessary that the whole process of defining boundaries is fully transparent and that the local authorities / communities are duly consulted, as required by the Charter.**

ii. The role of the Parliament

The list of the regions (and their names) is fixed in the Constitution (Article 133, paragraph 2). The Draft Law provides for changing their limits and the administrative centre and it is understandable that an act of Parliament is required.

For *rayons* and *hromadas*, there is no commitment in the Constitution and, in many countries, territorial changes of individual local government constituencies (including establishment, abolishment of adjustments in boundaries) do not require an act of Parliament and are within the competence of administrative authorities, subject to a procedure giving guarantees to the municipalities concerned.

Whereas it seems logical that the Parliament should adopt a territorial reform plan for the whole territory or for a large part of the territory, **it seems unnecessary to require a law for every single territorial rearrangement. Such a procedural requirement will make any change very difficult and will tend to politicise local issues**.

Therefore, it would be better to distinguish the initial process of comprehensive territorial reform – for which a law of the Parliament, if deemed necessary, could be justified – from the subsequent individual territorial changes. For the latter case, the law should organise an administrative procedure, with the final decision made by an order of the Government, subject to judicial review, and the role of the Parliament would be to establish the administrative

[12] This seems to be recognised in the Memorandum of the Cabinet of Ministers Part 1 where it states that the average municipality will cover 424 sq. km.

[13] To some extent this requirement is fulfilled by sections II b and c of the *Methodological Recommendations*, which provide for other types of community rather than those based around economic centres; section III provides useful general principles to aid decision-making in this field.

procedure through legislation. Of course, the intervention of the Parliament is even less justified when the issue at stake is the name of the ATU (see Article 18.6 of the draft Law).

In the same way, it could be noted that the draft law details the definition/classification of geographical areas that will be included in the *hromadas* and organises a complicated procedure to change their names or boundaries (Article 16 to 18). This is unnecessary and could give rise to useless disputes.

As mentioned in the Concept, what is really important is the organisation of the populated areas/localities, as sub-municipal units. This requires considering:
- previously existing municipalities in the case of amalgamation, in order to secure the acceptance of the reform;
- the kind of institutions to be established at that level, taking care not to undermine the unity of the municipality or the authority of the municipal council;
- the location of municipal infrastructures according to the geographical distribution of the populated areas and the number of population to be served;
- the division of electoral wards – depending on the electoral system;
- the list of tasks that could be delegated to this sub-municipal level.

Although when establishing the new territorial structure there may be a need to safeguard the identity of the current first level units, the adjustments to the inner divisions of the new *hromadas* should be left to the municipal council itself, subject to a few rules; the state authorities could ensure that these rules are respected though the normal supervisory mechanisms.

iii. The appropriateness of regional variation

A third issue, not directly dealt with by the current Draft Law, concerns the degree to which regional variation will be permitted or desired in terms of implementation of the new system, and whether the regional representative bodies (which in the course of the envisaged reforms are expected to receive additional powers and capabilities) will have a role in determining or influencing the territorial-administrative reform (and the course of its implementation) within their region. This issue is probably to be further discussed.

6. The criteria for determining the boundaries in relation to the EU nomenclature of territorial units for statistics (NUTS)

This issue is somewhat connected to the previous one. According to Article 3.1 (*in fine*) of the draft Law, "*the administrative-territorial division must meet the EU recommendations on the nomenclature of statistical units NUTS*". This statement reverses the rule of the EU regulation concerning the NUTS. The NUTS is not deemed to harmonise the administrative-territorial division of the member states, but to collect statistical data in comparable statistical constituencies as a basis for the cohesion and regional development policy.

According to Article 3 of the regulation of the European Parliament and Council n°1059/2003 of 26th May 2003, "*the definition of territorial units is based on administrative units existing in member States*". The design of the statistical units of member States shows nevertheless big disparities between these countries; this reflects much pragmatism in designing these units, and the statistical requirements of EUROSTAT are never taken into consideration for territorial reforms.

Therefore, ***the Ukrainian government has first to determine its territorial organisation according to its own needs***, and then the territorial units for the purpose of establishing statistical indicators needed by EUROSTAT will be designed according to the boundaries and the areas of the administrative-territorial units of Ukraine. The present Ukrainian regions are quite in line with current divisions for the NUTS 2 level.

7. The excessive powers of the upper-level ATUs over those of the lower level

According to paragraph 3.1 of the Concept, "*each ATU level must have powers, including sectoral ones, that dominate over other levels* ("домінуючими щодо інших рівнів") *in the budget, personnel and political respect, which justifies creation of such an ATU level*".

This statement is not repeated in the draft Law, but could be repeated in later drafts. It does not distinguish between self-government authorities and State de-concentrated authorities. This seems to imply that both state de-concentrated bodies and local self-government bodies of the upper level would have authority over lower-level local self-government bodies, not only as this may be entailed by its own responsibilities, but also as regards "budget, personnel and political" questions.

The scope of such a power is contrary to the Charter of Local Self-Government (the Charter): it runs against the basic principles enshrined in Article 3 of the Charter and, in addition, does not appear to respect the limits set to any power of administrative supervision by Article 8 of the Charter***.*** Therefore, ***the experts recommend deleting this statement***.

What could be acceptable is to foresee that a State authority of the upper level will be in charge of performing the administrative supervision on the activities of the lower-level authorities, subject to the fulfilment of the requirements of Article 8 of the Charter.

8. Lack of clarity in the establishment of state de-concentrated authorities at municipal level

The Concept (paragraph 3.8) mentions that "*territorial divisions (institutions) of central bodies of the executive power, a minimum list of which is defined by the law, are created at the municipal level"* ("територіальні підрозділи (установи) центральних органів виконавчої влади".

