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APPRAISAL OF THE DRAFT LAW OF UKRAINE ON STIMULATION AND STATE SUPPORT OF UNIFICATION OF RURAL TERRITORIAL COMMUNITIES

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Introduction

The present legal appraisal was requested by the Ministry of Regional Development and Construction within the framework of the Council of Europe Programme to Strengthen Local Democracy in Ukraine (2010-2013, funded by the Swedish International Development Cooperation Agency Sida). The draft law on "*Stimulation and State Support of Unification of Rural Territorial Communities"* should become a part of the legal basis for implementing an ambitious local self-government reform, together with the draft laws "On Local Self Government" and "On Local State Administration". An introductory sentence of the draft explains that "*this Law establishes the procedure for the resolution of issues related to the unification of rural territorial communities."*

The draft law provides for a legal framework for amalgamating rural communities (*hromadas*) in order to improve service provision and save administrative costs. This is a law on procedure and State financial support. It reflects the idea that, according to the Government, rural areas are the priority in local government reform. It is therefore submitted before the general Strategy for local self-government reform in Ukraine is adopted, although the need for the Strategy has been discussed for more than ten years and has given rise to many reform projects under all governments. It is, however, important to have a wider perspective in order to avoid inconsistencies or unforeseen and undesired consequences.

Inter-municipal cooperation (IMC) institutions can be an alternative to amalgamation when the latter proves to be impossible or politically too difficult, or a supplement to amalgamation, where a number of services can be organised on a wider scale, without the disadvantage of creating municipalities that are too large, since this may hamper citizen access to municipal administration.

A Conference on Legislative Support to IMC was organised in Kyiv on 17 December 2010 by the Council of Europe (CoE) Programme to Strengthen Local Democracy in Ukraine and the Parliamentary Committee on State Building and Local Self-Government in order to discuss the draft and the options for IMC policy. This paper is a consolidated appraisal taking into account the comments of other experts and the discussion of the conference. The Conference participants agreed on three statements:

1. Territorial reform is important for Ukraine for administrative and political reasons; but there are also economic and social reasons that make it more urgent today.
2. It is a difficult and complicated task, that has been postponed several times because of resistance, including from the population, which is often unaware of all the benefits of the reform; so there is a need for greater explanation in order to reach political consensus;
3. A law is needed because the existing provisions of the Law on local self-government are not sufficiently precise on this subject and have not been implemented; a new law will create an opportunity for a national debate on the subject so that the stakes become more visible and understandable for the citizens. The government should announce the reform among its priorities. The law is also needed to create specific incentives that will accelerate the process of unification/amalgamation, as in other countries.

I. The need for territorial consolidation in Ukraine: merger and cooperation

The general problem of Ukrainian local self-government (LSG) is owing to the very specific and complicated organisation of the first level of LSG. This situation is unknown in Western European countries. The first level of LSG in Ukraine is based on the notion of "settlement". Villages and cities may be one or several settlements, and they form the territorial basis of the *hromada*, which is considered an "administrative territorial unit" (1997 Law on LSG, Article 1: there are administrative territorial units of different levels, and some inside of a city). As a result, instead of one type of first level LSG unit (which is the practice of most European countries), there are several kinds of first level LSG units.

This creates complexity for the actors themselves, both the ones in charge of a given territory and its citizens. As in other countries, many of these first level LSG units are very small in territory and population, and lack the resources needed to provide services, or to attract enterprises and investment. Thus Ukraine is faced with the same options as all other European countries at a certain point in their history: *status quo*, amalgamation, or IMC. In fact, these options are generally mixed because cooperation and amalgamation can be alternatives to each other but are also complementary.

Previous experience demonstrates that fragmentation can be a real handicap for development policies and for provision of public services to the population. The explanatory note to the draft Law lists the negative effects and weaknesses of many LSG units due to fragmentation of the territorial administration, especially in rural areas: absence or low quality of basic public services (water distribution, sewage, waste collection and disposal, roads), little or no social assistance, culture, health, education services, etc. This results in the absence of farming on large agricultural territories, poverty and emigration, etc. These economic and social problems are not directly caused by municipal fragmentation, but the absence of strong local government deprives *hromadas* of any capacity to solve problems and to launch efficient policies. Many *hromadas* are not able to initiate cooperation with other administrations and to draw up programmes that could attract investment or external financial support.

The policy of territorial consolidation in Ukraine may be seen from two perspectives: the modernisation and improvement of public entities, through clarification and rationalisation of the administrative map, better distribution of competences and resources on the one hand; and the economic and financial crisis that pushes today towards territorial consolidation on the other. Ukraine receives important support from the IMF, so there is an urgent obligation to make public administration work more efficiently.

Reshaping territorial administration in rural areas should be a high priority for government and parliament. But issues surrounding rural territories are part of a more general issue of territorial organisation in Ukraine, which has been discussed for many years with no results. Amalgamation or creation of IMC entities should not be considered separately but as an important part of a general strategy of territorial consolidation and LSG reform.

The present territorial organisation was conceived at a time when it was coherent with political and administrative centralisation, in which the economic and social policies were conducted by a central planning body. All LSG units were parts of the State administration in a “matrioshka” architecture. This is no longer the case. *Hromadas* must comply with the principles of the European Charter of Local Self-Government (ECLSG) and are autonomous actors of development policies. LSG units should have a size that allows them to have sufficient human and financial resources to produce a fair society, economic services and provide social welfare. The ECLSG not only promotes formal democracy; its spirit is in the organisation of LSG, which brings the best services to all people.

Another issue of the LSG system in Ukraine is that certain areas of the territories are not included in the boundaries of a *hromada,* and they are directly ruled by the second LSG level, the *rayon*. Such situations exist in other countries, but under condition of amalgamation of two tiers of LSG, mainly in metropolitan areas, and the second level enjoys full decentralisation[1]. The situation in Ukraine whereby the second level has *rayon* competences for the whole territory and municipal competencies for only parts of it - notably rural ones that need special care - is complicated. There is a great risk of inequality in such cases: the population of these territories is separated from the service delivering authorities, while the "central" *rayon* authorities neglect their management. This situation could become even more complicated if, after the merger of villages, some rural territories have the status of a unified municipality and some territories are left without any neighbouring administration. [2]

There should be an explicit choice, expressed in a clear political statement, that the objective in the medium- or long-term is to have a unified form of organisation at the first level of LSG addressing three different situations:

- Municipalities with an adequate size and perimeter remain unchanged;
- Municipalities which are too small merge (mainly but not exclusively rural ones);
- areas where merger is not possible (or not accepted) create adequate IMC entities.

The IMC provisions should be included in the same text as the merger provisions, and they should be discussed at the same time, because of their interdependence.

II. Three Issues to Consider

The discussions on the draft law concentrate on three major issues analysed below.

1. Should there be a separate Law or a Chapter in the basic Law on LSG?

Since the revision of the current basic Law on LSG is under preparation, it could be wise to include a chapter on amalgamation and IMC in this law, rather than having a separate

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[1] *Kreifreiestadt* in Germany, when the commune and Kreis are merged in one entity in big cities. In France, Paris; a new law of December 16th 2010 allows other amalgamations if the concerned LG decide them.

[2] This depends on the size of the different tiers. If a new commune is created with settlements that may be more than 20 kilometres away one from another, its size may be the same, or at least nearly, with the size of certain *rayons*.

legislation. A separate law on amalgamation can be adopted quite quickly if there is sufficient political consensus on its objectives. The basic law on LSG may take more time because of disagreement on other issues. However, in view of the substance of the law, **the recommendation would be to integrate joint provisions on amalgamation and IMC into the basic law**. This option should be considered by the government. It creates an opportunity to inform the citizens on the stakes of a more rational and efficient territorial organization. A separate law will be needed to establish pertinent procedures and other rules for amalgamation and IMC. But the rules should not appear as exceptional, separated from the other provisions on LSG entities. Merger and IMC must be seen as part of the ongoing developments of a decentralised State.[3] They should be an integral part of the LSG system, and they should be ruled by permanent provisions in the basic law.[4] Specific government policies to encourage local governments to accelerate the creation of united or IMC entities do not need new procedures. The political will can be expressed in incentives, legal and financial support, in addition to the ordinary provisions.

2. Separate provisions for rural hromadas?

The present draft is meant to bring together small rural communities. Clearly, this is a very important stake in the creation of bigger and stronger LSG units at the first level. The new communities will remain rural, because of the geographical, sociological and economic make-up of the municipality, and not because of the number of inhabitants. Specific rules may take this into account, if there is a need for them. Yet the current definition of rural communities is not clear.[5]

Amalgamation or cooperation with a city is also an option that should be considered. Villages that merge with a medium-size city have access to more services in an easy and cost effective

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[3] In the Netherlands there is an ongoing trend of merging communes on a voluntary basis because new political leaders consider this useful. In France, which has many IMC entities, there is a continuous creation, winding up or modification of IMC bodies, etc.

[4] This is the case in most countries. In France, the rules on amalgamation and IMC are in the *General Code of LSG*. In Germany, the municipal law is a competence of the Land; so there are a variety of situations, but IMC is considered as fully part of municipal law.

[5] The draft does not explain a “rural territorial community”. Article 140 of the Constitution and the terminology of the recent draft law to amend the local self-government law imply that this should be a village or rural settlement, as opposed to a city. But, is a borough a big village or a small town/city? There is no provision on boundaries, on municipal personnel and reorganisation of municipal services and on the representation of the former communities.

way: public transport, waste collection and disposal, libraries, sports facilities, police, etc. There can be a synergy between a city and small neighbouring communities for development policy, use of public equipment, and sharing of certain costs. Next, there are large cities with a belt of smaller communities. A merger can be twofold: the town gets a larger territory for its development (business districts, housing), at a lower cost for the buyers. And the population of small communities gets access to the city services. Two neighbouring cities may decide to cooperate on specific projects: hospital, waste, schools, transport, promotion of tourism.

Merger and IMC should be open procedures offered to all local governments in order to allow them to choose the best way to fulfil their tasks and organise their development. **Most of the rules should be common and general for all types of municipalities, rural and urban.**

3. Financial incentives for amalgamation and cooperation?

The draft law has important provisions on financial incentives for communities starting a merger process, with figures that are higher than those generally given in other countries, which demonstrates the importance of this policy for the government. Financial incentives from the State budget for amalgamation or cooperation are justified for at least four reasons:

1) These reforms have a cost for the participating municipalities: for research and consultancy (economists, lawyers, specialist on organisation, taxes, budgeting, etc); for reorganisation of the administrations, organisation of a local referendum. There should, in which case, be a specific grant for launching the procedure.
2) Creation of a new entity is not only of local interest but also of regional and national one, because it can improve the overall territorial administration.
3) A large new municipality or a new IMC entity will have the critical size for spending public money more efficiently in investment or public services.
4) Financial incentives can speed up the creation of IMC or merger processes[6]. The financial motivation will become more and more important in a lasting fiscal stress for local administrations. More money is not the only important factor; competition between the communities is even more important. Those that do not cooperate or merge will obtain significantly less in terms of development than those which do. The competitiveness mechanism is very well understood by local government managers and politicians.

[6] Financial incentives contributed greatly to the success of IMC in France after the 1999: 2600 new highly integrated communities were created in a couple of years.

III. Analytical Assessment of the Draft Law

The following issues should be discussed by the authorities and revised in the draft.

1. Guidance and coordination by central government (Article 3.)

LSG units absolutely need support for any unification or cooperation process[7]. There is a need for methodology, legal guidance, and financial support, where state administrations have important responsibilities. However, the law must be precise and should say what bylaws should be issued and what kind of support the government can give, because the draft law cannot become an indirect way of limiting the autonomy of local authorities. The commission to be established within the specially authorized central executive authority in charge of regional policy issues may not include exclusively representatives of central authorities and scientific institutions. It must also include local government representatives, including *rayons*. This is a requirement of the ECLSG Art. 4 para 6[8], and it will be politically wise in order to facilitate consensus.

2. Conditions and criteria for the merger of rural territorial communities (Article 4.)

Article 4 of the draft defines several criteria and conditions that should be respected by the founders of a new united community. The CoE experts support the idea that the creation of new administrative structures cannot be left to the discretionary decision of local authorities. It is a public interest to create long-lasting entities of optimal size, which will improve local institutions. Experience of other countries demonstrates that geographic or demographic limits generate "perverse effects," which are never relevant for all situations. The draft law states that a united community must include at least 4000 persons. The distance from the administrative centre of a territorial community to the most remote village of this community may not exceed 20 km and, to determine the new administrative centre, the population and the service capacity are considered. It is not clear how this distance will be measured: boundary to boundary, village centre to village centre, and what is a village centre?

[7] See the toolkit published by the CoE, UNDP and LGI for IMC. The same recommendations are also pertinent for mergers.

[8] *"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".*

It is reasonable to suggest a lower limit of the number of inhabitants, because there are cases where IMC entities or merged communes are still too small and don't reach the minimal capacity of resources and a sufficient population to make them viable[9]. On the other hand, in certain circumstances it may be impossible to stay above the limit. With small, remote villages, 4000 inhabitants would be too large, and people might be too far away from the centre and from each other. Alternatively, the proposed union could contain a population over 4000, but during the referendum one or two communes might reject integration, and the figure could fall under 4000, for example 3750. Should the whole process then be stopped? The limit opens up an opportunity for blackmail, or could cause the process to collapse. While it is reasonable to set a limit of 4000, some flexibility should be allowed, depending on each individual case. A special study and a report could be produced proving that the union is improving the capacities of LSG and will still create a viable entity.

The distance criterion also raises some questions. For example, the municipal administration should be close to people, and 20 km might be too far for an aging population in areas lacking an efficient public transport system. Therefore, the law should include an alternative criterion based on the time needed to reach the administrative centre (for example 45 minutes or less than 1 hour by car or motorcycle)[10]. If the new entity is too big and scattered there will never be any sense of solidarity or a community life between the inhabitants. In fact, if the distance between two settlements of the new entity is close to 40 km, few types of equipment could be shared, and too much money would have to be spent on transportation and roads. This has to be a serious consideration when examining the proposals at the *rayon* level.

Do these criteria apply to any merger? Between a city and settlements, for instance? Are there also such criteria for IMC bodies? There is a need for a thorough study showing which municipalities should be merged, for what reasons, and with what benefits. Ideally, instead of listing the criteria, the law should be clearer and more demanding on the background study for initiating the merger process. It should state that the councils decide to merge on the basis of a report, which demonstrates the need for and benefits of a merger. And then the law could authorise the state authorities (at the *oblast* level) to veto proposals that are not rational or do not meet the requirements.

[9] In France, many IMC communities unite only 3 or 4 small communes with less than 2000 inhabitants in all.
[10] In a big city citizens may also need that much time to go to the central city hall or to specific municipal services.

3. Initiating the merger of rural territorial communities (Article 5.)

This article has been seriously criticised by all experts. The provision of Articles 5 and 6 is not adequate for dealing with such complex issues[11]. They overestimate the capacity of the project to attract full support from citizens. It is an unrealistic statement that "*the unification of rural territorial communities may be initiated by the corresponding village councils and initiative groups with at least 10 members from among the inhabitants of the villages that initiate the unification.*"

Further, the draft does not say to whom this initiative must be sent and where it is registered. A council or several inhabitants from one village cannot ask for a merger with other villages without some discussion or even negotiation with these villages. As other experiences of mergers show, it is unlikely that the ordinary people will organise initiatives for municipal amalgamation or creation of an IMC entity. Then the state *rayon* administration is to formulate a recommendation directed to the *rayon* council for organising a referendum in all these localities. This type of procedure also raises concerns.

How can a council decide to initiate a process for unification if there is no concrete project describing the list of communities involved, the agenda, the financial consequences, the new organisation, possible development policies or new investments to be created? First, the initiative has to be credible and to be based on the previous agreements of several local councils, or on the initiative of inhabitants, but in this case there should be a minimum percentage of *voters* (a more appropriate term than *inhabitants*) from the different localities. Then, the unification process will build on this core agreement.

Secondly, the main question is determining the area in which the referendum will be organised. Article 4 gives criteria on how to determine this area, but there is no clear provision on who is empowered to decide the boundaries. Articles 5 and 6 imply that the area is determined following the submission of the initiative. Logically, it should belong to the head of the *rayon* state administration to decide on the area; but it follows from Article 6 (paragraph 2) that the *rayon* council decides only on the organisation of the referendum, not on the area.

[11] The CoE-UNDP- LGI Toolkit on IMC contains good recommendations on this subject.

The state *oblast* administration should have a more important role to play in the process. It is unlikely that the qualified staff can be found in all state *rayon* administrations, especially in rural areas. A task force should be established at the *oblast* level in order to assist the *rayon* administrations. Furthermore, if the merger process finds support and is successful, there would be four or five united rural territorial communities in each *rayon*, and this would bring into question the existing territorial division into *rayons*, and the existence of *rayon* state administrations and councils who will not support the reform.

Representatives of local self-government have to be involved in the design of the territory of the future united rural territorial communities from the very beginning, their support is a basic condition for success. Ideally, a local commission elected by all mayors of the *rayon* should be formed. This would facilitate the dialogue between all mayors, and between all mayors and the head of the state administration on the future municipal pattern of the *rayon*[12]. Then, it would be easier to submit the proposals to the voters. This method does not rule out the initiative of some mayors or inhabitants, but it will avoid too many discretionary decisions of the head of the state *rayon* administration on a case-by-case basis, and this will increase the transparency of the process and the legitimacy of the final design.

Several authorities should be enabled to take the initiative. Merger and IMC never occur spontaneously; they need political leadership and technical support. The State as well as the *rayon* should have the possibility of launching a process that is not dependant on the good will of some of the inhabitants over the national territory. The best method would be to organise a systematic study of possible unions at the most appropriate level: this would be one where there is good information; staff and financing for the studies; political capacity of creating consensus with the ability to resist unreasonable projects.

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[12] This problem is well known in France where the municipal pattern is very much fragmented, especially in rural areas. A commission is elected at the department level (a larger constituency than the Ukrainian *rayon*) by all mayors and presidents of joint-authorities; the prefect has to establish a scheme for the development of IMC in consultation with this commission; a vote with special majority may bind the prefect in some circumstances. Several reforms have strengthened the role of this commission and the authority of its decisions, and recently the new local government reform adopted by the parliament on 17 November 2010. This method could be used to prepare a unification plan at the *rayon* level, with proposal of new enlarged communities consistent with each other.

4. Review and summary of proposals and decision for the unification of rural territorial communities (Article 6.)

Article 6 of the draft contains complicated proceedings that are not clearly related to the initiative. It is not clear what happens between the moment when an initiative is registered and these proceedings. It will be the responsibility of the *rayon* state administration to summarise, with the participation of the corresponding local council commissions, proposals for unification of rural territorial communities, develop recommendations on the optimal resolution of this task, observing the main conditions and criteria. The feasibility study and the examination of the project's pertinence may therefore be carried out on the basis of "spontaneous" proposals. But at such a late stage, it would be very difficult for the *rayon* administration to contest the proposals, reshape the territorial limits in a more rational form and form consensus. Discussion with all other authorities will complicate it even more and there is a great risk of decisions being taken in a spirit of hurried compromise that will rapidly prove inefficient. The delay of 7 days is therefore not acceptable and should be at least one month. The whole process should therefore be reformulated with much attention given to the way initiative is launched and how the first outline of the union becomes public and a matter for discussion by political representatives and the population.

As regards the referendum itself, it seems that the Constitution (Article 140) would require that the votes are counted for each territorial community, since the self-governing right belongs to territorial communities. But it would make the reform impossible if the opposition of only one *hromada* was enough to defeat the decision. However it is possible to have a large majority, large enough to launch the new united territorial community on a large-scale basis, without forcing the decision if the project is too controversial or raises too much opposition, and make it possible to overcome isolated opponents[13].

Other points to consider include the need for special financing for organising referendums, and the preference for counting the overall sum of votes for all villages that took part, rather than a separate count for each village. The draft should refer to "direct decision of the citizens" and review the referendum procedure. The separate counting solution will probably

[13] In France, for the creation of an integrated joint-authority ("*communauté*"), there is no referendum, but as a rule the majority within the area of the consultation has to be either 2/3 of municipal councils representing ½ of the population, or alternatively ½ of the municipal councils representing 2/3 of the population. Other majorities can be envisaged.

be supported in the name of the "autonomy" of each village, on the basis of the Constitution and of the Charter. This idea can be challenged because the creation of each local government area and the modification of its boundaries are not exclusive powers of each LSG unit; rather it is a matter for the national administration and of broader interest than for just one group of its current population which has the right to express its opinion.

