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APPRAISAL
OF THE DRAFT HOUSING CODE OF UKRAINE

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General Remarks

The Council of Europe (CoE) submitted comments on the first draft of the Housing Code in September 2008. The new draft recently adopted at the first reading by the Verkhovna Rada contains some changes and improvements compared to the first draft, although Council of Europe expertise was not always taken into consideration.

For example, the 2008 CoE expertise pointed out the inconveniencies of too much emphasis on ownership, because a significant part of the population may not have enough saving capacity (low income families, young households), and because the lack of rented accommodation also makes the labour market less mobile and flexible. In the new draft, whereas the general orientation towards ownership is maintained, the housing policy clearly caters for social housing, in contribution to the realisation of housing rights (in particular, Art.20 and 26). The list of beneficiaries has been extended. The social housing fund should be better identified with Articles 10, 60, and 63, according to which the social housing fund consists of housing premises transferred by the State to municipalities. Very much will depend on the extent of this fund. However, the provision that guarantees **housing free of rent to not very clearly specified categories of citizens** remains problematic (art.2.2).

The **financing of the housing policy** is another major issue still not addressed by this draft Housing Code. There should be a separate chapter or a separate law on this issue: there will be no real improvement of the housing situation if there is no comprehensive housing finance policy[1]. There appears to be no comprehensive housing financing policy in Ukraine. Furthermore, despite the recent amendments to the Budget Code, adopted in 2010, the housing and the municipal economy are still not included in the transfer system for local government functions guaranteed by the State. However, according to Article 47 of the Constitution, the State has a duty to support citizens' right to housing. If the development of housing and of the municipal economy is a government priority, the concept that this is a purely local matter not subject to equalisation can no longer be maintained. The **equalisation system should be reformed** to take account of the local government's duty to improve housing conditions and related services, and the need for adequate resources for this purpose. This issue has been pointed out in the 2001 CoE Report on Local Finance in Ukraine, and in the CoE appraisal of the National Programme of Reform and Development of Housing and Municipal Economy, submitted in November 2007. The Council of Europe would like once again to emphasise the paramount importance of finding a solution to this issue (this could require a separate study).

The present appraisal will focus on legal provisions concerning co-ownership: the organisation of co-ownership (I), the governance of apartments (II) and the legal framework for housing management (III). The appraisal also takes into account the recent draft law

[1] For example, in the French housing code (*code de la construction et de l'habitation*), there are two kinds of provisions on financing: i) for social housing; ii) for housing in general. This is always a mix of State support to loans to households and to private building corporations or to municipal housing corporations, of subsidies to households under revenue conditions to help them to have access to the housing market (personal housing allowance: *aide personnalisée au logement*), and of subsidies contributing to the start of some programmes. The main resource is from loans and, in order to finance loans, it is necessary to channel savings towards housing investments and transform short-term deposits into long-term credits. With regard to social housing, it is one of the main duties of a national financial institution (*Caisse des Dépôts et Consignations*) to collect savings through the banking systems in order to grant long-term loans with low interest rates to social housing corporations. There are also specific provisions to support those who are involved in housing renovation, and tax benefits for private investments in housing for rent.

amending legislative provisions on the establishment and the activity of co-owner associations, distributed at the discussion on housing legislation held on 10 November 2010.

From a methodological viewpoint, the new Housing Code should be a consolidation of all various pieces of housing-related legislation. Including provisions on the same issue in the Housing Code and other pieces of legislation will raise interpretation problems. For example, there is a 2002 Law on Co-ownership Associations (*ob'ednannia spivvlasnikiv*), and a Chapter 3 of part II of the draft Housing Code regulating other issues on the nature and the purpose of co-ownership associations. The draft law presented on the 10 November meeting will amend the law of 2002, but there is no coordination between this and the Housing Code. The recommendation is **to incorporate the Law on Co-ownership Associations into the draft Housing Code**, including amendments formulated in the recent draft law. This draft would be thus limited to amendments to other pieces of legislation (Articles 2 to 6 of part I). Furthermore, the regulations on housing management in these amendments are not the same as those in the draft Housing Code, and the terminology used for the function of housing manager in Ukrainian is different (compare new Articles 12 and 13 of the law on co-ownership and articles starting from Art 149 of the draft Housing Code: the function of the housing manager – *upravitel'* - is no longer regulated in the draft Code but in the amendments to the law on co-ownership associations, whereas the draft Code regulates the functions of the various housing service providers - *vykonavec*).