At the roundtable of 24 November 2008, the Ukrainian authorities clarified this point: the State de-concentrated authorities will be established only at the district and the region levels; at the local level, these authorities will have agents (for example police units, treasury units), but not subordinated units in the municipal administration. This is quite normal and does not call for any further comment. ***It would however be useful to clarify the wording in the text of the Concept in order to avoid any misunderstandings***.

9. The need to provide for incentives

Some positive incentives to speed up the reform should be considered. In all countries, changes in traditional territorial division provoke many objections and great resistance. It is therefore necessary to convince people that they will benefit from the reform.

In addition to public discussion, additional grants to support the creation of the new ATUs can help enormously[14]. Another approach is the implementation of a comprehensive development and investment programme for the infrastructure to be taken over by the new municipalities[15]. The administrative reform would then be linked with a modernisation programme and this would help to mobilise elected officials and citizens expecting improvements in their living conditions.

In the context of Ukraine, the territorial reform could be linked to the comprehensive programme adopted by the Government to improve housing conditions and the provision of services of the so-called municipal economy.

Incentive measures should be based on a framework included in the law on territorial reform; they should then be developed as required by specific legislation/regulations and implemented by the Government.

10. The need to reconsider the possibility of anticipating the constitutional review

The constitutional review has been announced for the fourth (and last) stage. This could entail difficulties, since the municipal reform is for the second and third stages and, therefore, will have to be designed within the limits of the present Article 133 of the Constitution.

IV. CONCLUSIONS

The Concept paper is a valuable document insofar as it rightly points not only to the need for the institutions of local self-government to be strengthened at all levels, but also to the need to reorganise state administration at various local levels. State administration should be separated from the local self-government bodies at *oblast* and *rayon* level, to secure self-government rights. Therefore, the reform may represent an important opportunity for rationalising the structure of state administration, creating a more consistent local government system (based on local units with enhanced size and role) and eventually reinforcing decentralisation in Ukraine, if the political context allows this to be done.

However, further developments are required and more clarity should be sought regarding the relationships between local state authorities and self-government bodies, the concept of the district (rayon), the relationships between local self-government levels, the process of mergers and inter-municipal co-operation, and the division of responsibilities. This will strengthen the reform and be crucial to its viability.

Further clarification is also required on how the criteria of accessibility, distance and population would be applied to Ukrainian reality in determining the optimum size of ATUs. At the roundtable of 24 November 2008, several experts expressed the view that population would be a more objective and reliable basis than service standards which are open to interpretation (especially those based on travelling times) and whose relevance could be questioned. A workable compromise would be to take population as the main criterion, with some variation according to the elevation or density of the areas of Ukraine; service-related indicators such as distance would be a secondary criterion, enabling some municipalities to

[14] As an example, this is how the development of inter-municipal co-operation ("*intercommunalité*") in France was supported.

[15] This approach was followed in Greece during the "Capodistrian reform" of 1997, which resulted in the reduction of the number of municipalities from around 6 000 to around 1 000.

have a smaller population, where physical geography or specific settlement patterns would make this a logical outcome.

The draft Law is affected by the lack of clarity on these crucial issues and, therefore, on the shape of the desired administrative system that should result. As a whole, the draft Law is strongly procedural in character and the procedural approach entails a risk that the law will be directed to different aims from those envisaged by the architects of the reform. This is particularly true in that so many minor decisions are to be vouchsafed to parliament by the law.

While the time limit of one year (in point 3 of the final and transitional provisions) may be taken as providing strong encouragement to existing communities to merge into viable *hromadas*, it is understood that if they do not do this voluntarily, new *hromadas* will be created by working groups set up by the Cabinet of Ministers. If the working groups are to deliver their proposals within one year, the current Concept paper and draft Law do not provide an adequate basis.

A more thorough version of the reform concept and an improved draft will be needed, with greater clarity as to the desired shape of the future system. Only then would both the communities willing to merge voluntary and, subsequently, the working groups to be set up by the Cabinet of Ministers have sufficiently precise terms or reference to deliver a coherent system within the time allowed: the general debate on first principles and the aims of the reform should be completed before the law is passed, with subsequent debates confined, ideally, to the details of implementation.

In discussing the aims and result of the reform, expectations should be realistic. Not every village can be regenerated by the reform, and the enhanced municipalities will face the problem of how to deal with small and dying communities, for which administrative reform is not a panacea. Whilst the problems of dying communities may have been exacerbated by an irrational territorial-administrative structure, the cause of these problems lies in socio-economic changes that can be alleviated, but not easily reversed. The new municipalities should be encouraged to focus on what can reasonably be achieved – such as stimulating the economy of small towns rather than seeking to regenerate every village. Just as fragmentation of local authorities into smaller units can dilute local autonomy overall, so diffusion of regeneration effort across many small communities can lead to a waste of scarce resources.

The experts note that, while problems of irrationality (namely in terms of spatial categories and status) may be dealt with by the reform through legal instruments rationalising the system, there are problems of capacity which can also be helped through legal means, but only indirectly and in a limited way. This poses the question as to whether the new system of territorial organisation will suit both the capacity available (so that the reform does not collapse right at the outset), and create the conditions for an increase in capacity. This issue would deserve thorough consideration.

Finally, the experts stress that a crucial risk lies in whether the reform would be given sufficient support to be implemented. There will still be complicated issues in terms of the relationship between levels of government and between state and local self-government that the reform may resolve, but only if the laws are implemented with the right oversight and political support – laws alone cannot make the reform achieve its stated objectives. At least this seems to be recognised in section 7 of the reform Concept, but it will require substantial resources.