If the final option is for a separate count, then there should be a protection against sectoral, political, economic or even individual interests. In small districts certain groups can hinder the reform and damage the interests of the larger population. If a merger can only be created with unanimity of all communities, small groups in the villages might have a decisive negative influence and block the merger or use blackmail to make unreasonable demands. The best system would be the one with a double optional majority: either X% (60 or 70) of the villages representing Y% (50; 60?) of the population, or Y% (50, 60) of the villages representing X% (60, 70?) of the population, etc.

5. Budget and financial issues

5.1 Financial unification: taxes, prices, debts

The draft has short provisions for creating a unified budget after the amalgamation has taken place. There are several issues which should be addressed by the law but are missing in the draft. They concern the unification of tax rates and price of services. Each village may have its own figures with important differences. They cannot remain in force indefinitely. What happens after unification? Will there be an average tariff? Or does the new council have to decide on all these figures? What about a transitional period to bring them to an average level? Something more precise should be said on the debt. Logically the debts and properties of the merged *hromadas* become debts and properties of the new *hromada*. Article 8 needs to be expanded and clearer on these issues.

5.2 Financial incentives and special grants for unification

As already mentioned, the grants are important to make merger or cooperation more attractive. Two different types of additional grants should be distinguished. The first one is needed to cover the direct costs of the merger proceedings themselves: the preliminary feasibility studies for the delimitation of the perimeter of the new *hromada* or the IMC and for the definition of its main characteristics, the procedures to create it and the drawing up of the scheme of the new entity. At the end, further support must be provided to pay the costs of the

referendum. These grants are part of the provisions that define the process of initiative and creation. Additional financial support can be of different types, temporary or permanent, partly earmarked and progressive. It should be conceived in a way that helps to bring visible and positive improvement in the LSG organisation and management, and in public services.

There is no need for large amounts of money the first year of the reform – immediate grants would not motivate efficiency; the political direction and the staff of the new entity will not be fully operative to conceive programmes of investment; the leaders at this stage would not have time to prepare a strategy and list their priorities. It would be more expedient to pay, for example, about 35% of the additional grant in the first year, 70% in the second, and the rest in the third year after creation. This would also be an incentive for better planning of the creation of new services and investments. It would be easier on the national budget and would allow support to be given to a greater number of initiatives.

The budget of the united rural *hromada* gets additional subsidies, 25% of the budget of the united *hromada*. Depending on the number of communes and size of population this percentage can reach 50, 75 or even 100%. The philosophy is to motivate a greater number of villages with a bigger population to merge. Albeit a positive idea, it could result in wrong decisions if the size and shape of the united community are chosen to meet the criteria of subsidy rather than the criteria of rational territorial management.

The time limit of 3 years is not clear. The draft does not specify how it is calculated: is it from the date of the creation of the united rural *hromada*? Or from the election of the new council? Or the adoption of the first "unified budget"? Three years is not long for investment and development policies, considering in particular that the first year will be spent on formalities. Ideally, a progressive payment should be stretched over 5 years. The total amount of these subsidies for the three years may not be enough to finance an ambitious programme. The risk is that the money will be used for current expenditure. The administrative supervision of the efficient use of subsidies carried out by the specially authorised central executive authority in charge of regional policy issues might not be sufficient for avoiding this.

More sophisticated criteria could be used for calculating the amount of subsidies: an equalisation model would favour grants for "poor" *hromadas*; a development model would

favour economic programmes; grants could also be modelled in relation to the level of existing equipment in the enlarged *hromada* etc.[14]

The estimates in the Explanatory Note to the draft are not very convincing. There will be many diverse situations depending on the wealth of the amalgamated villages. The merger of poor villages heavily dependent on subsidies will not make them less dependent. And merging poor villages with wealthier ones supposes that these latter exist in the region and will accept the merger; they may prefer to stay "independent" rather than to share their resources. This is also a reason why mergers must be formed following a majority vote of the villagers and not a unanimous one.

It would be too optimistic to hope that a merger can really save money for the budget, at least in the short term. A larger community has "structural costs" that may be important, including travel expenses for the employees and council members, etc. The probability is that the implementation of the reform will generate new costs. So it is not sure that the total amount of additional grants may be earmarked for investment alone.

The whole reform should not be presented as a means to reduce expenditure and to make savings directly in the budgets, even if this can be the case for marginal amounts. The real objective is to make the decision process in this area more efficient and improve the capacity of development policies and public services in a more efficient way. Budgetary cuts based on the forecasts of the Explanatory Note could severely undermine the success of the reform.

6. Absence of provisions on employees and on a permanent territorial representation

The draft does not deal with the situation of the village employees. Do they automatically become union employees, with the same salary, which can be different from one entity to another? What about their career and pensions? There is no provision on the representation of the former *hromadas*. International experience has shown that successful amalgamation policies generally include a form of representation of the former communities in the new one;

[14] Costs *per capita* for infrastructures increase in areas of low density. This will be the case in many regions that the reform is supposed to help. In a number of such areas, it will not be possible to increase the number of unified communities and their population without generating excessive remoteness. Therefore, the law should introduce another variable based on the number of inhabitants per km². This requires obviously careful statistical estimates. It could be suggested to link the expenditure with these subsidies and the implementation of the Reform programme of housing and municipal economy. This would make it possible to show the improvements for people to be expected nationally by the implementation of both reforms. This would also facilitate the planning of the development of the various sectors of the municipal economy.

the villages should be able to elect a representative to the new city council and sometimes keep some services in their city halls.

IV. Integrating a Chapter on IMC into the Basic Law on Local Self-Government

The purpose of inter-municipal cooperation

When the municipal territorial pattern is fragmented, the development of new tasks that need to be organised for a larger population area cannot be undertaken at the level of traditional settlements upon which municipalities are based in most countries (there are important exceptions). Alternatively, the amalgamation (or consolidation) of municipalities makes it possible to raise the municipal dimension to the scale of the new needs. Various countries, especially in Northern Europe have followed this path. However, territorial reform based on amalgamation does not render IMC unnecessary. First of all, in urban areas, the urban development cannot be contained in administrative boundaries, and beyond the consolidation of the core, cooperation is again necessary for urban transport systems, strategic planning, and land development. In rural areas, new problems arise with an aging population and the decline of the economic basis, further consolidation steps may create new problems of remoteness, and cooperation can be a relevant alternative for a number of functions.

But the territorial reform is not only a matter of administrative rationalisation and management. Everything depends on the general organisation of the state, on the perception of what is local in the political culture, whether the local is identified with the city or with the village, whether the main service provider is the state or the local authorities. All these factors influence the path and even the possibility of territorial reform. In various countries where territorial reform through amalgamation has proved politically impossible, the development of more integrated forms of IMC has been used as a practical alternative. This path has been followed in France, and the new law on the local government reform adopted on 17 November 2010 is aimed at completing the setting up of "inter-municipalities" until the end of 2013. A similar path has been followed by Hungary and Italy and is on the agenda in Spain, despite the fact that it is more difficult to implement because of the power of the autonomous regions. However, in both cases, the IMC bodies develop from the municipalities or from the municipal community, e.g. they are public powers and not private associations or contractual arrangements, although these might be used in order to deal with specific needs. In the UK, as in Germany or in France, IMC bodies are public law corporations.

IMC provisions in the 2010 draft law amending the 1997 Law on Local Self-Government

First of all, the concepts of *hromada* reflected in this draft law and in the draft law on the Stimulation of State Support of Unification of Rural Territorial Hromadas are not the same. As emphasised above, the result of the unification will be the formation of a new territorial community called the "united rural territorial community". In contrast, under Article 6, paragraph 4 of the amending draft law, the voluntary unification will result only in the formation of joint bodies for several communities, but not of a new enlarged community in place of the former ones. This second option is less ambitious, but makes it possible also to rationalise the municipal pattern. Whatever the political choice, any contradiction or divergence between both pieces of legislation should be avoided.

In the amending draft law, the IMC provisions are scant and do not meet the needs of Ukraine. Article 11 is the only article specifically dedicated to the subject, and financial matters are addressed in articles 60, paragraph 7, and 61, paragraph 4. IMC cannot be developed using these provisions. Article 11 does not give an adequate basis for the IMC development because it is based on a wrong concept: it uses two instruments; the association and the agreement, and the association itself is established through an agreement. Both are instruments of private, not public law. First, the association can be used both to solve management issues for some tasks and to represent rights and interests of the member territorial communities. Second, under paragraph 7, no power of an LSG body may be transferred to an association; this is understandable only if the association is a legal body of private law. Third, they are subject to registration by the Ministry of Justice, just as any private association or private legal person. The use of agreements is also regulated by Article 60.7: an agreement between several territorial communities can be passed to establish a co-ownership right on an object of municipal property or to join municipal funds for a joint project or for the joint financing of a joint communal enterprise or institution. Article 61.4 is identical in its budget rules to the previous one: it provides that the budgetary funds of several territorial communities may be amalgamated on a contractual basis.

These provisions do not meet the needs, whatever the political choice for the territorial reform. IMC cannot solve major problems of performance of municipal functions if territorial communities are not entitled to delegate powers to the joint bodies. This limitation can only be overcome by providing for specific public law corporations that can be established on the

basis of an agreement of member municipalities (eventually a majority thereof) by an administrative act, e.g. an act of public power. Then, the duties and the powers of the local authorities will be the same in relation to the task, whether they are exercised by the territorial community itself or through a joint body.

Therefore, it is not an article that the Law needs , but **a chapter** determining, in particular:

- the procedure for establishing IMC;
- the legal status of such a public law corporation;
- its governance;
- the financing (contributions of member municipalities or own resources from taxes, fees, duties, charges);
- the tasks that have to be exercised through the IMC, and the conditions according to which such tasks may be delegated;
- the supervision by member municipalities and the state supervision (that should be the same as for the territorial communities themselves);
- the rules on the transfer of personnel and of property;
- the relationships with municipal enterprises and institutions subject to the jurisdiction of the inter-municipal corporation.

As regards governance, the recommendation is for direct election of the board of an inter-municipal corporation in order to involve the citizens in the reform from the beginning.[15] Such a step should be undertaken on the basis of a broad consensus with the associations of territorial communities.

[15] The French experience shows that it is extremely difficult to replace election by municipal council with direct election by citizens. But this can be a very much politicised issue.

SECRETARIAT GENERAL

DIRECTORATE GENERAL OF DEMOCRACY AND POLITICAL AFFAIRS

DIRECTORATE OF DEMOCRATIC INSTITUTIONS

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APPRAISAL OF THE DRAFT LAW OF UKRAINE ON STIMULATION AND STATE SUPPORT OF UNIFICATION OF RURAL TERRITORIAL COMMUNITIES

The present report was prepared by the Directorate of Democratic Institutions, Directorate General of Democracy and Political Affairs, in co-operation with Prof. Gérard Marcou, University Paris 1 Panthéon-Sorbonne, Director of GRALE (Research Group on Local Administration in Europe), and Prof Robert HERTZOG, University of Strasbourg France.

Introduction

The present legal appraisal was requested by the Ministry of Regional Development and Construction within the framework of the Council of Europe Programme to Strengthen Local Democracy in Ukraine (2010-2013, funded by the Swedish International Development Cooperation Agency Sida). The draft law on "*Stimulation and State Support of Unification of Rural Territorial Communities"* should become a part of the legal basis for implementing an ambitious local self-government reform, together with the draft laws "On Local Self Government" and "On Local State Administration". An introductory sentence of the draft explains that "*this Law establishes the procedure for the resolution of issues related to the unification of rural territorial communities."*

The draft law provides for a legal framework for amalgamating rural communities (*hromadas*) in order to improve service provision and save administrative costs. This is a law on procedure and State financial support. It reflects the idea that, according to the Government, rural areas are the priority in local government reform. It is therefore submitted before the general Strategy for local self-government reform in Ukraine is adopted, although the need for the Strategy has been discussed for more than ten years and has given rise to many reform projects under all governments. It is, however, important to have a wider perspective in order to avoid inconsistencies or unforeseen and undesired consequences.

Inter-municipal cooperation (IMC) institutions can be an alternative to amalgamation when the latter proves to be impossible or politically too difficult, or a supplement to amalgamation, where a number of services can be organised on a wider scale, without the disadvantage of creating municipalities that are too large, since this may hamper citizen access to municipal administration.

A Conference on Legislative Support to IMC was organised in Kyiv on 17 December 2010 by the Council of Europe (CoE) Programme to Strengthen Local Democracy in Ukraine and the Parliamentary Committee on State Building and Local Self-Government in order to discuss the draft and the options for IMC policy. This paper is a consolidated appraisal taking into account the comments of other experts and the discussion of the conference. The Conference participants agreed on three statements:

1. Territorial reform is important for Ukraine for administrative and political reasons; but there are also economic and social reasons that make it more urgent today.
2. It is a difficult and complicated task, that has been postponed several times because of resistance, including from the population, which is often unaware of all the benefits of the reform; so there is a need for greater explanation in order to reach political consensus;
3. A law is needed because the existing provisions of the Law on local self-government are not sufficiently precise on this subject and have not been implemented; a new law will create an opportunity for a national debate on the subject so that the stakes become more visible and understandable for the citizens. The government should announce the reform among its priorities. The law is also needed to create specific incentives that will accelerate the process of unification/amalgamation, as in other countries.

I. The need for territorial consolidation in Ukraine: merger and cooperation

The general problem of Ukrainian local self-government (LSG) is owing to the very specific and complicated organisation of the first level of LSG. This situation is unknown in Western European countries. The first level of LSG in Ukraine is based on the notion of "settlement". Villages and cities may be one or several settlements, and they form the territorial basis of the *hromada*, which is considered an "administrative territorial unit" (1997 Law on LSG, Article 1: there are administrative territorial units of different levels, and some inside of a city). As a result, instead of one type of first level LSG unit (which is the practice of most European countries), there are several kinds of first level LSG units.

This creates complexity for the actors themselves, both the ones in charge of a given territory and its citizens. As in other countries, many of these first level LSG units are very small in territory and population, and lack the resources needed to provide services, or to attract enterprises and investment. Thus Ukraine is faced with the same options as all other European countries at a certain point in their history: *status quo*, amalgamation, or IMC. In fact, these options are generally mixed because cooperation and amalgamation can be alternatives to each other but are also complementary.

Previous experience demonstrates that fragmentation can be a real handicap for development policies and for provision of public services to the population. The explanatory note to the draft Law lists the negative effects and weaknesses of many LSG units due to fragmentation of the territorial administration, especially in rural areas: absence or low quality of basic public services (water distribution, sewage, waste collection and disposal, roads), little or no social assistance, culture, health, education services, etc. This results in the absence of farming on large agricultural territories, poverty and emigration, etc. These economic and social problems are not directly caused by municipal fragmentation, but the absence of strong local government deprives *hromadas* of any capacity to solve problems and to launch efficient policies. Many *hromadas* are not able to initiate cooperation with other administrations and to draw up programmes that could attract investment or external financial support.

The policy of territorial consolidation in Ukraine may be seen from two perspectives: the modernisation and improvement of public entities, through clarification and rationalisation of the administrative map, better distribution of competences and resources on the one hand; and the economic and financial crisis that pushes today towards territorial consolidation on the other. Ukraine receives important support from the IMF, so there is an urgent obligation to make public administration work more efficiently.

Reshaping territorial administration in rural areas should be a high priority for government and parliament. But issues surrounding rural territories are part of a more general issue of territorial organisation in Ukraine, which has been discussed for many years with no results. Amalgamation or creation of IMC entities should not be considered separately but as an important part of a general strategy of territorial consolidation and LSG reform.

The present territorial organisation was conceived at a time when it was coherent with political and administrative centralisation, in which the economic and social policies were conducted by a central planning body. All LSG units were parts of the State administration in a “matrioshka” architecture. This is no longer the case. *Hromadas* must comply with the principles of the European Charter of Local Self-Government (ECLSG) and are autonomous actors of development policies. LSG units should have a size that allows them to have sufficient human and financial resources to produce a fair society, economic services and provide social welfare. The ECLSG not only promotes formal democracy; its spirit is in the organisation of LSG, which brings the best services to all people.

Another issue of the LSG system in Ukraine is that certain areas of the territories are not included in the boundaries of a *hromada,* and they are directly ruled by the second LSG level, the *rayon*. Such situations exist in other countries, but under condition of amalgamation of two tiers of LSG, mainly in metropolitan areas, and the second level enjoys full decentralisation[1]. The situation in Ukraine whereby the second level has *rayon* competences for the whole territory and municipal competencies for only parts of it - notably rural ones that need special care - is complicated. There is a great risk of inequality in such cases: the population of these territories is separated from the service delivering authorities, while the "central" *rayon* authorities neglect their management. This situation could become even more complicated if, after the merger of villages, some rural territories have the status of a unified municipality and some territories are left without any neighbouring administration. [2]

There should be an explicit choice, expressed in a clear political statement, that the objective in the medium- or long-term is to have a unified form of organisation at the first level of LSG addressing three different situations:

- Municipalities with an adequate size and perimeter remain unchanged;
- Municipalities which are too small merge (mainly but not exclusively rural ones);
- areas where merger is not possible (or not accepted) create adequate IMC entities.

The IMC provisions should be included in the same text as the merger provisions, and they should be discussed at the same time, because of their interdependence.

II. Three Issues to Consider

The discussions on the draft law concentrate on three major issues analysed below.

1. Should there be a separate Law or a Chapter in the basic Law on LSG?

Since the revision of the current basic Law on LSG is under preparation, it could be wise to include a chapter on amalgamation and IMC in this law, rather than having a separate

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[1] *Kreifreiestadt* in Germany, when the commune and Kreis are merged in one entity in big cities. In France, Paris; a new law of December 16th 2010 allows other amalgamations if the concerned LG decide them.

[2] This depends on the size of the different tiers. If a new commune is created with settlements that may be more than 20 kilometres away one from another, its size may be the same, or at least nearly, with the size of certain *rayons*.

legislation. A separate law on amalgamation can be adopted quite quickly if there is sufficient political consensus on its objectives. The basic law on LSG may take more time because of disagreement on other issues. However, in view of the substance of the law, **the recommendation would be to integrate joint provisions on amalgamation and IMC into the basic law**. This option should be considered by the government. It creates an opportunity to inform the citizens on the stakes of a more rational and efficient territorial organization. A separate law will be needed to establish pertinent procedures and other rules for amalgamation and IMC. But the rules should not appear as exceptional, separated from the other provisions on LSG entities. Merger and IMC must be seen as part of the ongoing developments of a decentralised State.[3] They should be an integral part of the LSG system, and they should be ruled by permanent provisions in the basic law.[4] Specific government policies to encourage local governments to accelerate the creation of united or IMC entities do not need new procedures. The political will can be expressed in incentives, legal and financial support, in addition to the ordinary provisions.

2. Separate provisions for rural hromadas?

The present draft is meant to bring together small rural communities. Clearly, this is a very important stake in the creation of bigger and stronger LSG units at the first level. The new communities will remain rural, because of the geographical, sociological and economic make-up of the municipality, and not because of the number of inhabitants. Specific rules may take this into account, if there is a need for them. Yet the current definition of rural communities is not clear.[5]

Amalgamation or cooperation with a city is also an option that should be considered. Villages that merge with a medium-size city have access to more services in an easy and cost effective

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[3] In the Netherlands there is an ongoing trend of merging communes on a voluntary basis because new political leaders consider this useful. In France, which has many IMC entities, there is a continuous creation, winding up or modification of IMC bodies, etc.

[4] This is the case in most countries. In France, the rules on amalgamation and IMC are in the *General Code of LSG*. In Germany, the municipal law is a competence of the Land; so there are a variety of situations, but IMC is considered as fully part of municipal law.

[5] The draft does not explain a "rural territorial community". Article 140 of the Constitution and the terminology of the recent draft law to amend the local self-government law imply that this should be a village or rural settlement, as opposed to a city. But, is a borough a big village or a small town/city? There is no provision on boundaries, on municipal personnel and reorganisation of municipal services and on the representation of the former communities.

way: public transport, waste collection and disposal, libraries, sports facilities, police, etc. There can be a synergy between a city and small neighbouring communities for development policy, use of public equipment, and sharing of certain costs. Next, there are large cities with a belt of smaller communities. A merger can be twofold: the town gets a larger territory for its development (business districts, housing), at a lower cost for the buyers. And the population of small communities gets access to the city services. Two neighbouring cities may decide to cooperate on specific projects: hospital, waste, schools, transport, promotion of tourism.