I. The organisation of co-ownership (condominium)

The new legal framework of co-ownership is a necessary consequence of the policy aimed at developing housing ownership for newly built housing as well as for privatised housing from the State and municipal funds. One of the aims of the reform is certainly to alleviate the burden of municipal and State administrations with regard to the housing supply, while shifting the responsibility of housing management to new co-owners, as well as to support the development services related to housing that were provided until recently only by municipal administrations and enterprises. This objective is reflected in Article 114, par.2: "The goal of housing privatisation from the State and municipal housing stock is to create conditions for the realisation of the right of citizens to choose freely the way to meet their housing needs and to involve citizens in participating in up-keeping, servicing and operating the housing stock, safeguarding the co-ownership fund, and to develop market relationships in the housing sphere".

Article 20 recognises five ways of realising citizen housing rights: 1) construction; 2) purchasing and co-ownership; 3) renting; 4) occupation of social housing; 5) purchasing property rights and use of housing though other ways in accordance with the law. In CoE 2008 assessment of the previous draft this classification was criticised, because it confuses the material operation (construction) with legal relationships (purchasing housing). Construction is impossible without purchasing property rights in respect of the housing to be built and the land where building will take place.[2] The occupier of an accommodation is always either an owner or a tenant, but ownership may be acquired though various legal means. The Code in its Article 20 should make a clearer distinction between owner and tenant .

[2] The Russian Housing Code of 2004 is more consistent in this case, since it makes a distinction between renting and purchasing.

As regards the access to housing ownership, the draft Code regulates two ways: housing cooperatives, for newly built housing, and the privatisation of the State and municipal housing supply.

The new draft includes a major simplification. Instead of the three different types of cooperatives included in the first draft (the building cooperative, the housing cooperative and the cooperatives for young households), it creates only one type of housing cooperative, which is set up as a consumer cooperative, for the construction, reconstruction and purchase of housing in co-ownership. The cooperative members are also involved in management of the housing premises in co-ownership, once they have purchased their apartment and have taken possession (Art.37 and following). Articles 38 to 48 establish a uniform legal framework for the organisation and the governance of all housing cooperatives. This solution is much better and avoids changing the status of the cooperative after completion of the building. Nevertheless, Article 49 makes it possible to change the construction cooperative into a housing cooperative, a managing cooperative (*zhytlovo-obslugovuiuchtchyï kooperayiv*) or a co-ownership association; when all co-owners have paid their share in full. Article 49 is not fully consistent with the previous articles; only the transformation into a co-ownership association once all co-owners have paid their share in full may be justified. Whether the members of the cooperative want to manage the premises themselves can be settled by the statute of the cooperative; this does not require putting forward a new type of housing cooperative. Therefore, the recommendation is that the link between Articles 49 and 48 be reconsidered, so that the law contains the simplest possible legal architecture for condominiums.