Merger and IMC should be open procedures offered to all local governments in order to allow them to choose the best way to fulfil their tasks and organise their development. **Most of the rules should be common and general for all types of municipalities, rural and urban.**

3. Financial incentives for amalgamation and cooperation?

The draft law has important provisions on financial incentives for communities starting a merger process, with figures that are higher than those generally given in other countries, which demonstrates the importance of this policy for the government. Financial incentives from the State budget for amalgamation or cooperation are justified for at least four reasons:

1) These reforms have a cost for the participating municipalities: for research and consultancy (economists, lawyers, specialist on organisation, taxes, budgeting, etc); for reorganisation of the administrations, organisation of a local referendum. There should, in which case, be a specific grant for launching the procedure.
2) Creation of a new entity is not only of local interest but also of regional and national one, because it can improve the overall territorial administration.
3) A large new municipality or a new IMC entity will have the critical size for spending public money more efficiently in investment or public services.
4) Financial incentives can speed up the creation of IMC or merger processes[6]. The financial motivation will become more and more important in a lasting fiscal stress for local administrations. More money is not the only important factor; competition between the communities is even more important. Those that do not cooperate or merge will obtain significantly less in terms of development than those which do. The competitiveness mechanism is very well understood by local government managers and politicians.

[6] Financial incentives contributed greatly to the success of IMC in France after the 1999: 2600 new highly integrated communities were created in a couple of years.

III. Analytical Assessment of the Draft Law

The following issues should be discussed by the authorities and revised in the draft.

1. Guidance and coordination by central government (Article 3.)

LSG units absolutely need support for any unification or cooperation process[7]. There is a need for methodology, legal guidance, and financial support, where state administrations have important responsibilities. However, the law must be precise and should say what bylaws should be issued and what kind of support the government can give, because the draft law cannot become an indirect way of limiting the autonomy of local authorities. The commission to be established within the specially authorized central executive authority in charge of regional policy issues may not include exclusively representatives of central authorities and scientific institutions. It must also include local government representatives, including *rayons*. This is a requirement of the ECLSG Art. 4 para 6[8], and it will be politically wise in order to facilitate consensus.

2. Conditions and criteria for the merger of rural territorial communities (Article 4.)

Article 4 of the draft defines several criteria and conditions that should be respected by the founders of a new united community. The CoE experts support the idea that the creation of new administrative structures cannot be left to the discretionary decision of local authorities. It is a public interest to create long-lasting entities of optimal size, which will improve local institutions. Experience of other countries demonstrates that geographic or demographic limits generate "perverse effects," which are never relevant for all situations. The draft law states that a united community must include at least 4000 persons. The distance from the administrative centre of a territorial community to the most remote village of this community may not exceed 20 km and, to determine the new administrative centre, the population and the service capacity are considered. It is not clear how this distance will be measured: boundary to boundary, village centre to village centre, and what is a village centre?

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[7] See the toolkit published by the CoE, UNDP and LGI for IMC. The same recommendations are also pertinent for mergers.

[8] *"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".*

It is reasonable to suggest a lower limit of the number of inhabitants, because there are cases where IMC entities or merged communes are still too small and don't reach the minimal capacity of resources and a sufficient population to make them viable[9]. On the other hand, in certain circumstances it may be impossible to stay above the limit. With small, remote villages, 4000 inhabitants would be too large, and people might be too far away from the centre and from each other. Alternatively, the proposed union could contain a population over 4000, but during the referendum one or two communes might reject integration, and the figure could fall under 4000, for example 3750. Should the whole process then be stopped? The limit opens up an opportunity for blackmail, or could cause the process to collapse. While it is reasonable to set a limit of 4000, some flexibility should be allowed, depending on each individual case. A special study and a report could be produced proving that the union is improving the capacities of LSG and will still create a viable entity.

The distance criterion also raises some questions. For example, the municipal administration should be close to people, and 20 km might be too far for an aging population in areas lacking an efficient public transport system. Therefore, the law should include an alternative criterion based on the time needed to reach the administrative centre (for example 45 minutes or less than 1 hour by car or motorcycle)[10]. If the new entity is too big and scattered there will never be any sense of solidarity or a community life between the inhabitants. In fact, if the distance between two settlements of the new entity is close to 40 km, few types of equipment could be shared, and too much money would have to be spent on transportation and roads. This has to be a serious consideration when examining the proposals at the *rayon* level.

Do these criteria apply to any merger? Between a city and settlements, for instance? Are there also such criteria for IMC bodies? There is a need for a thorough study showing which municipalities should be merged, for what reasons, and with what benefits. Ideally, instead of listing the criteria, the law should be clearer and more demanding on the background study for initiating the merger process. It should state that the councils decide to merge on the basis of a report, which demonstrates the need for and benefits of a merger. And then the law could authorise the state authorities (at the *oblast* level) to veto proposals that are not rational or do not meet the requirements.

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[9] In France, many IMC communities unite only 3 or 4 small communes with less than 2000 inhabitants in all.
[10] In a big city citizens may also need that much time to go to the central city hall or to specific municipal services.

3. Initiating the merger of rural territorial communities (Article 5.)

This article has been seriously criticised by all experts. The provision of Articles 5 and 6 is not adequate for dealing with such complex issues[11]. They overestimate the capacity of the project to attract full support from citizens. It is an unrealistic statement that "*the unification of rural territorial communities may be initiated by the corresponding village councils and initiative groups with at least 10 members from among the inhabitants of the villages that initiate the unification."*

Further, the draft does not say to whom this initiative must be sent and where it is registered. A council or several inhabitants from one village cannot ask for a merger with other villages without some discussion or even negotiation with these villages. As other experiences of mergers show, it is unlikely that the ordinary people will organise initiatives for municipal amalgamation or creation of an IMC entity. Then the state *rayon* administration is to formulate a recommendation directed to the *rayon* council for organising a referendum in all these localities. This type of procedure also raises concerns.

How can a council decide to initiate a process for unification if there is no concrete project describing the list of communities involved, the agenda, the financial consequences, the new organisation, possible development policies or new investments to be created? First, the initiative has to be credible and to be based on the previous agreements of several local councils, or on the initiative of inhabitants, but in this case there should be a minimum percentage of *voters* (a more appropriate term than *inhabitants*) from the different localities. Then, the unification process will build on this core agreement.

Secondly, the main question is determining the area in which the referendum will be organised. Article 4 gives criteria on how to determine this area, but there is no clear provision on who is empowered to decide the boundaries. Articles 5 and 6 imply that the area is determined following the submission of the initiative. Logically, it should belong to the head of the *rayon* state administration to decide on the area; but it follows from Article 6 (paragraph 2) that the *rayon* council decides only on the organisation of the referendum, not on the area.

[11] The CoE-UNDP- LGI Toolkit on IMC contains good recommendations on this subject.

The state *oblast* administration should have a more important role to play in the process. It is unlikely that the qualified staff can be found in all state *rayon* administrations, especially in rural areas. A task force should be established at the *oblast* level in order to assist the *rayon* administrations. Furthermore, if the merger process finds support and is successful, there would be four or five united rural territorial communities in each *rayon*, and this would bring into question the existing territorial division into *rayons*, and the existence of *rayon* state administrations and councils who will not support the reform.

Representatives of local self-government have to be involved in the design of the territory of the future united rural territorial communities from the very beginning, their support is a basic condition for success. Ideally, a local commission elected by all mayors of the *rayon* should be formed. This would facilitate the dialogue between all mayors, and between all mayors and the head of the state administration on the future municipal pattern of the *rayon*[12]. Then, it would be easier to submit the proposals to the voters. This method does not rule out the initiative of some mayors or inhabitants, but it will avoid too many discretionary decisions of the head of the state *rayon* administration on a case-by-case basis, and this will increase the transparency of the process and the legitimacy of the final design.

Several authorities should be enabled to take the initiative. Merger and IMC never occur spontaneously; they need political leadership and technical support. The State as well as the *rayon* should have the possibility of launching a process that is not dependant on the good will of some of the inhabitants over the national territory. The best method would be to organise a systematic study of possible unions at the most appropriate level: this would be one where there is good information; staff and financing for the studies; political capacity of creating consensus with the ability to resist unreasonable projects.

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[12] This problem is well known in France where the municipal pattern is very much fragmented, especially in rural areas. A commission is elected at the department level (a larger constituency than the Ukrainian *rayon*) by all mayors and presidents of joint-authorities; the prefect has to establish a scheme for the development of IMC in consultation with this commission; a vote with special majority may bind the prefect in some circumstances. Several reforms have strengthened the role of this commission and the authority of its decisions, and recently the new local government reform adopted by the parliament on 17 November 2010. This method could be used to prepare a unification plan at the *rayon* level, with proposal of new enlarged communities consistent with each other.

4. Review and summary of proposals and decision for the unification of rural territorial communities (Article 6.)

Article 6 of the draft contains complicated proceedings that are not clearly related to the initiative. It is not clear what happens between the moment when an initiative is registered and these proceedings. It will be the responsibility of the *rayon* state administration to summarise, with the participation of the corresponding local council commissions, proposals for unification of rural territorial communities, develop recommendations on the optimal resolution of this task, observing the main conditions and criteria. The feasibility study and the examination of the project's pertinence may therefore be carried out on the basis of "spontaneous" proposals. But at such a late stage, it would be very difficult for the *rayon* administration to contest the proposals, reshape the territorial limits in a more rational form and form consensus. Discussion with all other authorities will complicate it even more and there is a great risk of decisions being taken in a spirit of hurried compromise that will rapidly prove inefficient. The delay of 7 days is therefore not acceptable and should be at least one month. The whole process should therefore be reformulated with much attention given to the way initiative is launched and how the first outline of the union becomes public and a matter for discussion by political representatives and the population.

As regards the referendum itself, it seems that the Constitution (Article 140) would require that the votes are counted for each territorial community, since the self-governing right belongs to territorial communities. But it would make the reform impossible if the opposition of only one *hromada* was enough to defeat the decision. However it is possible to have a large majority, large enough to launch the new united territorial community on a large-scale basis, without forcing the decision if the project is too controversial or raises too much opposition, and make it possible to overcome isolated opponents[13].

Other points to consider include the need for special financing for organising referendums, and the preference for counting the overall sum of votes for all villages that took part, rather than a separate count for each village. The draft should refer to "direct decision of the citizens" and review the referendum procedure. The separate counting solution will probably

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[13] In France, for the creation of an integrated joint-authority ("*communauté*"), there is no referendum, but as a rule the majority within the area of the consultation has to be either 2/3 of municipal councils representing ½ of the population, or alternatively ½ of the municipal councils representing 2/3 of the population. Other majorities can be envisaged.

be supported in the name of the "autonomy" of each village, on the basis of the Constitution and of the Charter. This idea can be challenged because the creation of each local government area and the modification of its boundaries are not exclusive powers of each LSG unit; rather it is a matter for the national administration and of broader interest than for just one group of its current population which has the right to express its opinion.

If the final option is for a separate count, then there should be a protection against sectoral, political, economic or even individual interests. In small districts certain groups can hinder the reform and damage the interests of the larger population. If a merger can only be created with unanimity of all communities, small groups in the villages might have a decisive negative influence and block the merger or use blackmail to make unreasonable demands. The best system would be the one with a double optional majority: either X% (60 or 70) of the villages representing Y% (50; 60?) of the population, or Y% (50, 60) of the villages representing X% (60, 70?) of the population, etc.

5. Budget and financial issues

5.1 Financial unification: taxes, prices, debts

The draft has short provisions for creating a unified budget after the amalgamation has taken place. There are several issues which should be addressed by the law but are missing in the draft. They concern the unification of tax rates and price of services. Each village may have its own figures with important differences. They cannot remain in force indefinitely. What happens after unification? Will there be an average tariff? Or does the new council have to decide on all these figures? What about a transitional period to bring them to an average level? Something more precise should be said on the debt. Logically the debts and properties of the merged *hromadas* become debts and properties of the new *hromada*. Article 8 needs to be expanded and clearer on these issues.

5.2 Financial incentives and special grants for unification

As already mentioned, the grants are important to make merger or cooperation more attractive. Two different types of additional grants should be distinguished. The first one is needed to cover the direct costs of the merger proceedings themselves: the preliminary feasibility studies for the delimitation of the perimeter of the new *hromada* or the IMC and for the definition of its main characteristics, the procedures to create it and the drawing up of the scheme of the new entity. At the end, further support must be provided to pay the costs of the

referendum. These grants are part of the provisions that define the process of initiative and creation. Additional financial support can be of different types, temporary or permanent, partly earmarked and progressive. It should be conceived in a way that helps to bring visible and positive improvement in the LSG organisation and management, and in public services.

There is no need for large amounts of money the first year of the reform – immediate grants would not motivate efficiency; the political direction and the staff of the new entity will not be fully operative to conceive programmes of investment; the leaders at this stage would not have time to prepare a strategy and list their priorities. It would be more expedient to pay, for example, about 35% of the additional grant in the first year, 70% in the second, and the rest in the third year after creation. This would also be an incentive for better planning of the creation of new services and investments. It would be easier on the national budget and would allow support to be given to a greater number of initiatives.

The budget of the united rural *hromada* gets additional subsidies, 25% of the budget of the united *hromada*. Depending on the number of communes and size of population this percentage can reach 50, 75 or even 100%. The philosophy is to motivate a greater number of villages with a bigger population to merge. Albeit a positive idea, it could result in wrong decisions if the size and shape of the united community are chosen to meet the criteria of subsidy rather than the criteria of rational territorial management.

The time limit of 3 years is not clear. The draft does not specify how it is calculated: is it from the date of the creation of the united rural *hromada*? Or from the election of the new council? Or the adoption of the first "unified budget"? Three years is not long for investment and development policies, considering in particular that the first year will be spent on formalities. Ideally, a progressive payment should be stretched over 5 years. The total amount of these subsidies for the three years may not be enough to finance an ambitious programme. The risk is that the money will be used for current expenditure. The administrative supervision of the efficient use of subsidies carried out by the specially authorised central executive authority in charge of regional policy issues might not be sufficient for avoiding this.

More sophisticated criteria could be used for calculating the amount of subsidies: an equalisation model would favour grants for "poor" *hromadas*; a development model would

favour economic programmes; grants could also be modelled in relation to the level of existing equipment in the enlarged *hromada* etc.[14]

The estimates in the Explanatory Note to the draft are not very convincing. There will be many diverse situations depending on the wealth of the amalgamated villages. The merger of poor villages heavily dependent on subsidies will not make them less dependent. And merging poor villages with wealthier ones supposes that these latter exist in the region and will accept the merger; they may prefer to stay "independent" rather than to share their resources. This is also a reason why mergers must be formed following a majority vote of the villagers and not a unanimous one.

It would be too optimistic to hope that a merger can really save money for the budget, at least in the short term. A larger community has "structural costs" that may be important, including travel expenses for the employees and council members, etc. The probability is that the implementation of the reform will generate new costs. So it is not sure that the total amount of additional grants may be earmarked for investment alone.

The whole reform should not be presented as a means to reduce expenditure and to make savings directly in the budgets, even if this can be the case for marginal amounts. The real objective is to make the decision process in this area more efficient and improve the capacity of development policies and public services in a more efficient way. Budgetary cuts based on the forecasts of the Explanatory Note could severely undermine the success of the reform.

6. Absence of provisions on employees and on a permanent territorial representation

The draft does not deal with the situation of the village employees. Do they automatically become union employees, with the same salary, which can be different from one entity to another? What about their career and pensions? There is no provision on the representation of the former *hromadas*. International experience has shown that successful amalgamation policies generally include a form of representation of the former communities in the new one;

[14] Costs *per capita* for infrastructures increase in areas of low density. This will be the case in many regions that the reform is supposed to help. In a number of such areas, it will not be possible to increase the number of unified communities and their population without generating excessive remoteness. Therefore, the law should introduce another variable based on the number of inhabitants per km². This requires obviously careful statistical estimates. It could be suggested to link the expenditure with these subsidies and the implementation of the Reform programme of housing and municipal economy. This would make it possible to show the improvements for people to be expected nationally by the implementation of both reforms. This would also facilitate the planning of the development of the various sectors of the municipal economy.

the villages should be able to elect a representative to the new city council and sometimes keep some services in their city halls.

IV. Integrating a Chapter on IMC into the Basic Law on Local Self-Government

The purpose of inter-municipal cooperation

When the municipal territorial pattern is fragmented, the development of new tasks that need to be organised for a larger population area cannot be undertaken at the level of traditional settlements upon which municipalities are based in most countries (there are important exceptions). Alternatively, the amalgamation (or consolidation) of municipalities makes it possible to raise the municipal dimension to the scale of the new needs. Various countries, especially in Northern Europe have followed this path. However, territorial reform based on amalgamation does not render IMC unnecessary. First of all, in urban areas, the urban development cannot be contained in administrative boundaries, and beyond the consolidation of the core, cooperation is again necessary for urban transport systems, strategic planning, and land development. In rural areas, new problems arise with an aging population and the decline of the economic basis, further consolidation steps may create new problems of remoteness, and cooperation can be a relevant alternative for a number of functions.

But the territorial reform is not only a matter of administrative rationalisation and management. Everything depends on the general organisation of the state, on the perception of what is local in the political culture, whether the local is identified with the city or with the village, whether the main service provider is the state or the local authorities. All these factors influence the path and even the possibility of territorial reform. In various countries where territorial reform through amalgamation has proved politically impossible, the development of more integrated forms of IMC has been used as a practical alternative. This path has been followed in France, and the new law on the local government reform adopted on 17 November 2010 is aimed at completing the setting up of “inter-municipalities” until the end of 2013. A similar path has been followed by Hungary and Italy and is on the agenda in Spain, despite the fact that it is more difficult to implement because of the power of the autonomous regions. However, in both cases, the IMC bodies develop from the municipalities or from the municipal community, e.g. they are public powers and not private associations or contractual arrangements, although these might be used in order to deal with specific needs. In the UK, as in Germany or in France, IMC bodies are public law corporations.

IMC provisions in the 2010 draft law amending the 1997 Law on Local Self-Government

First of all, the concepts of *hromada* reflected in this draft law and in the draft law on the Stimulation of State Support of Unification of Rural Territorial Hromadas are not the same. As emphasised above, the result of the unification will be the formation of a new territorial community called the "united rural territorial community". In contrast, under Article 6, paragraph 4 of the amending draft law, the voluntary unification will result only in the formation of joint bodies for several communities, but not of a new enlarged community in place of the former ones. This second option is less ambitious, but makes it possible also to rationalise the municipal pattern. Whatever the political choice, any contradiction or divergence between both pieces of legislation should be avoided.

In the amending draft law, the IMC provisions are scant and do not meet the needs of Ukraine. Article 11 is the only article specifically dedicated to the subject, and financial matters are addressed in articles 60, paragraph 7, and 61, paragraph 4. IMC cannot be developed using these provisions. Article 11 does not give an adequate basis for the IMC development because it is based on a wrong concept: it uses two instruments; the association and the agreement, and the association itself is established through an agreement. Both are instruments of private, not public law. First, the association can be used both to solve management issues for some tasks and to represent rights and interests of the member territorial communities. Second, under paragraph 7, no power of an LSG body may be transferred to an association; this is understandable only if the association is a legal body of private law. Third, they are subject to registration by the Ministry of Justice, just as any private association or private legal person. The use of agreements is also regulated by Article 60.7: an agreement between several territorial communities can be passed to establish a co-ownership right on an object of municipal property or to join municipal funds for a joint project or for the joint financing of a joint communal enterprise or institution. Article 61.4 is identical in its budget rules to the previous one: it provides that the budgetary funds of several territorial communities may be amalgamated on a contractual basis.

These provisions do not meet the needs, whatever the political choice for the territorial reform. IMC cannot solve major problems of performance of municipal functions if territorial communities are not entitled to delegate powers to the joint bodies. This limitation can only be overcome by providing for specific public law corporations that can be established on the

basis of an agreement of member municipalities (eventually a majority thereof) by an administrative act, e.g. an act of public power. Then, the duties and the powers of the local authorities will be the same in relation to the task, whether they are exercised by the territorial community itself or through a joint body.

Therefore, it is not an article that the Law needs , but **a chapter** determining, in particular:

- the procedure for establishing IMC;
- the legal status of such a public law corporation;
- its governance;
- the financing (contributions of member municipalities or own resources from taxes, fees, duties, charges);
- the tasks that have to be exercised through the IMC, and the conditions according to which such tasks may be delegated;
- the supervision by member municipalities and the state supervision (that should be the same as for the territorial communities themselves);
- the rules on the transfer of personnel and of property;
- the relationships with municipal enterprises and institutions subject to the jurisdiction of the inter-municipal corporation.

As regards governance, the recommendation is for direct election of the board of an inter-municipal corporation in order to involve the citizens in the reform from the beginning.[15] Such a step should be undertaken on the basis of a broad consensus with the associations of territorial communities.

[15] The French experience shows that it is extremely difficult to replace election by municipal council with direct election by citizens. But this can be a very much politicised issue.

SECRETARIAT GENERAL

DIRECTORATE GENERAL OF DEMOCRACY AND POLITICAL AFFAIRS

DIRECTORATE OF DEMOCRATIC INSTITUTIONS

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APPRAISAL OF THE DRAFT LAW OF UKRAINE ON STIMULATION AND STATE SUPPORT OF UNIFICATION OF RURAL TERRITORIAL COMMUNITIES

The present report was prepared by the Directorate of Democratic Institutions, Directorate General of Democracy and Political Affairs, in co-operation with Prof. Gérard Marcou, University Paris 1 Panthéon-Sorbonne, Director of GRALE (Research Group on Local Administration in Europe), and Prof Robert HERTZOG, University of Strasbourg France.

Introduction

The present legal appraisal was requested by the Ministry of Regional Development and Construction within the framework of the Council of Europe Programme to Strengthen Local Democracy in Ukraine (2010-2013, funded by the Swedish International Development Cooperation Agency Sida). The draft law on "*Stimulation and State Support of Unification of Rural Territorial Communities"* should become a part of the legal basis for implementing an ambitious local self-government reform, together with the draft laws "On Local Self Government" and "On Local State Administration". An introductory sentence of the draft explains that "*this Law establishes the procedure for the resolution of issues related to the unification of rural territorial communities."*

The draft law provides for a legal framework for amalgamating rural communities (*hromadas*) in order to improve service provision and save administrative costs. This is a law on procedure and State financial support. It reflects the idea that, according to the Government, rural areas are the priority in local government reform. It is therefore submitted before the general Strategy for local self-government reform in Ukraine is adopted, although the need for the Strategy has been discussed for more than ten years and has given rise to many reform projects under all governments. It is, however, important to have a wider perspective in order to avoid inconsistencies or unforeseen and undesired consequences.

Inter-municipal cooperation (IMC) institutions can be an alternative to amalgamation when the latter proves to be impossible or politically too difficult, or a supplement to amalgamation, where a number of services can be organised on a wider scale, without the disadvantage of creating municipalities that are too large, since this may hamper citizen access to municipal administration.

A Conference on Legislative Support to IMC was organised in Kyiv on 17 December 2010 by the Council of Europe (CoE) Programme to Strengthen Local Democracy in Ukraine and the Parliamentary Committee on State Building and Local Self-Government in order to discuss the draft and the options for IMC policy. This paper is a consolidated appraisal taking into account the comments of other experts and the discussion of the conference. The Conference participants agreed on three statements:

1. Territorial reform is important for Ukraine for administrative and political reasons; but there are also economic and social reasons that make it more urgent today.
2. It is a difficult and complicated task, that has been postponed several times because of resistance, including from the population, which is often unaware of all the benefits of the reform; so there is a need for greater explanation in order to reach political consensus;
3. A law is needed because the existing provisions of the Law on local self-government are not sufficiently precise on this subject and have not been implemented; a new law will create an opportunity for a national debate on the subject so that the stakes become more visible and understandable for the citizens. The government should announce the reform among its priorities. The law is also needed to create specific incentives that will accelerate the process of unification/amalgamation, as in other countries.

I. The need for territorial consolidation in Ukraine: merger and cooperation

The general problem of Ukrainian local self-government (LSG) is owing to the very specific and complicated organisation of the first level of LSG. This situation is unknown in Western European countries. The first level of LSG in Ukraine is based on the notion of "settlement". Villages and cities may be one or several settlements, and they form the territorial basis of the *hromada*, which is considered an "administrative territorial unit" (1997 Law on LSG, Article 1: there are administrative territorial units of different levels, and some inside of a city). As a result, instead of one type of first level LSG unit (which is the practice of most European countries), there are several kinds of first level LSG units.

This creates complexity for the actors themselves, both the ones in charge of a given territory and its citizens. As in other countries, many of these first level LSG units are very small in territory and population, and lack the resources needed to provide services, or to attract enterprises and investment. Thus Ukraine is faced with the same options as all other European countries at a certain point in their history: *status quo*, amalgamation, or IMC. In fact, these options are generally mixed because cooperation and amalgamation can be alternatives to each other but are also complementary.

Previous experience demonstrates that fragmentation can be a real handicap for development policies and for provision of public services to the population. The explanatory note to the draft Law lists the negative effects and weaknesses of many LSG units due to fragmentation of the territorial administration, especially in rural areas: absence or low quality of basic public services (water distribution, sewage, waste collection and disposal, roads), little or no social assistance, culture, health, education services, etc. This results in the absence of farming on large agricultural territories, poverty and emigration, etc. These economic and social problems are not directly caused by municipal fragmentation, but the absence of strong local government deprives *hromadas* of any capacity to solve problems and to launch efficient policies. Many *hromadas* are not able to initiate cooperation with other administrations and to draw up programmes that could attract investment or external financial support.

The policy of territorial consolidation in Ukraine may be seen from two perspectives: the modernisation and improvement of public entities, through clarification and rationalisation of the administrative map, better distribution of competences and resources on the one hand; and the economic and financial crisis that pushes today towards territorial consolidation on the other. Ukraine receives important support from the IMF, so there is an urgent obligation to make public administration work more efficiently.

Reshaping territorial administration in rural areas should be a high priority for government and parliament. But issues surrounding rural territories are part of a more general issue of territorial organisation in Ukraine, which has been discussed for many years with no results. Amalgamation or creation of IMC entities should not be considered separately but as an important part of a general strategy of territorial consolidation and LSG reform.

The present territorial organisation was conceived at a time when it was coherent with political and administrative centralisation, in which the economic and social policies were conducted by a central planning body. All LSG units were parts of the State administration in a “matrioshka” architecture. This is no longer the case. *Hromadas* must comply with the principles of the European Charter of Local Self-Government (ECLSG) and are autonomous actors of development policies. LSG units should have a size that allows them to have sufficient human and financial resources to produce a fair society, economic services and provide social welfare. The ECLSG not only promotes formal democracy; its spirit is in the organisation of LSG, which brings the best services to all people.

Another issue of the LSG system in Ukraine is that certain areas of the territories are not included in the boundaries of a *hromada,* and they are directly ruled by the second LSG level, the *rayon*. Such situations exist in other countries, but under condition of amalgamation of two tiers of LSG, mainly in metropolitan areas, and the second level enjoys full decentralisation[1]. The situation in Ukraine whereby the second level has *rayon* competences for the whole territory and municipal competencies for only parts of it - notably rural ones that need special care - is complicated. There is a great risk of inequality in such cases: the population of these territories is separated from the service delivering authorities, while the "central" *rayon* authorities neglect their management. This situation could become even more complicated if, after the merger of villages, some rural territories have the status of a unified municipality and some territories are left without any neighbouring administration. [2]

There should be an explicit choice, expressed in a clear political statement, that the objective in the medium- or long-term is to have a unified form of organisation at the first level of LSG addressing three different situations:

- Municipalities with an adequate size and perimeter remain unchanged;
- Municipalities which are too small merge (mainly but not exclusively rural ones);
- areas where merger is not possible (or not accepted) create adequate IMC entities.

The IMC provisions should be included in the same text as the merger provisions, and they should be discussed at the same time, because of their interdependence.

II. Three Issues to Consider

The discussions on the draft law concentrate on three major issues analysed below.

1. Should there be a separate Law or a Chapter in the basic Law on LSG?

Since the revision of the current basic Law on LSG is under preparation, it could be wise to include a chapter on amalgamation and IMC in this law, rather than having a separate

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[1] *Kreifreiestadt* in Germany, when the commune and Kreis are merged in one entity in big cities. In France, Paris; a new law of December 16th 2010 allows other amalgamations if the concerned LG decide them.

[2] This depends on the size of the different tiers. If a new commune is created with settlements that may be more than 20 kilometres away one from another, its size may be the same, or at least nearly, with the size of certain *rayons*.

legislation. A separate law on amalgamation can be adopted quite quickly if there is sufficient political consensus on its objectives. The basic law on LSG may take more time because of disagreement on other issues. However, in view of the substance of the law, **the recommendation would be to integrate joint provisions on amalgamation and IMC into the basic law**. This option should be considered by the government. It creates an opportunity to inform the citizens on the stakes of a more rational and efficient territorial organization. A separate law will be needed to establish pertinent procedures and other rules for amalgamation and IMC. But the rules should not appear as exceptional, separated from the other provisions on LSG entities. Merger and IMC must be seen as part of the ongoing developments of a decentralised State.[3] They should be an integral part of the LSG system, and they should be ruled by permanent provisions in the basic law.[4] Specific government policies to encourage local governments to accelerate the creation of united or IMC entities do not need new procedures. The political will can be expressed in incentives, legal and financial support, in addition to the ordinary provisions.

2. Separate provisions for rural hromadas?

The present draft is meant to bring together small rural communities. Clearly, this is a very important stake in the creation of bigger and stronger LSG units at the first level. The new communities will remain rural, because of the geographical, sociological and economic make-up of the municipality, and not because of the number of inhabitants. Specific rules may take this into account, if there is a need for them. Yet the current definition of rural communities is not clear.[5]

Amalgamation or cooperation with a city is also an option that should be considered. Villages that merge with a medium-size city have access to more services in an easy and cost effective

[3] In the Netherlands there is an ongoing trend of merging communes on a voluntary basis because new political leaders consider this useful. In France, which has many IMC entities, there is a continuous creation, winding up or modification of IMC bodies, etc.

[4] This is the case in most countries. In France, the rules on amalgamation and IMC are in the *General Code of LSG*. In Germany, the municipal law is a competence of the Land; so there are a variety of situations, but IMC is considered as fully part of municipal law.

[5] The draft does not explain a "rural territorial community". Article 140 of the Constitution and the terminology of the recent draft law to amend the local self-government law imply that this should be a village or rural settlement, as opposed to a city. But, is a borough a big village or a small town/city? There is no provision on boundaries, on municipal personnel and reorganisation of municipal services and on the representation of the former communities.

way: public transport, waste collection and disposal, libraries, sports facilities, police, etc. There can be a synergy between a city and small neighbouring communities for development policy, use of public equipment, and sharing of certain costs. Next, there are large cities with a belt of smaller communities. A merger can be twofold: the town gets a larger territory for its development (business districts, housing), at a lower cost for the buyers. And the population of small communities gets access to the city services. Two neighbouring cities may decide to cooperate on specific projects: hospital, waste, schools, transport, promotion of tourism.

Merger and IMC should be open procedures offered to all local governments in order to allow them to choose the best way to fulfil their tasks and organise their development. **Most of the rules should be common and general for all types of municipalities, rural and urban.**

3. Financial incentives for amalgamation and cooperation?

The draft law has important provisions on financial incentives for communities starting a merger process, with figures that are higher than those generally given in other countries, which demonstrates the importance of this policy for the government. Financial incentives from the State budget for amalgamation or cooperation are justified for at least four reasons:

1) These reforms have a cost for the participating municipalities: for research and consultancy (economists, lawyers, specialist on organisation, taxes, budgeting, etc); for reorganisation of the administrations, organisation of a local referendum. There should, in which case, be a specific grant for launching the procedure.
2) Creation of a new entity is not only of local interest but also of regional and national one, because it can improve the overall territorial administration.
3) A large new municipality or a new IMC entity will have the critical size for spending public money more efficiently in investment or public services.
4) Financial incentives can speed up the creation of IMC or merger processes[6]. The financial motivation will become more and more important in a lasting fiscal stress for local administrations. More money is not the only important factor; competition between the communities is even more important. Those that do not cooperate or merge will obtain significantly less in terms of development than those which do. The competitiveness mechanism is very well understood by local government managers and politicians.

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[6] Financial incentives contributed greatly to the success of IMC in France after the 1999: 2600 new highly integrated communities were created in a couple of years.

III. Analytical Assessment of the Draft Law

The following issues should be discussed by the authorities and revised in the draft.

1. Guidance and coordination by central government (Article 3.)

LSG units absolutely need support for any unification or cooperation process[7]. There is a need for methodology, legal guidance, and financial support, where state administrations have important responsibilities. However, the law must be precise and should say what bylaws should be issued and what kind of support the government can give, because the draft law cannot become an indirect way of limiting the autonomy of local authorities. The commission to be established within the specially authorized central executive authority in charge of regional policy issues may not include exclusively representatives of central authorities and scientific institutions. It must also include local government representatives, including *rayons*. This is a requirement of the ECLSG Art. 4 para 6[8], and it will be politically wise in order to facilitate consensus.

2. Conditions and criteria for the merger of rural territorial communities (Article 4.)

Article 4 of the draft defines several criteria and conditions that should be respected by the founders of a new united community. The CoE experts support the idea that the creation of new administrative structures cannot be left to the discretionary decision of local authorities. It is a public interest to create long-lasting entities of optimal size, which will improve local institutions. Experience of other countries demonstrates that geographic or demographic limits generate "perverse effects," which are never relevant for all situations. The draft law states that a united community must include at least 4000 persons. The distance from the administrative centre of a territorial community to the most remote village of this community may not exceed 20 km and, to determine the new administrative centre, the population and the service capacity are considered. It is not clear how this distance will be measured: boundary to boundary, village centre to village centre, and what is a village centre?

[7] See the toolkit published by the CoE, UNDP and LGI for IMC. The same recommendations are also pertinent for mergers.

[8] *"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".*

It is reasonable to suggest a lower limit of the number of inhabitants, because there are cases where IMC entities or merged communes are still too small and don't reach the minimal capacity of resources and a sufficient population to make them viable[9]. On the other hand, in certain circumstances it may be impossible to stay above the limit. With small, remote villages, 4000 inhabitants would be too large, and people might be too far away from the centre and from each other. Alternatively, the proposed union could contain a population over 4000, but during the referendum one or two communes might reject integration, and the figure could fall under 4000, for example 3750. Should the whole process then be stopped? The limit opens up an opportunity for blackmail, or could cause the process to collapse. While it is reasonable to set a limit of 4000, some flexibility should be allowed, depending on each individual case. A special study and a report could be produced proving that the union is improving the capacities of LSG and will still create a viable entity.

The distance criterion also raises some questions. For example, the municipal administration should be close to people, and 20 km might be too far for an aging population in areas lacking an efficient public transport system. Therefore, the law should include an alternative criterion based on the time needed to reach the administrative centre (for example 45 minutes or less than 1 hour by car or motorcycle)[10]. If the new entity is too big and scattered there will never be any sense of solidarity or a community life between the inhabitants. In fact, if the distance between two settlements of the new entity is close to 40 km, few types of equipment could be shared, and too much money would have to be spent on transportation and roads. This has to be a serious consideration when examining the proposals at the *rayon* level.

Do these criteria apply to any merger? Between a city and settlements, for instance? Are there also such criteria for IMC bodies? There is a need for a thorough study showing which municipalities should be merged, for what reasons, and with what benefits. Ideally, instead of listing the criteria, the law should be clearer and more demanding on the background study for initiating the merger process. It should state that the councils decide to merge on the basis of a report, which demonstrates the need for and benefits of a merger. And then the law could authorise the state authorities (at the *oblast* level) to veto proposals that are not rational or do not meet the requirements.

[9] In France, many IMC communities unite only 3 or 4 small communes with less than 2000 inhabitants in all.
[10] In a big city citizens may also need that much time to go to the central city hall or to specific municipal services.

3. Initiating the merger of rural territorial communities (Article 5.)

This article has been seriously criticised by all experts. The provision of Articles 5 and 6 is not adequate for dealing with such complex issues[11]. They overestimate the capacity of the project to attract full support from citizens. It is an unrealistic statement that "*the unification of rural territorial communities may be initiated by the corresponding village councils and initiative groups with at least 10 members from among the inhabitants of the villages that initiate the unification.*"

Further, the draft does not say to whom this initiative must be sent and where it is registered. A council or several inhabitants from one village cannot ask for a merger with other villages without some discussion or even negotiation with these villages. As other experiences of mergers show, it is unlikely that the ordinary people will organise initiatives for municipal amalgamation or creation of an IMC entity. Then the state *rayon* administration is to formulate a recommendation directed to the *rayon* council for organising a referendum in all these localities. This type of procedure also raises concerns.

How can a council decide to initiate a process for unification if there is no concrete project describing the list of communities involved, the agenda, the financial consequences, the new organisation, possible development policies or new investments to be created? First, the initiative has to be credible and to be based on the previous agreements of several local councils, or on the initiative of inhabitants, but in this case there should be a minimum percentage of *voters* (a more appropriate term than *inhabitants*) from the different localities. Then, the unification process will build on this core agreement.

Secondly, the main question is determining the area in which the referendum will be organised. Article 4 gives criteria on how to determine this area, but there is no clear provision on who is empowered to decide the boundaries. Articles 5 and 6 imply that the area is determined following the submission of the initiative. Logically, it should belong to the head of the *rayon* state administration to decide on the area; but it follows from Article 6 (paragraph 2) that the *rayon* council decides only on the organisation of the referendum, not on the area.

[11] The CoE-UNDP- LGI Toolkit on IMC contains good recommendations on this subject.

The state *oblast* administration should have a more important role to play in the process. It is unlikely that the qualified staff can be found in all state *rayon* administrations, especially in rural areas. A task force should be established at the *oblast* level in order to assist the *rayon* administrations. Furthermore, if the merger process finds support and is successful, there would be four or five united rural territorial communities in each *rayon*, and this would bring into question the existing territorial division into *rayons*, and the existence of *rayon* state administrations and councils who will not support the reform.

Representatives of local self-government have to be involved in the design of the territory of the future united rural territorial communities from the very beginning, their support is a basic condition for success. Ideally, a local commission elected by all mayors of the *rayon* should be formed. This would facilitate the dialogue between all mayors, and between all mayors and the head of the state administration on the future municipal pattern of the *rayon*[12]. Then, it would be easier to submit the proposals to the voters. This method does not rule out the initiative of some mayors or inhabitants, but it will avoid too many discretionary decisions of the head of the state *rayon* administration on a case-by-case basis, and this will increase the transparency of the process and the legitimacy of the final design.

Several authorities should be enabled to take the initiative. Merger and IMC never occur spontaneously; they need political leadership and technical support. The State as well as the *rayon* should have the possibility of launching a process that is not dependant on the good will of some of the inhabitants over the national territory. The best method would be to organise a systematic study of possible unions at the most appropriate level: this would be one where there is good information; staff and financing for the studies; political capacity of creating consensus with the ability to resist unreasonable projects.

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[12] This problem is well known in France where the municipal pattern is very much fragmented, especially in rural areas. A commission is elected at the department level (a larger constituency than the Ukrainian *rayon*) by all mayors and presidents of joint-authorities; the prefect has to establish a scheme for the development of IMC in consultation with this commission; a vote with special majority may bind the prefect in some circumstances. Several reforms have strengthened the role of this commission and the authority of its decisions, and recently the new local government reform adopted by the parliament on 17 November 2010. This method could be used to prepare a unification plan at the *rayon* level, with proposal of new enlarged communities consistent with each other.

4. Review and summary of proposals and decision for the unification of rural territorial communities (Article 6.)

Article 6 of the draft contains complicated proceedings that are not clearly related to the initiative. It is not clear what happens between the moment when an initiative is registered and these proceedings. It will be the responsibility of the *rayon* state administration to summarise, with the participation of the corresponding local council commissions, proposals for unification of rural territorial communities, develop recommendations on the optimal resolution of this task, observing the main conditions and criteria. The feasibility study and the examination of the project's pertinence may therefore be carried out on the basis of "spontaneous" proposals. But at such a late stage, it would be very difficult for the *rayon* administration to contest the proposals, reshape the territorial limits in a more rational form and form consensus. Discussion with all other authorities will complicate it even more and there is a great risk of decisions being taken in a spirit of hurried compromise that will rapidly prove inefficient. The delay of 7 days is therefore not acceptable and should be at least one month. The whole process should therefore be reformulated with much attention given to the way initiative is launched and how the first outline of the union becomes public and a matter for discussion by political representatives and the population.

As regards the referendum itself, it seems that the Constitution (Article 140) would require that the votes are counted for each territorial community, since the self-governing right belongs to territorial communities. But it would make the reform impossible if the opposition of only one *hromada* was enough to defeat the decision. However it is possible to have a large majority, large enough to launch the new united territorial community on a large-scale basis, without forcing the decision if the project is too controversial or raises too much opposition, and make it possible to overcome isolated opponents[13].

Other points to consider include the need for special financing for organising referendums, and the preference for counting the overall sum of votes for all villages that took part, rather than a separate count for each village. The draft should refer to "direct decision of the citizens" and review the referendum procedure. The separate counting solution will probably

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[13] In France, for the creation of an integrated joint-authority ("*communauté*"), there is no referendum, but as a rule the majority within the area of the consultation has to be either 2/3 of municipal councils representing ½ of the population, or alternatively ½ of the municipal councils representing 2/3 of the population. Other majorities can be envisaged.

be supported in the name of the “autonomy” of each village, on the basis of the Constitution and of the Charter. This idea can be challenged because the creation of each local government area and the modification of its boundaries are not exclusive powers of each LSG unit; rather it is a matter for the national administration and of broader interest than for just one group of its current population which has the right to express its opinion.