The co-ownership association is established by the general assembly of co-owners when there are at least two of them that have acquired at least 50% of shares. This is a not-for-profit civil corporation responsible for housing management, through its own decision-making bodies. The creation of these associations is supported by the State administration and by municipal administration. They receive a grant for the capital expenditure they have to commit for up-keep of the premises (Art.57). In the case of a new building the constructor must initiate the creation of the co-owners association, by proposing its statute and by calling the general assembly. If the constructor holds more than 75% of the shares in the condominium, and there was no general assembly, he will submit the co-owners' association statute for approval to the municipal authority. These provisions are to protect individual co-owners; but, under such circumstances, even if a general assembly was called for, the inequality between the parties would justify referring the statute to the municipal authority. The recommendation is to amend Article 59, paragraph 2.2° accordingly. Small condominiums may opt for a simplified form of association (*tovarystvo*) (Art.60).

The conditions for creating the co-ownership association should be regulated more precisely (for example majority rules, or refer to general provisions on co-owners assemblies), and provide for what happens in the case there is no decision to create the association. It is not clear whether all co-owners have to be members of the association: in the previous draft, it was possible for co-owners not to join the association. The law should provide clearly for obligatory membership. Due to the responsibilities of the co-ownership association, in the collective interest of the condominium, all co-owners have to be involved, and have the same rights and obligations. The draft code should be clarified on this point and Article 56 should be amended.

II. The governance of condominiums

Chapter 13 of Part II of the draft Housing Code regulates the management of the housing supply. In particular, it includes decision-making rules that are applicable when no organisation was created by the co-owners to represent their collective interest, and subsidiary rules for general co-owners assemblies.

These provisions are an improvement on those from the first draft, since they are linked to the description of the legal framework of the management of the condominium for each type of organisation. According to Article 143, if no organisation has been established for the condominium, it belongs to the general co-owners assembly to decide on the type of organisation. Furthermore, if management of the condominium is interrupted, and no decision has been taken within one year of the coming into force of the code on the organisation of the condominium, or if this decision is not in accordance with legal requirements, the municipal authority has the duty to step in, to establish a budget and to undertake the necessary measures for the maintenance and the service of the condominium. Then, it has to decide on the organisation of the condominium and to organise a call for tender for appointing a housing manager. As a result, a condominium must be managed according to one of the three organisation forms provided by the law, and the municipal authority has to supervise the process of organising condominiums, with the power to substitute the co-owners to establish the necessary organisation, and to provide temporarily the necessary services to the condominium. Paragraph 6 provides for the financial support of the State and municipal authorities to condominiums. These provisions are relevant to ensure the implementation of the new legal framework for condominiums.

Articles 144 to 148 regulate general assemblies, which are the main decision-making organ of all organisation forms of condominiums (art.144, par.1). Due to the significance of the decisions to be taken by such assemblies, it is quite justified to have in the law detailed provisions on running procedures. However, since co-ownership associations, *tovarystvo* and managing cooperatives have to adopt their own statute, it is also possible to leave some legislative provisions as subsidiary provisions, e.g. applicable only if the point is not regulated or if it is wrongly regulated, by the statute.

Nevertheless, a weakness of the system proposed by the draft code is that the collective interests of the co-owners are only protected by the provision on organisation forms, or by the provision enabling municipal authorities to take into account the failure of co-owners to organise themselves. By contrast, the French law of 1965 on housing co-ownership establishes directly the “community of co-owners” in every housing premise with a number of flats and shared responsibility regarding common parts. This community is organised by the law as a “syndicate”, which is a legal person that has to adopt the condominium regulation. This regulation is the legal basis for the rights of each co-owner and of housing management. Being a legal subject from the beginning, the rights of the co-owners are also protected from the beginning, even for the period in which there is no representation of the co-owners.

Rules for running general assemblies are adequate. There is a rather high quorum of two thirds of all co-owners for the decision-making capacity of the assembly, but this is balanced by the possibility for two co-owners to call for a general assembly. The law should however require a proposal for an agenda for such a meeting. Voting rights are apportioned according to a co-owner’s shares in the condominium. A postal vote may be organised if two general assemblies fail to reach the quorum. Co-owners must vote on specific questions. However the

law (Arts.147 and 148) should be completed by provisions for ensuring the validity of the vote with the requirement of a minimum participation, and for ensuring that the count is valid (for example, by forming a ballot committee, and the obligation to send postal votes and the protocol to the court or a notary.