If the final option is for a separate count, then there should be a protection against sectoral, political, economic or even individual interests. In small districts certain groups can hinder the reform and damage the interests of the larger population. If a merger can only be created with unanimity of all communities, small groups in the villages might have a decisive negative influence and block the merger or use blackmail to make unreasonable demands. The best system would be the one with a double optional majority: either X% (60 or 70) of the villages representing Y% (50; 60?) of the population, or Y% (50, 60) of the villages representing X% (60, 70?) of the population, etc.

5. Budget and financial issues

5.1 Financial unification: taxes, prices, debts

The draft has short provisions for creating a unified budget after the amalgamation has taken place. There are several issues which should be addressed by the law but are missing in the draft. They concern the unification of tax rates and price of services. Each village may have its own figures with important differences. They cannot remain in force indefinitely. What happens after unification? Will there be an average tariff? Or does the new council have to decide on all these figures? What about a transitional period to bring them to an average level? Something more precise should be said on the debt. Logically the debts and properties of the merged *hromadas* become debts and properties of the new *hromada*. Article 8 needs to be expanded and clearer on these issues.

5.2 Financial incentives and special grants for unification

As already mentioned, the grants are important to make merger or cooperation more attractive. Two different types of additional grants should be distinguished. The first one is needed to cover the direct costs of the merger proceedings themselves: the preliminary feasibility studies for the delimitation of the perimeter of the new *hromada* or the IMC and for the definition of its main characteristics, the procedures to create it and the drawing up of the scheme of the new entity. At the end, further support must be provided to pay the costs of the

referendum. These grants are part of the provisions that define the process of initiative and creation. Additional financial support can be of different types, temporary or permanent, partly earmarked and progressive. It should be conceived in a way that helps to bring visible and positive improvement in the LSG organisation and management, and in public services.

There is no need for large amounts of money the first year of the reform – immediate grants would not motivate efficiency; the political direction and the staff of the new entity will not be fully operative to conceive programmes of investment; the leaders at this stage would not have time to prepare a strategy and list their priorities. It would be more expedient to pay, for example, about 35% of the additional grant in the first year, 70% in the second, and the rest in the third year after creation. This would also be an incentive for better planning of the creation of new services and investments. It would be easier on the national budget and would allow support to be given to a greater number of initiatives.

The budget of the united rural *hromada* gets additional subsidies, 25% of the budget of the united *hromada*. Depending on the number of communes and size of population this percentage can reach 50, 75 or even 100%. The philosophy is to motivate a greater number of villages with a bigger population to merge. Albeit a positive idea, it could result in wrong decisions if the size and shape of the united community are chosen to meet the criteria of subsidy rather than the criteria of rational territorial management.

The time limit of 3 years is not clear. The draft does not specify how it is calculated: is it from the date of the creation of the united rural *hromada*? Or from the election of the new council? Or the adoption of the first "unified budget"? Three years is not long for investment and development policies, considering in particular that the first year will be spent on formalities. Ideally, a progressive payment should be stretched over 5 years. The total amount of these subsidies for the three years may not be enough to finance an ambitious programme. The risk is that the money will be used for current expenditure. The administrative supervision of the efficient use of subsidies carried out by the specially authorised central executive authority in charge of regional policy issues might not be sufficient for avoiding this.

More sophisticated criteria could be used for calculating the amount of subsidies: an equalisation model would favour grants for "poor" *hromadas*; a development model would

favour economic programmes; grants could also be modelled in relation to the level of existing equipment in the enlarged *hromada* etc.[14]

The estimates in the Explanatory Note to the draft are not very convincing. There will be many diverse situations depending on the wealth of the amalgamated villages. The merger of poor villages heavily dependent on subsidies will not make them less dependent. And merging poor villages with wealthier ones supposes that these latter exist in the region and will accept the merger; they may prefer to stay "independent" rather than to share their resources. This is also a reason why mergers must be formed following a majority vote of the villagers and not a unanimous one.

It would be too optimistic to hope that a merger can really save money for the budget, at least in the short term. A larger community has "structural costs" that may be important, including travel expenses for the employees and council members, etc. The probability is that the implementation of the reform will generate new costs. So it is not sure that the total amount of additional grants may be earmarked for investment alone.

The whole reform should not be presented as a means to reduce expenditure and to make savings directly in the budgets, even if this can be the case for marginal amounts. The real objective is to make the decision process in this area more efficient and improve the capacity of development policies and public services in a more efficient way. Budgetary cuts based on the forecasts of the Explanatory Note could severely undermine the success of the reform.

6. Absence of provisions on employees and on a permanent territorial representation

The draft does not deal with the situation of the village employees. Do they automatically become union employees, with the same salary, which can be different from one entity to another? What about their career and pensions? There is no provision on the representation of the former *hromadas*. International experience has shown that successful amalgamation policies generally include a form of representation of the former communities in the new one;

[14] Costs *per capita* for infrastructures increase in areas of low density. This will be the case in many regions that the reform is supposed to help. In a number of such areas, it will not be possible to increase the number of unified communities and their population without generating excessive remoteness. Therefore, the law should introduce another variable based on the number of inhabitants per km². This requires obviously careful statistical estimates. It could be suggested to link the expenditure with these subsidies and the implementation of the Reform programme of housing and municipal economy. This would make it possible to show the improvements for people to be expected nationally by the implementation of both reforms. This would also facilitate the planning of the development of the various sectors of the municipal economy.

the villages should be able to elect a representative to the new city council and sometimes keep some services in their city halls.

IV. Integrating a Chapter on IMC into the Basic Law on Local Self-Government

The purpose of inter-municipal cooperation

When the municipal territorial pattern is fragmented, the development of new tasks that need to be organised for a larger population area cannot be undertaken at the level of traditional settlements upon which municipalities are based in most countries (there are important exceptions). Alternatively, the amalgamation (or consolidation) of municipalities makes it possible to raise the municipal dimension to the scale of the new needs. Various countries, especially in Northern Europe have followed this path. However, territorial reform based on amalgamation does not render IMC unnecessary. First of all, in urban areas, the urban development cannot be contained in administrative boundaries, and beyond the consolidation of the core, cooperation is again necessary for urban transport systems, strategic planning, and land development. In rural areas, new problems arise with an aging population and the decline of the economic basis, further consolidation steps may create new problems of remoteness, and cooperation can be a relevant alternative for a number of functions.

But the territorial reform is not only a matter of administrative rationalisation and management. Everything depends on the general organisation of the state, on the perception of what is local in the political culture, whether the local is identified with the city or with the village, whether the main service provider is the state or the local authorities. All these factors influence the path and even the possibility of territorial reform. In various countries where territorial reform through amalgamation has proved politically impossible, the development of more integrated forms of IMC has been used as a practical alternative. This path has been followed in France, and the new law on the local government reform adopted on 17 November 2010 is aimed at completing the setting up of “inter-municipalities” until the end of 2013. A similar path has been followed by Hungary and Italy and is on the agenda in Spain, despite the fact that it is more difficult to implement because of the power of the autonomous regions. However, in both cases, the IMC bodies develop from the municipalities or from the municipal community, e.g. they are public powers and not private associations or contractual arrangements, although these might be used in order to deal with specific needs. In the UK, as in Germany or in France, IMC bodies are public law corporations.

IMC provisions in the 2010 draft law amending the 1997 Law on Local Self-Government

First of all, the concepts of *hromada* reflected in this draft law and in the draft law on the Stimulation of State Support of Unification of Rural Territorial Hromadas are not the same. As emphasised above, the result of the unification will be the formation of a new territorial community called the “united rural territorial community”. In contrast, under Article 6, paragraph 4 of the amending draft law, the voluntary unification will result only in the formation of joint bodies for several communities, but not of a new enlarged community in place of the former ones. This second option is less ambitious, but makes it possible also to rationalise the municipal pattern. Whatever the political choice, any contradiction or divergence between both pieces of legislation should be avoided.

In the amending draft law, the IMC provisions are scant and do not meet the needs of Ukraine. Article 11 is the only article specifically dedicated to the subject, and financial matters are addressed in articles 60, paragraph 7, and 61, paragraph 4. IMC cannot be developed using these provisions. Article 11 does not give an adequate basis for the IMC development because it is based on a wrong concept: it uses two instruments; the association and the agreement, and the association itself is established through an agreement. Both are instruments of private, not public law. First, the association can be used both to solve management issues for some tasks and to represent rights and interests of the member territorial communities. Second, under paragraph 7, no power of an LSG body may be transferred to an association; this is understandable only if the association is a legal body of private law. Third, they are subject to registration by the Ministry of Justice, just as any private association or private legal person. The use of agreements is also regulated by Article 60.7: an agreement between several territorial communities can be passed to establish a co-ownership right on an object of municipal property or to join municipal funds for a joint project or for the joint financing of a joint communal enterprise or institution. Article 61.4 is identical in its budget rules to the previous one: it provides that the budgetary funds of several territorial communities may be amalgamated on a contractual basis.

These provisions do not meet the needs, whatever the political choice for the territorial reform. IMC cannot solve major problems of performance of municipal functions if territorial communities are not entitled to delegate powers to the joint bodies. This limitation can only be overcome by providing for specific public law corporations that can be established on the

basis of an agreement of member municipalities (eventually a majority thereof) by an administrative act, e.g. an act of public power. Then, the duties and the powers of the local authorities will be the same in relation to the task, whether they are exercised by the territorial community itself or through a joint body.

Therefore, it is not an article that the Law needs , but **a chapter** determining, in particular:

- the procedure for establishing IMC;
- the legal status of such a public law corporation;
- its governance;
- the financing (contributions of member municipalities or own resources from taxes, fees, duties, charges);
- the tasks that have to be exercised through the IMC, and the conditions according to which such tasks may be delegated;
- the supervision by member municipalities and the state supervision (that should be the same as for the territorial communities themselves);
- the rules on the transfer of personnel and of property;
- the relationships with municipal enterprises and institutions subject to the jurisdiction of the inter-municipal corporation.

As regards governance, the recommendation is for direct election of the board of an inter-municipal corporation in order to involve the citizens in the reform from the beginning.[15] Such a step should be undertaken on the basis of a broad consensus with the associations of territorial communities.

[15] The French experience shows that it is extremely difficult to replace election by municipal council with direct election by citizens. But this can be a very much politicised issue.

SECRETARIAT GENERAL

DIRECTORATE GENERAL OF DEMOCRACY AND POLITICAL AFFAIRS

DIRECTORATE OF DEMOCRATIC INSTITUTIONS

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APPRAISAL OF THE DRAFT LAW OF UKRAINE ON STIMULATION AND STATE SUPPORT OF UNIFICATION OF RURAL TERRITORIAL COMMUNITIES

The present report was prepared by the Directorate of Democratic Institutions, Directorate General of Democracy and Political Affairs, in co-operation with Prof. Gérard Marcou, University Paris 1 Panthéon-Sorbonne, Director of GRALE (Research Group on Local Administration in Europe), and Prof Robert HERTZOG, University of Strasbourg France.

Introduction

The present legal appraisal was requested by the Ministry of Regional Development and Construction within the framework of the Council of Europe Programme to Strengthen Local Democracy in Ukraine (2010-2013, funded by the Swedish International Development Cooperation Agency Sida). The draft law on "*Stimulation and State Support of Unification of Rural Territorial Communities"* should become a part of the legal basis for implementing an ambitious local self-government reform, together with the draft laws "On Local Self Government" and "On Local State Administration". An introductory sentence of the draft explains that "*this Law establishes the procedure for the resolution of issues related to the unification of rural territorial communities."*

The draft law provides for a legal framework for amalgamating rural communities (*hromadas*) in order to improve service provision and save administrative costs. This is a law on procedure and State financial support. It reflects the idea that, according to the Government, rural areas are the priority in local government reform. It is therefore submitted before the general Strategy for local self-government reform in Ukraine is adopted, although the need for the Strategy has been discussed for more than ten years and has given rise to many reform projects under all governments. It is, however, important to have a wider perspective in order to avoid inconsistencies or unforeseen and undesired consequences.

Inter-municipal cooperation (IMC) institutions can be an alternative to amalgamation when the latter proves to be impossible or politically too difficult, or a supplement to amalgamation, where a number of services can be organised on a wider scale, without the disadvantage of creating municipalities that are too large, since this may hamper citizen access to municipal administration.

A Conference on Legislative Support to IMC was organised in Kyiv on 17 December 2010 by the Council of Europe (CoE) Programme to Strengthen Local Democracy in Ukraine and the Parliamentary Committee on State Building and Local Self-Government in order to discuss the draft and the options for IMC policy. This paper is a consolidated appraisal taking into account the comments of other experts and the discussion of the conference. The Conference participants agreed on three statements:

1. Territorial reform is important for Ukraine for administrative and political reasons; but there are also economic and social reasons that make it more urgent today.
2. It is a difficult and complicated task, that has been postponed several times because of resistance, including from the population, which is often unaware of all the benefits of the reform; so there is a need for greater explanation in order to reach political consensus;
3. A law is needed because the existing provisions of the Law on local self-government are not sufficiently precise on this subject and have not been implemented; a new law will create an opportunity for a national debate on the subject so that the stakes become more visible and understandable for the citizens. The government should announce the reform among its priorities. The law is also needed to create specific incentives that will accelerate the process of unification/amalgamation, as in other countries.

I. The need for territorial consolidation in Ukraine: merger and cooperation

The general problem of Ukrainian local self-government (LSG) is owing to the very specific and complicated organisation of the first level of LSG. This situation is unknown in Western European countries. The first level of LSG in Ukraine is based on the notion of "settlement". Villages and cities may be one or several settlements, and they form the territorial basis of the *hromada*, which is considered an "administrative territorial unit" (1997 Law on LSG, Article 1: there are administrative territorial units of different levels, and some inside of a city). As a result, instead of one type of first level LSG unit (which is the practice of most European countries), there are several kinds of first level LSG units.

This creates complexity for the actors themselves, both the ones in charge of a given territory and its citizens. As in other countries, many of these first level LSG units are very small in territory and population, and lack the resources needed to provide services, or to attract enterprises and investment. Thus Ukraine is faced with the same options as all other European countries at a certain point in their history: *status quo*, amalgamation, or IMC. In fact, these options are generally mixed because cooperation and amalgamation can be alternatives to each other but are also complementary.

Previous experience demonstrates that fragmentation can be a real handicap for development policies and for provision of public services to the population. The explanatory note to the draft Law lists the negative effects and weaknesses of many LSG units due to fragmentation of the territorial administration, especially in rural areas: absence or low quality of basic public services (water distribution, sewage, waste collection and disposal, roads), little or no social assistance, culture, health, education services, etc. This results in the absence of farming on large agricultural territories, poverty and emigration, etc. These economic and social problems are not directly caused by municipal fragmentation, but the absence of strong local government deprives *hromadas* of any capacity to solve problems and to launch efficient policies. Many *hromadas* are not able to initiate cooperation with other administrations and to draw up programmes that could attract investment or external financial support.

The policy of territorial consolidation in Ukraine may be seen from two perspectives: the modernisation and improvement of public entities, through clarification and rationalisation of the administrative map, better distribution of competences and resources on the one hand; and the economic and financial crisis that pushes today towards territorial consolidation on the other. Ukraine receives important support from the IMF, so there is an urgent obligation to make public administration work more efficiently.

Reshaping territorial administration in rural areas should be a high priority for government and parliament. But issues surrounding rural territories are part of a more general issue of territorial organisation in Ukraine, which has been discussed for many years with no results. Amalgamation or creation of IMC entities should not be considered separately but as an important part of a general strategy of territorial consolidation and LSG reform.

The present territorial organisation was conceived at a time when it was coherent with political and administrative centralisation, in which the economic and social policies were conducted by a central planning body. All LSG units were parts of the State administration in a “matrioshka” architecture. This is no longer the case. *Hromadas* must comply with the principles of the European Charter of Local Self-Government (ECLSG) and are autonomous actors of development policies. LSG units should have a size that allows them to have sufficient human and financial resources to produce a fair society, economic services and provide social welfare. The ECLSG not only promotes formal democracy; its spirit is in the organisation of LSG, which brings the best services to all people.

Another issue of the LSG system in Ukraine is that certain areas of the territories are not included in the boundaries of a *hromada,* and they are directly ruled by the second LSG level, the *rayon*. Such situations exist in other countries, but under condition of amalgamation of two tiers of LSG, mainly in metropolitan areas, and the second level enjoys full decentralisation[1]. The situation in Ukraine whereby the second level has *rayon* competences for the whole territory and municipal competencies for only parts of it - notably rural ones that need special care - is complicated. There is a great risk of inequality in such cases: the population of these territories is separated from the service delivering authorities, while the "central" *rayon* authorities neglect their management. This situation could become even more complicated if, after the merger of villages, some rural territories have the status of a unified municipality and some territories are left without any neighbouring administration. [2]

There should be an explicit choice, expressed in a clear political statement, that the objective in the medium- or long-term is to have a unified form of organisation at the first level of LSG addressing three different situations:

- Municipalities with an adequate size and perimeter remain unchanged;
- Municipalities which are too small merge (mainly but not exclusively rural ones);
- areas where merger is not possible (or not accepted) create adequate IMC entities.

The IMC provisions should be included in the same text as the merger provisions, and they should be discussed at the same time, because of their interdependence.

II. Three Issues to Consider

The discussions on the draft law concentrate on three major issues analysed below.

1. Should there be a separate Law or a Chapter in the basic Law on LSG?

Since the revision of the current basic Law on LSG is under preparation, it could be wise to include a chapter on amalgamation and IMC in this law, rather than having a separate

[1] *Kreifreiestadt* in Germany, when the commune and Kreis are merged in one entity in big cities. In France, Paris; a new law of December 16th 2010 allows other amalgamations if the concerned LG decide them.

[2] This depends on the size of the different tiers. If a new commune is created with settlements that may be more than 20 kilometres away one from another, its size may be the same, or at least nearly, with the size of certain *rayons*.

legislation. A separate law on amalgamation can be adopted quite quickly if there is sufficient political consensus on its objectives. The basic law on LSG may take more time because of disagreement on other issues. However, in view of the substance of the law, **the recommendation would be to integrate joint provisions on amalgamation and IMC into the basic law**. This option should be considered by the government. It creates an opportunity to inform the citizens on the stakes of a more rational and efficient territorial organization. A separate law will be needed to establish pertinent procedures and other rules for amalgamation and IMC. But the rules should not appear as exceptional, separated from the other provisions on LSG entities. Merger and IMC must be seen as part of the ongoing developments of a decentralised State.[3] They should be an integral part of the LSG system, and they should be ruled by permanent provisions in the basic law.[4] Specific government policies to encourage local governments to accelerate the creation of united or IMC entities do not need new procedures. The political will can be expressed in incentives, legal and financial support, in addition to the ordinary provisions.

2. Separate provisions for rural hromadas?

The present draft is meant to bring together small rural communities. Clearly, this is a very important stake in the creation of bigger and stronger LSG units at the first level. The new communities will remain rural, because of the geographical, sociological and economic make-up of the municipality, and not because of the number of inhabitants. Specific rules may take this into account, if there is a need for them. Yet the current definition of rural communities is not clear.[5]

Amalgamation or cooperation with a city is also an option that should be considered. Villages that merge with a medium-size city have access to more services in an easy and cost effective

[3] In the Netherlands there is an ongoing trend of merging communes on a voluntary basis because new political leaders consider this useful. In France, which has many IMC entities, there is a continuous creation, winding up or modification of IMC bodies, etc.

[4] This is the case in most countries. In France, the rules on amalgamation and IMC are in the *General Code of LSG*. In Germany, the municipal law is a competence of the Land; so there are a variety of situations, but IMC is considered as fully part of municipal law.

[5] The draft does not explain a “rural territorial community”. Article 140 of the Constitution and the terminology of the recent draft law to amend the local self-government law imply that this should be a village or rural settlement, as opposed to a city. But, is a borough a big village or a small town/city? There is no provision on boundaries, on municipal personnel and reorganisation of municipal services and on the representation of the former communities.

way: public transport, waste collection and disposal, libraries, sports facilities, police, etc. There can be a synergy between a city and small neighbouring communities for development policy, use of public equipment, and sharing of certain costs. Next, there are large cities with a belt of smaller communities. A merger can be twofold: the town gets a larger territory for its development (business districts, housing), at a lower cost for the buyers. And the population of small communities gets access to the city services. Two neighbouring cities may decide to cooperate on specific projects: hospital, waste, schools, transport, promotion of tourism.

Merger and IMC should be open procedures offered to all local governments in order to allow them to choose the best way to fulfil their tasks and organise their development. **Most of the rules should be common and general for all types of municipalities, rural and urban.**

3. Financial incentives for amalgamation and cooperation?

The draft law has important provisions on financial incentives for communities starting a merger process, with figures that are higher than those generally given in other countries, which demonstrates the importance of this policy for the government. Financial incentives from the State budget for amalgamation or cooperation are justified for at least four reasons:

1) These reforms have a cost for the participating municipalities: for research and consultancy (economists, lawyers, specialist on organisation, taxes, budgeting, etc); for reorganisation of the administrations, organisation of a local referendum. There should, in which case, be a specific grant for launching the procedure.
2) Creation of a new entity is not only of local interest but also of regional and national one, because it can improve the overall territorial administration.
3) A large new municipality or a new IMC entity will have the critical size for spending public money more efficiently in investment or public services.
4) Financial incentives can speed up the creation of IMC or merger processes[6]. The financial motivation will become more and more important in a lasting fiscal stress for local administrations. More money is not the only important factor; competition between the communities is even more important. Those that do not cooperate or merge will obtain significantly less in terms of development than those which do. The competitiveness mechanism is very well understood by local government managers and politicians.

[6] Financial incentives contributed greatly to the success of IMC in France after the 1999: 2600 new highly integrated communities were created in a couple of years.

III. Analytical Assessment of the Draft Law

The following issues should be discussed by the authorities and revised in the draft.

1. Guidance and coordination by central government (Article 3.)

LSG units absolutely need support for any unification or cooperation process[7]. There is a need for methodology, legal guidance, and financial support, where state administrations have important responsibilities. However, the law must be precise and should say what bylaws should be issued and what kind of support the government can give, because the draft law cannot become an indirect way of limiting the autonomy of local authorities. The commission to be established within the specially authorized central executive authority in charge of regional policy issues may not include exclusively representatives of central authorities and scientific institutions. It must also include local government representatives, including *rayons*. This is a requirement of the ECLSG Art. 4 para 6[8], and it will be politically wise in order to facilitate consensus.

2. Conditions and criteria for the merger of rural territorial communities (Article 4.)

Article 4 of the draft defines several criteria and conditions that should be respected by the founders of a new united community. The CoE experts support the idea that the creation of new administrative structures cannot be left to the discretionary decision of local authorities. It is a public interest to create long-lasting entities of optimal size, which will improve local institutions. Experience of other countries demonstrates that geographic or demographic limits generate "perverse effects," which are never relevant for all situations. The draft law states that a united community must include at least 4000 persons. The distance from the administrative centre of a territorial community to the most remote village of this community may not exceed 20 km and, to determine the new administrative centre, the population and the service capacity are considered. It is not clear how this distance will be measured: boundary to boundary, village centre to village centre, and what is a village centre?

[7] See the toolkit published by the CoE, UNDP and LGI for IMC. The same recommendations are also pertinent for mergers.

[8] *"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".*

It is reasonable to suggest a lower limit of the number of inhabitants, because there are cases where IMC entities or merged communes are still too small and don't reach the minimal capacity of resources and a sufficient population to make them viable[9]. On the other hand, in certain circumstances it may be impossible to stay above the limit. With small, remote villages, 4000 inhabitants would be too large, and people might be too far away from the centre and from each other. Alternatively, the proposed union could contain a population over 4000, but during the referendum one or two communes might reject integration, and the figure could fall under 4000, for example 3750. Should the whole process then be stopped? The limit opens up an opportunity for blackmail, or could cause the process to collapse. While it is reasonable to set a limit of 4000, some flexibility should be allowed, depending on each individual case. A special study and a report could be produced proving that the union is improving the capacities of LSG and will still create a viable entity.

The distance criterion also raises some questions. For example, the municipal administration should be close to people, and 20 km might be too far for an aging population in areas lacking an efficient public transport system. Therefore, the law should include an alternative criterion based on the time needed to reach the administrative centre (for example 45 minutes or less than 1 hour by car or motorcycle)[10]. If the new entity is too big and scattered there will never be any sense of solidarity or a community life between the inhabitants. In fact, if the distance between two settlements of the new entity is close to 40 km, few types of equipment could be shared, and too much money would have to be spent on transportation and roads. This has to be a serious consideration when examining the proposals at the *rayon* level.

Do these criteria apply to any merger? Between a city and settlements, for instance? Are there also such criteria for IMC bodies? There is a need for a thorough study showing which municipalities should be merged, for what reasons, and with what benefits. Ideally, instead of listing the criteria, the law should be clearer and more demanding on the background study for initiating the merger process. It should state that the councils decide to merge on the basis of a report, which demonstrates the need for and benefits of a merger. And then the law could authorise the state authorities (at the *oblast* level) to veto proposals that are not rational or do not meet the requirements.

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[9] In France, many IMC communities unite only 3 or 4 small communes with less than 2000 inhabitants in all.
[10] In a big city citizens may also need that much time to go to the central city hall or to specific municipal services.

3. Initiating the merger of rural territorial communities (Article 5.)

This article has been seriously criticised by all experts. The provision of Articles 5 and 6 is not adequate for dealing with such complex issues[11]. They overestimate the capacity of the project to attract full support from citizens. It is an unrealistic statement that "*the unification of rural territorial communities may be initiated by the corresponding village councils and initiative groups with at least 10 members from among the inhabitants of the villages that initiate the unification.*"

Further, the draft does not say to whom this initiative must be sent and where it is registered. A council or several inhabitants from one village cannot ask for a merger with other villages without some discussion or even negotiation with these villages. As other experiences of mergers show, it is unlikely that the ordinary people will organise initiatives for municipal amalgamation or creation of an IMC entity. Then the state *rayon* administration is to formulate a recommendation directed to the *rayon* council for organising a referendum in all these localities. This type of procedure also raises concerns.

How can a council decide to initiate a process for unification if there is no concrete project describing the list of communities involved, the agenda, the financial consequences, the new organisation, possible development policies or new investments to be created? First, the initiative has to be credible and to be based on the previous agreements of several local councils, or on the initiative of inhabitants, but in this case there should be a minimum percentage of *voters* (a more appropriate term than *inhabitants*) from the different localities. Then, the unification process will build on this core agreement.

Secondly, the main question is determining the area in which the referendum will be organised. Article 4 gives criteria on how to determine this area, but there is no clear provision on who is empowered to decide the boundaries. Articles 5 and 6 imply that the area is determined following the submission of the initiative. Logically, it should belong to the head of the *rayon* state administration to decide on the area; but it follows from Article 6 (paragraph 2) that the *rayon* council decides only on the organisation of the referendum, not on the area.

[11] The CoE-UNDP- LGI Toolkit on IMC contains good recommendations on this subject.

The state *oblast* administration should have a more important role to play in the process. It is unlikely that the qualified staff can be found in all state *rayon* administrations, especially in rural areas. A task force should be established at the *oblast* level in order to assist the *rayon* administrations. Furthermore, if the merger process finds support and is successful, there would be four or five united rural territorial communities in each *rayon*, and this would bring into question the existing territorial division into *rayons*, and the existence of *rayon* state administrations and councils who will not support the reform.

Representatives of local self-government have to be involved in the design of the territory of the future united rural territorial communities from the very beginning, their support is a basic condition for success. Ideally, a local commission elected by all mayors of the *rayon* should be formed. This would facilitate the dialogue between all mayors, and between all mayors and the head of the state administration on the future municipal pattern of the *rayon*[12]. Then, it would be easier to submit the proposals to the voters. This method does not rule out the initiative of some mayors or inhabitants, but it will avoid too many discretionary decisions of the head of the state *rayon* administration on a case-by-case basis, and this will increase the transparency of the process and the legitimacy of the final design.

Several authorities should be enabled to take the initiative. Merger and IMC never occur spontaneously; they need political leadership and technical support. The State as well as the *rayon* should have the possibility of launching a process that is not dependant on the good will of some of the inhabitants over the national territory. The best method would be to organise a systematic study of possible unions at the most appropriate level: this would be one where there is good information; staff and financing for the studies; political capacity of creating consensus with the ability to resist unreasonable projects.

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[12] This problem is well known in France where the municipal pattern is very much fragmented, especially in rural areas. A commission is elected at the department level (a larger constituency than the Ukrainian *rayon*) by all mayors and presidents of joint-authorities; the prefect has to establish a scheme for the development of IMC in consultation with this commission; a vote with special majority may bind the prefect in some circumstances. Several reforms have strengthened the role of this commission and the authority of its decisions, and recently the new local government reform adopted by the parliament on 17 November 2010. This method could be used to prepare a unification plan at the *rayon* level, with proposal of new enlarged communities consistent with each other.

4. Review and summary of proposals and decision for the unification of rural territorial communities (Article 6.)

Article 6 of the draft contains complicated proceedings that are not clearly related to the initiative. It is not clear what happens between the moment when an initiative is registered and these proceedings. It will be the responsibility of the *rayon* state administration to summarise, with the participation of the corresponding local council commissions, proposals for unification of rural territorial communities, develop recommendations on the optimal resolution of this task, observing the main conditions and criteria. The feasibility study and the examination of the project's pertinence may therefore be carried out on the basis of "spontaneous" proposals. But at such a late stage, it would be very difficult for the *rayon* administration to contest the proposals, reshape the territorial limits in a more rational form and form consensus. Discussion with all other authorities will complicate it even more and there is a great risk of decisions being taken in a spirit of hurried compromise that will rapidly prove inefficient. The delay of 7 days is therefore not acceptable and should be at least one month. The whole process should therefore be reformulated with much attention given to the way initiative is launched and how the first outline of the union becomes public and a matter for discussion by political representatives and the population.

As regards the referendum itself, it seems that the Constitution (Article 140) would require that the votes are counted for each territorial community, since the self-governing right belongs to territorial communities. But it would make the reform impossible if the opposition of only one *hromada* was enough to defeat the decision. However it is possible to have a large majority, large enough to launch the new united territorial community on a large-scale basis, without forcing the decision if the project is too controversial or raises too much opposition, and make it possible to overcome isolated opponents[13].

Other points to consider include the need for special financing for organising referendums, and the preference for counting the overall sum of votes for all villages that took part, rather than a separate count for each village. The draft should refer to "direct decision of the citizens" and review the referendum procedure. The separate counting solution will probably

[13] In France, for the creation of an integrated joint-authority ("*communauté*"), there is no referendum, but as a rule the majority within the area of the consultation has to be either 2/3 of municipal councils representing ½ of the population, or alternatively ½ of the municipal councils representing 2/3 of the population. Other majorities can be envisaged.

be supported in the name of the "autonomy" of each village, on the basis of the Constitution and of the Charter. This idea can be challenged because the creation of each local government area and the modification of its boundaries are not exclusive powers of each LSG unit; rather it is a matter for the national administration and of broader interest than for just one group of its current population which has the right to express its opinion.

If the final option is for a separate count, then there should be a protection against sectoral, political, economic or even individual interests. In small districts certain groups can hinder the reform and damage the interests of the larger population. If a merger can only be created with unanimity of all communities, small groups in the villages might have a decisive negative influence and block the merger or use blackmail to make unreasonable demands. The best system would be the one with a double optional majority: either X% (60 or 70) of the villages representing Y% (50; 60?) of the population, or Y% (50, 60) of the villages representing X% (60, 70?) of the population, etc.

5. Budget and financial issues

5.1 Financial unification: taxes, prices, debts

The draft has short provisions for creating a unified budget after the amalgamation has taken place. There are several issues which should be addressed by the law but are missing in the draft. They concern the unification of tax rates and price of services. Each village may have its own figures with important differences. They cannot remain in force indefinitely. What happens after unification? Will there be an average tariff? Or does the new council have to decide on all these figures? What about a transitional period to bring them to an average level? Something more precise should be said on the debt. Logically the debts and properties of the merged *hromadas* become debts and properties of the new *hromada*. Article 8 needs to be expanded and clearer on these issues.

5.2 Financial incentives and special grants for unification

As already mentioned, the grants are important to make merger or cooperation more attractive. Two different types of additional grants should be distinguished. The first one is needed to cover the direct costs of the merger proceedings themselves: the preliminary feasibility studies for the delimitation of the perimeter of the new *hromada* or the IMC and for the definition of its main characteristics, the procedures to create it and the drawing up of the scheme of the new entity. At the end, further support must be provided to pay the costs of the

referendum. These grants are part of the provisions that define the process of initiative and creation. Additional financial support can be of different types, temporary or permanent, partly earmarked and progressive. It should be conceived in a way that helps to bring visible and positive improvement in the LSG organisation and management, and in public services.

There is no need for large amounts of money the first year of the reform – immediate grants would not motivate efficiency; the political direction and the staff of the new entity will not be fully operative to conceive programmes of investment; the leaders at this stage would not have time to prepare a strategy and list their priorities. It would be more expedient to pay, for example, about 35% of the additional grant in the first year, 70% in the second, and the rest in the third year after creation. This would also be an incentive for better planning of the creation of new services and investments. It would be easier on the national budget and would allow support to be given to a greater number of initiatives.

The budget of the united rural *hromada* gets additional subsidies, 25% of the budget of the united *hromada*. Depending on the number of communes and size of population this percentage can reach 50, 75 or even 100%. The philosophy is to motivate a greater number of villages with a bigger population to merge. Albeit a positive idea, it could result in wrong decisions if the size and shape of the united community are chosen to meet the criteria of subsidy rather than the criteria of rational territorial management.

The time limit of 3 years is not clear. The draft does not specify how it is calculated: is it from the date of the creation of the united rural *hromada*? Or from the election of the new council? Or the adoption of the first "unified budget"? Three years is not long for investment and development policies, considering in particular that the first year will be spent on formalities. Ideally, a progressive payment should be stretched over 5 years. The total amount of these subsidies for the three years may not be enough to finance an ambitious programme. The risk is that the money will be used for current expenditure. The administrative supervision of the efficient use of subsidies carried out by the specially authorised central executive authority in charge of regional policy issues might not be sufficient for avoiding this.

More sophisticated criteria could be used for calculating the amount of subsidies: an equalisation model would favour grants for "poor" *hromadas*; a development model would

favour economic programmes; grants could also be modelled in relation to the level of existing equipment in the enlarged *hromada* etc.[14]

The estimates in the Explanatory Note to the draft are not very convincing. There will be many diverse situations depending on the wealth of the amalgamated villages. The merger of poor villages heavily dependent on subsidies will not make them less dependent. And merging poor villages with wealthier ones supposes that these latter exist in the region and will accept the merger; they may prefer to stay "independent" rather than to share their resources. This is also a reason why mergers must be formed following a majority vote of the villagers and not a unanimous one.

It would be too optimistic to hope that a merger can really save money for the budget, at least in the short term. A larger community has "structural costs" that may be important, including travel expenses for the employees and council members, etc. The probability is that the implementation of the reform will generate new costs. So it is not sure that the total amount of additional grants may be earmarked for investment alone.

The whole reform should not be presented as a means to reduce expenditure and to make savings directly in the budgets, even if this can be the case for marginal amounts. The real objective is to make the decision process in this area more efficient and improve the capacity of development policies and public services in a more efficient way. Budgetary cuts based on the forecasts of the Explanatory Note could severely undermine the success of the reform.

6. Absence of provisions on employees and on a permanent territorial representation

The draft does not deal with the situation of the village employees. Do they automatically become union employees, with the same salary, which can be different from one entity to another? What about their career and pensions? There is no provision on the representation of the former *hromadas*. International experience has shown that successful amalgamation policies generally include a form of representation of the former communities in the new one;

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[14] Costs *per capita* for infrastructures increase in areas of low density. This will be the case in many regions that the reform is supposed to help. In a number of such areas, it will not be possible to increase the number of unified communities and their population without generating excessive remoteness. Therefore, the law should introduce another variable based on the number of inhabitants per km². This requires obviously careful statistical estimates. It could be suggested to link the expenditure with these subsidies and the implementation of the Reform programme of housing and municipal economy. This would make it possible to show the improvements for people to be expected nationally by the implementation of both reforms. This would also facilitate the planning of the development of the various sectors of the municipal economy.

the villages should be able to elect a representative to the new city council and sometimes keep some services in their city halls.

IV. Integrating a Chapter on IMC into the Basic Law on Local Self-Government

The purpose of inter-municipal cooperation

When the municipal territorial pattern is fragmented, the development of new tasks that need to be organised for a larger population area cannot be undertaken at the level of traditional settlements upon which municipalities are based in most countries (there are important exceptions). Alternatively, the amalgamation (or consolidation) of municipalities makes it possible to raise the municipal dimension to the scale of the new needs. Various countries, especially in Northern Europe have followed this path. However, territorial reform based on amalgamation does not render IMC unnecessary. First of all, in urban areas, the urban development cannot be contained in administrative boundaries, and beyond the consolidation of the core, cooperation is again necessary for urban transport systems, strategic planning, and land development. In rural areas, new problems arise with an aging population and the decline of the economic basis, further consolidation steps may create new problems of remoteness, and cooperation can be a relevant alternative for a number of functions.

But the territorial reform is not only a matter of administrative rationalisation and management. Everything depends on the general organisation of the state, on the perception of what is local in the political culture, whether the local is identified with the city or with the village, whether the main service provider is the state or the local authorities. All these factors influence the path and even the possibility of territorial reform. In various countries where territorial reform through amalgamation has proved politically impossible, the development of more integrated forms of IMC has been used as a practical alternative. This path has been followed in France, and the new law on the local government reform adopted on 17 November 2010 is aimed at completing the setting up of “inter-municipalities” until the end of 2013. A similar path has been followed by Hungary and Italy and is on the agenda in Spain, despite the fact that it is more difficult to implement because of the power of the autonomous regions. However, in both cases, the IMC bodies develop from the municipalities or from the municipal community, e.g. they are public powers and not private associations or contractual arrangements, although these might be used in order to deal with specific needs. In the UK, as in Germany or in France, IMC bodies are public law corporations.

IMC provisions in the 2010 draft law amending the 1997 Law on Local Self-Government

First of all, the concepts of *hromada* reflected in this draft law and in the draft law on the Stimulation of State Support of Unification of Rural Territorial Hromadas are not the same. As emphasised above, the result of the unification will be the formation of a new territorial community called the "united rural territorial community". In contrast, under Article 6, paragraph 4 of the amending draft law, the voluntary unification will result only in the formation of joint bodies for several communities, but not of a new enlarged community in place of the former ones. This second option is less ambitious, but makes it possible also to rationalise the municipal pattern. Whatever the political choice, any contradiction or divergence between both pieces of legislation should be avoided.

In the amending draft law, the IMC provisions are scant and do not meet the needs of Ukraine. Article 11 is the only article specifically dedicated to the subject, and financial matters are addressed in articles 60, paragraph 7, and 61, paragraph 4. IMC cannot be developed using these provisions. Article 11 does not give an adequate basis for the IMC development because it is based on a wrong concept: it uses two instruments; the association and the agreement, and the association itself is established through an agreement. Both are instruments of private, not public law. First, the association can be used both to solve management issues for some tasks and to represent rights and interests of the member territorial communities. Second, under paragraph 7, no power of an LSG body may be transferred to an association; this is understandable only if the association is a legal body of private law. Third, they are subject to registration by the Ministry of Justice, just as any private association or private legal person. The use of agreements is also regulated by Article 60.7: an agreement between several territorial communities can be passed to establish a co-ownership right on an object of municipal property or to join municipal funds for a joint project or for the joint financing of a joint communal enterprise or institution. Article 61.4 is identical in its budget rules to the previous one: it provides that the budgetary funds of several territorial communities may be amalgamated on a contractual basis.

These provisions do not meet the needs, whatever the political choice for the territorial reform. IMC cannot solve major problems of performance of municipal functions if territorial communities are not entitled to delegate powers to the joint bodies. This limitation can only be overcome by providing for specific public law corporations that can be established on the

basis of an agreement of member municipalities (eventually a majority thereof) by an administrative act, e.g. an act of public power. Then, the duties and the powers of the local authorities will be the same in relation to the task, whether they are exercised by the territorial community itself or through a joint body.

Therefore, it is not an article that the Law needs , but **a chapter** determining, in particular:

- the procedure for establishing IMC;
- the legal status of such a public law corporation;
- its governance;
- the financing (contributions of member municipalities or own resources from taxes, fees, duties, charges);
- the tasks that have to be exercised through the IMC, and the conditions according to which such tasks may be delegated;
- the supervision by member municipalities and the state supervision (that should be the same as for the territorial communities themselves);
- the rules on the transfer of personnel and of property;
- the relationships with municipal enterprises and institutions subject to the jurisdiction of the inter-municipal corporation.