III. The legal framework of housing management

The new draft provides for a better legal framework for housing management services. The draft makes it possible for a housing cooperative to take over its housing management, in the form of a managing cooperative (see above). However, it is likely that, despite very good examples, such as those displayed at the 10 November meeting, most condominiums will need to contract out housing management: either nobody will be ready to devote enough time to this task, or simply nobody will have the minimum skills necessary to manage accounts, organise tenders, assess bids to tender, and so on. The privatisation of housing also means that municipalities will reduce their own management capacity, and concentrate on rented social housing. As a consequence a large space is opening for private initiative in housing management services.

This activity has to be strictly regulated to avoid exposing co-owners to the risk of fraud or mismanagement through lack of adequate technical skills. Articles 149 to 159 on the organisation and oversight for housing management services meet these requirements, whereas chapter 14 (art.160 to 173) regulates strictly the contracts for maintenance, important repairs and reconstruction.

With regard to the profession of housing manager, Article 150 details the content of housing management services. This list is quite comprehensive but should enable the housing manager to recover debts from co-owners of the condominium, if necessary though the courts, and to turn to the municipal authority if serious social problems are the cause of the debts. Regarding contracts entered into with enterprises to service the condominium, the housing manager should be authorised by the general assembly, or the board in case of emergency or for litigation as described below.

According to paragraph 5 of Article 151, housing managers (*vykonavec*) must be qualified in four subject areas, as provided by the law and that are detailed in a regulation of the Cabinet of Ministers. According to paragraph 6, those who do not have the required qualifications may not undertake the activity of housing manager. These provisions lack precision. It belongs to the law, not to a regulation of the Cabinet of Ministers to determine whether the exercise of this activity will be subject to a pure declaration, a license or an authorisation. Due to professional requirements to be detailed by a regulation of the Cabinet of Ministers, the best way should be a licence, which will be issued to every applicant after checking their documentation. If the administrative authority does not issue the licence or a decision stating the rayons why the licence cannot be issued within a given time limit, the applicant is deemed to have the license. It is also necessary to determine whether the State administration at the *rayon* level or the municipality will issue the licence: this task would be better ascribed to the State *rayon* authority or, alternatively, to the authority of cities of regional significance. Furthermore, any person not able to show they are qualified, is not authorised to perform this activity. The law should make it an offence to carry out the activity of housing manager without a licence, and provide a corresponding penalty. All this has to be regulated by the law

itself, and cannot simply be left to the Cabinet of Ministers. Therefore, Article 151 should be completed accordingly.

Lastly, the insurance provided for in Article 159 must be compulsory, as a guarantee for the co-owners; this has also to be clearly determined by the law.

The housing manager's mandate must be subject to contract approved by the condominium co-owners, and the law should provide for a contract model to be established by a regulation of the Cabinet of Ministers. This contract model should detail the auditing rights of the co-owners, and their access to all contracts and accounting documents. Article 151 should be completed accordingly.

A regulatory framework should be drawn up on housing management tariffs for at least several years. Since there is probably no market yet for this type of profession, there is a risk that some housing managers will try to take advantage of the fact that there are practically no competitors in their city. This framework should therefore be drawn up in consideration of the different regional conditions.

As regards the provision of technical services (repairs and others), the starting point is the capacity of municipal enterprises that were formerly in charge of the State or municipal housing. Their capacities will be probably maintained in part for the needs of the social housing, but they could also submit bids to tender organised by condominiums. This might help these municipal enterprises to improve their performance.

In order to develop housing management qualifications, the Government should encourage universities to create a professional degree based on the qualifications required for this activity.

The remaining issues are discussed in the 2008 CoE expertise on the first draft of the Housing Code; they are also relevant to this draft since it contains similar provisions.