As regards governance, the recommendation is for direct election of the board of an inter-municipal corporation in order to involve the citizens in the reform from the beginning.[15] Such a step should be undertaken on the basis of a broad consensus with the associations of territorial communities.

[15] The French experience shows that it is extremely difficult to replace election by municipal council with direct election by citizens. But this can be a very much politicised issue.

SECRETARIAT GENERAL

DIRECTORATE GENERAL OF DEMOCRACY AND POLITICAL AFFAIRS

DIRECTORATE OF DEMOCRATIC INSTITUTIONS

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APPRAISAL OF THE DRAFT LAW OF UKRAINE ON STIMULATION AND STATE SUPPORT OF UNIFICATION OF RURAL TERRITORIAL COMMUNITIES

The present report was prepared by the Directorate of Democratic Institutions, Directorate General of Democracy and Political Affairs, in co-operation with Prof. Gérard Marcou, University Paris 1 Panthéon-Sorbonne, Director of GRALE (Research Group on Local Administration in Europe), and Prof Robert HERTZOG, University of Strasbourg France.

Introduction

The present legal appraisal was requested by the Ministry of Regional Development and Construction within the framework of the Council of Europe Programme to Strengthen Local Democracy in Ukraine (2010-2013, funded by the Swedish International Development Cooperation Agency Sida). The draft law on "*Stimulation and State Support of Unification of Rural Territorial Communities"* should become a part of the legal basis for implementing an ambitious local self-government reform, together with the draft laws "On Local Self Government" and "On Local State Administration". An introductory sentence of the draft explains that "*this Law establishes the procedure for the resolution of issues related to the unification of rural territorial communities."*

The draft law provides for a legal framework for amalgamating rural communities (*hromadas*) in order to improve service provision and save administrative costs. This is a law on procedure and State financial support. It reflects the idea that, according to the Government, rural areas are the priority in local government reform. It is therefore submitted before the general Strategy for local self-government reform in Ukraine is adopted, although the need for the Strategy has been discussed for more than ten years and has given rise to many reform projects under all governments. It is, however, important to have a wider perspective in order to avoid inconsistencies or unforeseen and undesired consequences.

Inter-municipal cooperation (IMC) institutions can be an alternative to amalgamation when the latter proves to be impossible or politically too difficult, or a supplement to amalgamation, where a number of services can be organised on a wider scale, without the disadvantage of creating municipalities that are too large, since this may hamper citizen access to municipal administration.

A Conference on Legislative Support to IMC was organised in Kyiv on 17 December 2010 by the Council of Europe (CoE) Programme to Strengthen Local Democracy in Ukraine and the Parliamentary Committee on State Building and Local Self-Government in order to discuss the draft and the options for IMC policy. This paper is a consolidated appraisal taking into account the comments of other experts and the discussion of the conference. The Conference participants agreed on three statements:

1. Territorial reform is important for Ukraine for administrative and political reasons; but there are also economic and social reasons that make it more urgent today.
2. It is a difficult and complicated task, that has been postponed several times because of resistance, including from the population, which is often unaware of all the benefits of the reform; so there is a need for greater explanation in order to reach political consensus;
3. A law is needed because the existing provisions of the Law on local self-government are not sufficiently precise on this subject and have not been implemented; a new law will create an opportunity for a national debate on the subject so that the stakes become more visible and understandable for the citizens. The government should announce the reform among its priorities. The law is also needed to create specific incentives that will accelerate the process of unification/amalgamation, as in other countries.

I. The need for territorial consolidation in Ukraine: merger and cooperation

The general problem of Ukrainian local self-government (LSG) is owing to the very specific and complicated organisation of the first level of LSG. This situation is unknown in Western European countries. The first level of LSG in Ukraine is based on the notion of "settlement". Villages and cities may be one or several settlements, and they form the territorial basis of the *hromada*, which is considered an "administrative territorial unit" (1997 Law on LSG, Article 1: there are administrative territorial units of different levels, and some inside of a city). As a result, instead of one type of first level LSG unit (which is the practice of most European countries), there are several kinds of first level LSG units.

This creates complexity for the actors themselves, both the ones in charge of a given territory and its citizens. As in other countries, many of these first level LSG units are very small in territory and population, and lack the resources needed to provide services, or to attract enterprises and investment. Thus Ukraine is faced with the same options as all other European countries at a certain point in their history: *status quo*, amalgamation, or IMC. In fact, these options are generally mixed because cooperation and amalgamation can be alternatives to each other but are also complementary.

Previous experience demonstrates that fragmentation can be a real handicap for development policies and for provision of public services to the population. The explanatory note to the draft Law lists the negative effects and weaknesses of many LSG units due to fragmentation of the territorial administration, especially in rural areas: absence or low quality of basic public services (water distribution, sewage, waste collection and disposal, roads), little or no social assistance, culture, health, education services, etc. This results in the absence of farming on large agricultural territories, poverty and emigration, etc. These economic and social problems are not directly caused by municipal fragmentation, but the absence of strong local government deprives *hromadas* of any capacity to solve problems and to launch efficient policies. Many *hromadas* are not able to initiate cooperation with other administrations and to draw up programmes that could attract investment or external financial support.

The policy of territorial consolidation in Ukraine may be seen from two perspectives: the modernisation and improvement of public entities, through clarification and rationalisation of the administrative map, better distribution of competences and resources on the one hand; and the economic and financial crisis that pushes today towards territorial consolidation on the other. Ukraine receives important support from the IMF, so there is an urgent obligation to make public administration work more efficiently.

Reshaping territorial administration in rural areas should be a high priority for government and parliament. But issues surrounding rural territories are part of a more general issue of territorial organisation in Ukraine, which has been discussed for many years with no results. Amalgamation or creation of IMC entities should not be considered separately but as an important part of a general strategy of territorial consolidation and LSG reform.

The present territorial organisation was conceived at a time when it was coherent with political and administrative centralisation, in which the economic and social policies were conducted by a central planning body. All LSG units were parts of the State administration in a “matrioshka” architecture. This is no longer the case. *Hromadas* must comply with the principles of the European Charter of Local Self-Government (ECLSG) and are autonomous actors of development policies. LSG units should have a size that allows them to have sufficient human and financial resources to produce a fair society, economic services and provide social welfare. The ECLSG not only promotes formal democracy; its spirit is in the organisation of LSG, which brings the best services to all people.

Another issue of the LSG system in Ukraine is that certain areas of the territories are not included in the boundaries of a *hromada,* and they are directly ruled by the second LSG level, the *rayon*. Such situations exist in other countries, but under condition of amalgamation of two tiers of LSG, mainly in metropolitan areas, and the second level enjoys full decentralisation[1]. The situation in Ukraine whereby the second level has *rayon* competences for the whole territory and municipal competencies for only parts of it - notably rural ones that need special care - is complicated. There is a great risk of inequality in such cases: the population of these territories is separated from the service delivering authorities, while the "central" *rayon* authorities neglect their management. This situation could become even more complicated if, after the merger of villages, some rural territories have the status of a unified municipality and some territories are left without any neighbouring administration. [2]

There should be an explicit choice, expressed in a clear political statement, that the objective in the medium- or long-term is to have a unified form of organisation at the first level of LSG addressing three different situations:

- Municipalities with an adequate size and perimeter remain unchanged;
- Municipalities which are too small merge (mainly but not exclusively rural ones);
- areas where merger is not possible (or not accepted) create adequate IMC entities.

The IMC provisions should be included in the same text as the merger provisions, and they should be discussed at the same time, because of their interdependence.

II. Three Issues to Consider

The discussions on the draft law concentrate on three major issues analysed below.

1. Should there be a separate Law or a Chapter in the basic Law on LSG?

Since the revision of the current basic Law on LSG is under preparation, it could be wise to include a chapter on amalgamation and IMC in this law, rather than having a separate

[1] *Kreifreiestadt* in Germany, when the commune and Kreis are merged in one entity in big cities. In France, Paris; a new law of December 16th 2010 allows other amalgamations if the concerned LG decide them.

[2] This depends on the size of the different tiers. If a new commune is created with settlements that may be more than 20 kilometres away one from another, its size may be the same, or at least nearly, with the size of certain *rayons*.

legislation. A separate law on amalgamation can be adopted quite quickly if there is sufficient political consensus on its objectives. The basic law on LSG may take more time because of disagreement on other issues. However, in view of the substance of the law, **the recommendation would be to integrate joint provisions on amalgamation and IMC into the basic law**. This option should be considered by the government. It creates an opportunity to inform the citizens on the stakes of a more rational and efficient territorial organization. A separate law will be needed to establish pertinent procedures and other rules for amalgamation and IMC. But the rules should not appear as exceptional, separated from the other provisions on LSG entities. Merger and IMC must be seen as part of the ongoing developments of a decentralised State.[3] They should be an integral part of the LSG system, and they should be ruled by permanent provisions in the basic law.[4] Specific government policies to encourage local governments to accelerate the creation of united or IMC entities do not need new procedures. The political will can be expressed in incentives, legal and financial support, in addition to the ordinary provisions.

2. Separate provisions for rural hromadas?

The present draft is meant to bring together small rural communities. Clearly, this is a very important stake in the creation of bigger and stronger LSG units at the first level. The new communities will remain rural, because of the geographical, sociological and economic make-up of the municipality, and not because of the number of inhabitants. Specific rules may take this into account, if there is a need for them. Yet the current definition of rural communities is not clear.[5]

Amalgamation or cooperation with a city is also an option that should be considered. Villages that merge with a medium-size city have access to more services in an easy and cost effective

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[3] In the Netherlands there is an ongoing trend of merging communes on a voluntary basis because new political leaders consider this useful. In France, which has many IMC entities, there is a continuous creation, winding up or modification of IMC bodies, etc.

[4] This is the case in most countries. In France, the rules on amalgamation and IMC are in the *General Code of LSG*. In Germany, the municipal law is a competence of the Land; so there are a variety of situations, but IMC is considered as fully part of municipal law.

[5] The draft does not explain a “rural territorial community”. Article 140 of the Constitution and the terminology of the recent draft law to amend the local self-government law imply that this should be a village or rural settlement, as opposed to a city. But, is a borough a big village or a small town/city? There is no provision on boundaries, on municipal personnel and reorganisation of municipal services and on the representation of the former communities.

way: public transport, waste collection and disposal, libraries, sports facilities, police, etc. There can be a synergy between a city and small neighbouring communities for development policy, use of public equipment, and sharing of certain costs. Next, there are large cities with a belt of smaller communities. A merger can be twofold: the town gets a larger territory for its development (business districts, housing), at a lower cost for the buyers. And the population of small communities gets access to the city services. Two neighbouring cities may decide to cooperate on specific projects: hospital, waste, schools, transport, promotion of tourism.

Merger and IMC should be open procedures offered to all local governments in order to allow them to choose the best way to fulfil their tasks and organise their development. **Most of the rules should be common and general for all types of municipalities, rural and urban.**

3. Financial incentives for amalgamation and cooperation?

The draft law has important provisions on financial incentives for communities starting a merger process, with figures that are higher than those generally given in other countries, which demonstrates the importance of this policy for the government. Financial incentives from the State budget for amalgamation or cooperation are justified for at least four reasons:

1) These reforms have a cost for the participating municipalities: for research and consultancy (economists, lawyers, specialist on organisation, taxes, budgeting, etc); for reorganisation of the administrations, organisation of a local referendum. There should, in which case, be a specific grant for launching the procedure.
2) Creation of a new entity is not only of local interest but also of regional and national one, because it can improve the overall territorial administration.
3) A large new municipality or a new IMC entity will have the critical size for spending public money more efficiently in investment or public services.
4) Financial incentives can speed up the creation of IMC or merger processes[6]. The financial motivation will become more and more important in a lasting fiscal stress for local administrations. More money is not the only important factor; competition between the communities is even more important. Those that do not cooperate or merge will obtain significantly less in terms of development than those which do. The competitiveness mechanism is very well understood by local government managers and politicians.

[6] Financial incentives contributed greatly to the success of IMC in France after the 1999: 2600 new highly integrated communities were created in a couple of years.

III. Analytical Assessment of the Draft Law

The following issues should be discussed by the authorities and revised in the draft.

1. Guidance and coordination by central government (Article 3.)

LSG units absolutely need support for any unification or cooperation process[7]. There is a need for methodology, legal guidance, and financial support, where state administrations have important responsibilities. However, the law must be precise and should say what bylaws should be issued and what kind of support the government can give, because the draft law cannot become an indirect way of limiting the autonomy of local authorities. The commission to be established within the specially authorized central executive authority in charge of regional policy issues may not include exclusively representatives of central authorities and scientific institutions. It must also include local government representatives, including *rayons*. This is a requirement of the ECLSG Art. 4 para 6[8], and it will be politically wise in order to facilitate consensus.

2. Conditions and criteria for the merger of rural territorial communities (Article 4.)

Article 4 of the draft defines several criteria and conditions that should be respected by the founders of a new united community. The CoE experts support the idea that the creation of new administrative structures cannot be left to the discretionary decision of local authorities. It is a public interest to create long-lasting entities of optimal size, which will improve local institutions. Experience of other countries demonstrates that geographic or demographic limits generate "perverse effects," which are never relevant for all situations. The draft law states that a united community must include at least 4000 persons. The distance from the administrative centre of a territorial community to the most remote village of this community may not exceed 20 km and, to determine the new administrative centre, the population and the service capacity are considered. It is not clear how this distance will be measured: boundary to boundary, village centre to village centre, and what is a village centre?

[7] See the toolkit published by the CoE, UNDP and LGI for IMC. The same recommendations are also pertinent for mergers.

[8] *"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".*

It is reasonable to suggest a lower limit of the number of inhabitants, because there are cases where IMC entities or merged communes are still too small and don't reach the minimal capacity of resources and a sufficient population to make them viable[9]. On the other hand, in certain circumstances it may be impossible to stay above the limit. With small, remote villages, 4000 inhabitants would be too large, and people might be too far away from the centre and from each other. Alternatively, the proposed union could contain a population over 4000, but during the referendum one or two communes might reject integration, and the figure could fall under 4000, for example 3750. Should the whole process then be stopped? The limit opens up an opportunity for blackmail, or could cause the process to collapse. While it is reasonable to set a limit of 4000, some flexibility should be allowed, depending on each individual case. A special study and a report could be produced proving that the union is improving the capacities of LSG and will still create a viable entity.

The distance criterion also raises some questions. For example, the municipal administration should be close to people, and 20 km might be too far for an aging population in areas lacking an efficient public transport system. Therefore, the law should include an alternative criterion based on the time needed to reach the administrative centre (for example 45 minutes or less than 1 hour by car or motorcycle)[10]. If the new entity is too big and scattered there will never be any sense of solidarity or a community life between the inhabitants. In fact, if the distance between two settlements of the new entity is close to 40 km, few types of equipment could be shared, and too much money would have to be spent on transportation and roads. This has to be a serious consideration when examining the proposals at the *rayon* level.

Do these criteria apply to any merger? Between a city and settlements, for instance? Are there also such criteria for IMC bodies? There is a need for a thorough study showing which municipalities should be merged, for what reasons, and with what benefits. Ideally, instead of listing the criteria, the law should be clearer and more demanding on the background study for initiating the merger process. It should state that the councils decide to merge on the basis of a report, which demonstrates the need for and benefits of a merger. And then the law could authorise the state authorities (at the *oblast* level) to veto proposals that are not rational or do not meet the requirements.

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[9] In France, many IMC communities unite only 3 or 4 small communes with less than 2000 inhabitants in all.
[10] In a big city citizens may also need that much time to go to the central city hall or to specific municipal services.

3. Initiating the merger of rural territorial communities (Article 5.)

This article has been seriously criticised by all experts. The provision of Articles 5 and 6 is not adequate for dealing with such complex issues[11]. They overestimate the capacity of the project to attract full support from citizens. It is an unrealistic statement that "*the unification of rural territorial communities may be initiated by the corresponding village councils and initiative groups with at least 10 members from among the inhabitants of the villages that initiate the unification.*"

Further, the draft does not say to whom this initiative must be sent and where it is registered. A council or several inhabitants from one village cannot ask for a merger with other villages without some discussion or even negotiation with these villages. As other experiences of mergers show, it is unlikely that the ordinary people will organise initiatives for municipal amalgamation or creation of an IMC entity. Then the state *rayon* administration is to formulate a recommendation directed to the *rayon* council for organising a referendum in all these localities. This type of procedure also raises concerns.

How can a council decide to initiate a process for unification if there is no concrete project describing the list of communities involved, the agenda, the financial consequences, the new organisation, possible development policies or new investments to be created? First, the initiative has to be credible and to be based on the previous agreements of several local councils, or on the initiative of inhabitants, but in this case there should be a minimum percentage of *voters* (a more appropriate term than *inhabitants*) from the different localities. Then, the unification process will build on this core agreement.

Secondly, the main question is determining the area in which the referendum will be organised. Article 4 gives criteria on how to determine this area, but there is no clear provision on who is empowered to decide the boundaries. Articles 5 and 6 imply that the area is determined following the submission of the initiative. Logically, it should belong to the head of the *rayon* state administration to decide on the area; but it follows from Article 6 (paragraph 2) that the *rayon* council decides only on the organisation of the referendum, not on the area.

[11] The CoE-UNDP- LGI Toolkit on IMC contains good recommendations on this subject.

The state *oblast* administration should have a more important role to play in the process. It is unlikely that the qualified staff can be found in all state *rayon* administrations, especially in rural areas. A task force should be established at the *oblast* level in order to assist the *rayon* administrations. Furthermore, if the merger process finds support and is successful, there would be four or five united rural territorial communities in each *rayon*, and this would bring into question the existing territorial division into *rayons*, and the existence of *rayon* state administrations and councils who will not support the reform.

Representatives of local self-government have to be involved in the design of the territory of the future united rural territorial communities from the very beginning, their support is a basic condition for success. Ideally, a local commission elected by all mayors of the *rayon* should be formed. This would facilitate the dialogue between all mayors, and between all mayors and the head of the state administration on the future municipal pattern of the *rayon*[12]. Then, it would be easier to submit the proposals to the voters. This method does not rule out the initiative of some mayors or inhabitants, but it will avoid too many discretionary decisions of the head of the state *rayon* administration on a case-by-case basis, and this will increase the transparency of the process and the legitimacy of the final design.

Several authorities should be enabled to take the initiative. Merger and IMC never occur spontaneously; they need political leadership and technical support. The State as well as the *rayon* should have the possibility of launching a process that is not dependant on the good will of some of the inhabitants over the national territory. The best method would be to organise a systematic study of possible unions at the most appropriate level: this would be one where there is good information; staff and financing for the studies; political capacity of creating consensus with the ability to resist unreasonable projects.

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[12] This problem is well known in France where the municipal pattern is very much fragmented, especially in rural areas. A commission is elected at the department level (a larger constituency than the Ukrainian *rayon*) by all mayors and presidents of joint-authorities; the prefect has to establish a scheme for the development of IMC in consultation with this commission; a vote with special majority may bind the prefect in some circumstances. Several reforms have strengthened the role of this commission and the authority of its decisions, and recently the new local government reform adopted by the parliament on 17 November 2010. This method could be used to prepare a unification plan at the *rayon* level, with proposal of new enlarged communities consistent with each other.

4. Review and summary of proposals and decision for the unification of rural territorial communities (Article 6.)

Article 6 of the draft contains complicated proceedings that are not clearly related to the initiative. It is not clear what happens between the moment when an initiative is registered and these proceedings. It will be the responsibility of the *rayon* state administration to summarise, with the participation of the corresponding local council commissions, proposals for unification of rural territorial communities, develop recommendations on the optimal resolution of this task, observing the main conditions and criteria. The feasibility study and the examination of the project's pertinence may therefore be carried out on the basis of "spontaneous" proposals. But at such a late stage, it would be very difficult for the *rayon* administration to contest the proposals, reshape the territorial limits in a more rational form and form consensus. Discussion with all other authorities will complicate it even more and there is a great risk of decisions being taken in a spirit of hurried compromise that will rapidly prove inefficient. The delay of 7 days is therefore not acceptable and should be at least one month. The whole process should therefore be reformulated with much attention given to the way initiative is launched and how the first outline of the union becomes public and a matter for discussion by political representatives and the population.

As regards the referendum itself, it seems that the Constitution (Article 140) would require that the votes are counted for each territorial community, since the self-governing right belongs to territorial communities. But it would make the reform impossible if the opposition of only one *hromada* was enough to defeat the decision. However it is possible to have a large majority, large enough to launch the new united territorial community on a large-scale basis, without forcing the decision if the project is too controversial or raises too much opposition, and make it possible to overcome isolated opponents[13].

Other points to consider include the need for special financing for organising referendums, and the preference for counting the overall sum of votes for all villages that took part, rather than a separate count for each village. The draft should refer to "direct decision of the citizens" and review the referendum procedure. The separate counting solution will probably

[13] In France, for the creation of an integrated joint-authority ("*communauté*"), there is no referendum, but as a rule the majority within the area of the consultation has to be either 2/3 of municipal councils representing ½ of the population, or alternatively ½ of the municipal councils representing 2/3 of the population. Other majorities can be envisaged.

be supported in the name of the "autonomy" of each village, on the basis of the Constitution and of the Charter. This idea can be challenged because the creation of each local government area and the modification of its boundaries are not exclusive powers of each LSG unit; rather it is a matter for the national administration and of broader interest than for just one group of its current population which has the right to express its opinion.

If the final option is for a separate count, then there should be a protection against sectoral, political, economic or even individual interests. In small districts certain groups can hinder the reform and damage the interests of the larger population. If a merger can only be created with unanimity of all communities, small groups in the villages might have a decisive negative influence and block the merger or use blackmail to make unreasonable demands. The best system would be the one with a double optional majority: either X% (60 or 70) of the villages representing Y% (50; 60?) of the population, or Y% (50, 60) of the villages representing X% (60, 70?) of the population, etc.

5. Budget and financial issues

5.1 Financial unification: taxes, prices, debts

The draft has short provisions for creating a unified budget after the amalgamation has taken place. There are several issues which should be addressed by the law but are missing in the draft. They concern the unification of tax rates and price of services. Each village may have its own figures with important differences. They cannot remain in force indefinitely. What happens after unification? Will there be an average tariff? Or does the new council have to decide on all these figures? What about a transitional period to bring them to an average level? Something more precise should be said on the debt. Logically the debts and properties of the merged *hromadas* become debts and properties of the new *hromada*. Article 8 needs to be expanded and clearer on these issues.

5.2 Financial incentives and special grants for unification

As already mentioned, the grants are important to make merger or cooperation more attractive. Two different types of additional grants should be distinguished. The first one is needed to cover the direct costs of the merger proceedings themselves: the preliminary feasibility studies for the delimitation of the perimeter of the new *hromada* or the IMC and for the definition of its main characteristics, the procedures to create it and the drawing up of the scheme of the new entity. At the end, further support must be provided to pay the costs of the

referendum. These grants are part of the provisions that define the process of initiative and creation. Additional financial support can be of different types, temporary or permanent, partly earmarked and progressive. It should be conceived in a way that helps to bring visible and positive improvement in the LSG organisation and management, and in public services.

There is no need for large amounts of money the first year of the reform – immediate grants would not motivate efficiency; the political direction and the staff of the new entity will not be fully operative to conceive programmes of investment; the leaders at this stage would not have time to prepare a strategy and list their priorities. It would be more expedient to pay, for example, about 35% of the additional grant in the first year, 70% in the second, and the rest in the third year after creation. This would also be an incentive for better planning of the creation of new services and investments. It would be easier on the national budget and would allow support to be given to a greater number of initiatives.

The budget of the united rural *hromada* gets additional subsidies, 25% of the budget of the united *hromada*. Depending on the number of communes and size of population this percentage can reach 50, 75 or even 100%. The philosophy is to motivate a greater number of villages with a bigger population to merge. Albeit a positive idea, it could result in wrong decisions if the size and shape of the united community are chosen to meet the criteria of subsidy rather than the criteria of rational territorial management.

The time limit of 3 years is not clear. The draft does not specify how it is calculated: is it from the date of the creation of the united rural *hromada*? Or from the election of the new council? Or the adoption of the first "unified budget"? Three years is not long for investment and development policies, considering in particular that the first year will be spent on formalities. Ideally, a progressive payment should be stretched over 5 years. The total amount of these subsidies for the three years may not be enough to finance an ambitious programme. The risk is that the money will be used for current expenditure. The administrative supervision of the efficient use of subsidies carried out by the specially authorised central executive authority in charge of regional policy issues might not be sufficient for avoiding this.

More sophisticated criteria could be used for calculating the amount of subsidies: an equalisation model would favour grants for "poor" *hromadas*; a development model would

favour economic programmes; grants could also be modelled in relation to the level of existing equipment in the enlarged *hromada* etc.[14]

The estimates in the Explanatory Note to the draft are not very convincing. There will be many diverse situations depending on the wealth of the amalgamated villages. The merger of poor villages heavily dependent on subsidies will not make them less dependent. And merging poor villages with wealthier ones supposes that these latter exist in the region and will accept the merger; they may prefer to stay "independent" rather than to share their resources. This is also a reason why mergers must be formed following a majority vote of the villagers and not a unanimous one.

It would be too optimistic to hope that a merger can really save money for the budget, at least in the short term. A larger community has "structural costs" that may be important, including travel expenses for the employees and council members, etc. The probability is that the implementation of the reform will generate new costs. So it is not sure that the total amount of additional grants may be earmarked for investment alone.

The whole reform should not be presented as a means to reduce expenditure and to make savings directly in the budgets, even if this can be the case for marginal amounts. The real objective is to make the decision process in this area more efficient and improve the capacity of development policies and public services in a more efficient way. Budgetary cuts based on the forecasts of the Explanatory Note could severely undermine the success of the reform.

6. Absence of provisions on employees and on a permanent territorial representation

The draft does not deal with the situation of the village employees. Do they automatically become union employees, with the same salary, which can be different from one entity to another? What about their career and pensions? There is no provision on the representation of the former *hromadas*. International experience has shown that successful amalgamation policies generally include a form of representation of the former communities in the new one;

[14] Costs *per capita* for infrastructures increase in areas of low density. This will be the case in many regions that the reform is supposed to help. In a number of such areas, it will not be possible to increase the number of unified communities and their population without generating excessive remoteness. Therefore, the law should introduce another variable based on the number of inhabitants per km². This requires obviously careful statistical estimates. It could be suggested to link the expenditure with these subsidies and the implementation of the Reform programme of housing and municipal economy. This would make it possible to show the improvements for people to be expected nationally by the implementation of both reforms. This would also facilitate the planning of the development of the various sectors of the municipal economy.

the villages should be able to elect a representative to the new city council and sometimes keep some services in their city halls.

IV. Integrating a Chapter on IMC into the Basic Law on Local Self-Government

The purpose of inter-municipal cooperation

When the municipal territorial pattern is fragmented, the development of new tasks that need to be organised for a larger population area cannot be undertaken at the level of traditional settlements upon which municipalities are based in most countries (there are important exceptions). Alternatively, the amalgamation (or consolidation) of municipalities makes it possible to raise the municipal dimension to the scale of the new needs. Various countries, especially in Northern Europe have followed this path. However, territorial reform based on amalgamation does not render IMC unnecessary. First of all, in urban areas, the urban development cannot be contained in administrative boundaries, and beyond the consolidation of the core, cooperation is again necessary for urban transport systems, strategic planning, and land development. In rural areas, new problems arise with an aging population and the decline of the economic basis, further consolidation steps may create new problems of remoteness, and cooperation can be a relevant alternative for a number of functions.

But the territorial reform is not only a matter of administrative rationalisation and management. Everything depends on the general organisation of the state, on the perception of what is local in the political culture, whether the local is identified with the city or with the village, whether the main service provider is the state or the local authorities. All these factors influence the path and even the possibility of territorial reform. In various countries where territorial reform through amalgamation has proved politically impossible, the development of more integrated forms of IMC has been used as a practical alternative. This path has been followed in France, and the new law on the local government reform adopted on 17 November 2010 is aimed at completing the setting up of "inter-municipalities" until the end of 2013. A similar path has been followed by Hungary and Italy and is on the agenda in Spain, despite the fact that it is more difficult to implement because of the power of the autonomous regions. However, in both cases, the IMC bodies develop from the municipalities or from the municipal community, e.g. they are public powers and not private associations or contractual arrangements, although these might be used in order to deal with specific needs. In the UK, as in Germany or in France, IMC bodies are public law corporations.

IMC provisions in the 2010 draft law amending the 1997 Law on Local Self-Government

First of all, the concepts of *hromada* reflected in this draft law and in the draft law on the Stimulation of State Support of Unification of Rural Territorial Hromadas are not the same. As emphasised above, the result of the unification will be the formation of a new territorial community called the "united rural territorial community". In contrast, under Article 6, paragraph 4 of the amending draft law, the voluntary unification will result only in the formation of joint bodies for several communities, but not of a new enlarged community in place of the former ones. This second option is less ambitious, but makes it possible also to rationalise the municipal pattern. Whatever the political choice, any contradiction or divergence between both pieces of legislation should be avoided.

In the amending draft law, the IMC provisions are scant and do not meet the needs of Ukraine. Article 11 is the only article specifically dedicated to the subject, and financial matters are addressed in articles 60, paragraph 7, and 61, paragraph 4. IMC cannot be developed using these provisions. Article 11 does not give an adequate basis for the IMC development because it is based on a wrong concept: it uses two instruments; the association and the agreement, and the association itself is established through an agreement. Both are instruments of private, not public law. First, the association can be used both to solve management issues for some tasks and to represent rights and interests of the member territorial communities. Second, under paragraph 7, no power of an LSG body may be transferred to an association; this is understandable only if the association is a legal body of private law. Third, they are subject to registration by the Ministry of Justice, just as any private association or private legal person. The use of agreements is also regulated by Article 60.7: an agreement between several territorial communities can be passed to establish a co-ownership right on an object of municipal property or to join municipal funds for a joint project or for the joint financing of a joint communal enterprise or institution. Article 61.4 is identical in its budget rules to the previous one: it provides that the budgetary funds of several territorial communities may be amalgamated on a contractual basis.

These provisions do not meet the needs, whatever the political choice for the territorial reform. IMC cannot solve major problems of performance of municipal functions if territorial communities are not entitled to delegate powers to the joint bodies. This limitation can only be overcome by providing for specific public law corporations that can be established on the

basis of an agreement of member municipalities (eventually a majority thereof) by an administrative act, e.g. an act of public power. Then, the duties and the powers of the local authorities will be the same in relation to the task, whether they are exercised by the territorial community itself or through a joint body.

Therefore, it is not an article that the Law needs , but **a chapter** determining, in particular:

- the procedure for establishing IMC;
- the legal status of such a public law corporation;
- its governance;
- the financing (contributions of member municipalities or own resources from taxes, fees, duties, charges);
- the tasks that have to be exercised through the IMC, and the conditions according to which such tasks may be delegated;
- the supervision by member municipalities and the state supervision (that should be the same as for the territorial communities themselves);
- the rules on the transfer of personnel and of property;
- the relationships with municipal enterprises and institutions subject to the jurisdiction of the inter-municipal corporation.

As regards governance, the recommendation is for direct election of the board of an inter-municipal corporation in order to involve the citizens in the reform from the beginning.[15] Such a step should be undertaken on the basis of a broad consensus with the associations of territorial communities.

[15] The French experience shows that it is extremely difficult to replace election by municipal council with direct election by citizens. But this can be a very much politicised issue.

SECRETARIAT GENERAL

DIRECTORATE GENERAL OF DEMOCRACY AND POLITICAL AFFAIRS

DIRECTORATE OF DEMOCRATIC INSTITUTIONS

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APPRAISAL OF THE DRAFT LAW OF UKRAINE ON STIMULATION AND STATE SUPPORT OF UNIFICATION OF RURAL TERRITORIAL COMMUNITIES

The present report was prepared by the Directorate of Democratic Institutions, Directorate General of Democracy and Political Affairs, in co-operation with Prof. Gérard Marcou, University Paris 1 Panthéon-Sorbonne, Director of GRALE (Research Group on Local Administration in Europe), and Prof Robert HERTZOG, University of Strasbourg France.

Introduction

The present legal appraisal was requested by the Ministry of Regional Development and Construction within the framework of the Council of Europe Programme to Strengthen Local Democracy in Ukraine (2010-2013, funded by the Swedish International Development Cooperation Agency Sida). The draft law on "*Stimulation and State Support of Unification of Rural Territorial Communities"* should become a part of the legal basis for implementing an ambitious local self-government reform, together with the draft laws "On Local Self Government" and "On Local State Administration". An introductory sentence of the draft explains that "*this Law establishes the procedure for the resolution of issues related to the unification of rural territorial communities."*

The draft law provides for a legal framework for amalgamating rural communities (*hromadas*) in order to improve service provision and save administrative costs. This is a law on procedure and State financial support. It reflects the idea that, according to the Government, rural areas are the priority in local government reform. It is therefore submitted before the general Strategy for local self-government reform in Ukraine is adopted, although the need for the Strategy has been discussed for more than ten years and has given rise to many reform projects under all governments. It is, however, important to have a wider perspective in order to avoid inconsistencies or unforeseen and undesired consequences.

Inter-municipal cooperation (IMC) institutions can be an alternative to amalgamation when the latter proves to be impossible or politically too difficult, or a supplement to amalgamation, where a number of services can be organised on a wider scale, without the disadvantage of creating municipalities that are too large, since this may hamper citizen access to municipal administration.

A Conference on Legislative Support to IMC was organised in Kyiv on 17 December 2010 by the Council of Europe (CoE) Programme to Strengthen Local Democracy in Ukraine and the Parliamentary Committee on State Building and Local Self-Government in order to discuss the draft and the options for IMC policy. This paper is a consolidated appraisal taking into account the comments of other experts and the discussion of the conference. The Conference participants agreed on three statements:

1. Territorial reform is important for Ukraine for administrative and political reasons; but there are also economic and social reasons that make it more urgent today.
2. It is a difficult and complicated task, that has been postponed several times because of resistance, including from the population, which is often unaware of all the benefits of the reform; so there is a need for greater explanation in order to reach political consensus;
3. A law is needed because the existing provisions of the Law on local self-government are not sufficiently precise on this subject and have not been implemented; a new law will create an opportunity for a national debate on the subject so that the stakes become more visible and understandable for the citizens. The government should announce the reform among its priorities. The law is also needed to create specific incentives that will accelerate the process of unification/amalgamation, as in other countries.

I. The need for territorial consolidation in Ukraine: merger and cooperation

The general problem of Ukrainian local self-government (LSG) is owing to the very specific and complicated organisation of the first level of LSG. This situation is unknown in Western European countries. The first level of LSG in Ukraine is based on the notion of "settlement". Villages and cities may be one or several settlements, and they form the territorial basis of the *hromada*, which is considered an "administrative territorial unit" (1997 Law on LSG, Article 1: there are administrative territorial units of different levels, and some inside of a city). As a result, instead of one type of first level LSG unit (which is the practice of most European countries), there are several kinds of first level LSG units.

This creates complexity for the actors themselves, both the ones in charge of a given territory and its citizens. As in other countries, many of these first level LSG units are very small in territory and population, and lack the resources needed to provide services, or to attract enterprises and investment. Thus Ukraine is faced with the same options as all other European countries at a certain point in their history: *status quo*, amalgamation, or IMC. In fact, these options are generally mixed because cooperation and amalgamation can be alternatives to each other but are also complementary.

Previous experience demonstrates that fragmentation can be a real handicap for development policies and for provision of public services to the population. The explanatory note to the draft Law lists the negative effects and weaknesses of many LSG units due to fragmentation of the territorial administration, especially in rural areas: absence or low quality of basic public services (water distribution, sewage, waste collection and disposal, roads), little or no social assistance, culture, health, education services, etc. This results in the absence of farming on large agricultural territories, poverty and emigration, etc. These economic and social problems are not directly caused by municipal fragmentation, but the absence of strong local government deprives *hromadas* of any capacity to solve problems and to launch efficient policies. Many *hromadas* are not able to initiate cooperation with other administrations and to draw up programmes that could attract investment or external financial support.

The policy of territorial consolidation in Ukraine may be seen from two perspectives: the modernisation and improvement of public entities, through clarification and rationalisation of the administrative map, better distribution of competences and resources on the one hand; and the economic and financial crisis that pushes today towards territorial consolidation on the other. Ukraine receives important support from the IMF, so there is an urgent obligation to make public administration work more efficiently.

Reshaping territorial administration in rural areas should be a high priority for government and parliament. But issues surrounding rural territories are part of a more general issue of territorial organisation in Ukraine, which has been discussed for many years with no results. Amalgamation or creation of IMC entities should not be considered separately but as an important part of a general strategy of territorial consolidation and LSG reform.

The present territorial organisation was conceived at a time when it was coherent with political and administrative centralisation, in which the economic and social policies were conducted by a central planning body. All LSG units were parts of the State administration in a “matrioshka” architecture. This is no longer the case. *Hromadas* must comply with the principles of the European Charter of Local Self-Government (ECLSG) and are autonomous actors of development policies. LSG units should have a size that allows them to have sufficient human and financial resources to produce a fair society, economic services and provide social welfare. The ECLSG not only promotes formal democracy; its spirit is in the organisation of LSG, which brings the best services to all people.

Another issue of the LSG system in Ukraine is that certain areas of the territories are not included in the boundaries of a *hromada,* and they are directly ruled by the second LSG level, the *rayon*. Such situations exist in other countries, but under condition of amalgamation of two tiers of LSG, mainly in metropolitan areas, and the second level enjoys full decentralisation[1]. The situation in Ukraine whereby the second level has *rayon* competences for the whole territory and municipal competencies for only parts of it - notably rural ones that need special care - is complicated. There is a great risk of inequality in such cases: the population of these territories is separated from the service delivering authorities, while the "central" *rayon* authorities neglect their management. This situation could become even more complicated if, after the merger of villages, some rural territories have the status of a unified municipality and some territories are left without any neighbouring administration. [2]

There should be an explicit choice, expressed in a clear political statement, that the objective in the medium- or long-term is to have a unified form of organisation at the first level of LSG addressing three different situations:

- Municipalities with an adequate size and perimeter remain unchanged;
- Municipalities which are too small merge (mainly but not exclusively rural ones);
- areas where merger is not possible (or not accepted) create adequate IMC entities.

The IMC provisions should be included in the same text as the merger provisions, and they should be discussed at the same time, because of their interdependence.

II. Three Issues to Consider

The discussions on the draft law concentrate on three major issues analysed below.

1. Should there be a separate Law or a Chapter in the basic Law on LSG?

Since the revision of the current basic Law on LSG is under preparation, it could be wise to include a chapter on amalgamation and IMC in this law, rather than having a separate

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[1] *Kreifreiestadt* in Germany, when the commune and Kreis are merged in one entity in big cities. In France, Paris; a new law of December 16th 2010 allows other amalgamations if the concerned LG decide them.

[2] This depends on the size of the different tiers. If a new commune is created with settlements that may be more than 20 kilometres away one from another, its size may be the same, or at least nearly, with the size of certain *rayons*.

legislation. A separate law on amalgamation can be adopted quite quickly if there is sufficient political consensus on its objectives. The basic law on LSG may take more time because of disagreement on other issues. However, in view of the substance of the law, **the recommendation would be to integrate joint provisions on amalgamation and IMC into the basic law**. This option should be considered by the government. It creates an opportunity to inform the citizens on the stakes of a more rational and efficient territorial organization. A separate law will be needed to establish pertinent procedures and other rules for amalgamation and IMC. But the rules should not appear as exceptional, separated from the other provisions on LSG entities. Merger and IMC must be seen as part of the ongoing developments of a decentralised State.[3] They should be an integral part of the LSG system, and they should be ruled by permanent provisions in the basic law.[4] Specific government policies to encourage local governments to accelerate the creation of united or IMC entities do not need new procedures. The political will can be expressed in incentives, legal and financial support, in addition to the ordinary provisions.

2. Separate provisions for rural hromadas?

The present draft is meant to bring together small rural communities. Clearly, this is a very important stake in the creation of bigger and stronger LSG units at the first level. The new communities will remain rural, because of the geographical, sociological and economic make-up of the municipality, and not because of the number of inhabitants. Specific rules may take this into account, if there is a need for them. Yet the current definition of rural communities is not clear.[5]

Amalgamation or cooperation with a city is also an option that should be considered. Villages that merge with a medium-size city have access to more services in an easy and cost effective

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[3] In the Netherlands there is an ongoing trend of merging communes on a voluntary basis because new political leaders consider this useful. In France, which has many IMC entities, there is a continuous creation, winding up or modification of IMC bodies, etc.

[4] This is the case in most countries. In France, the rules on amalgamation and IMC are in the *General Code of LSG*. In Germany, the municipal law is a competence of the Land; so there are a variety of situations, but IMC is considered as fully part of municipal law.

[5] The draft does not explain a “rural territorial community”. Article 140 of the Constitution and the terminology of the recent draft law to amend the local self-government law imply that this should be a village or rural settlement, as opposed to a city. But, is a borough a big village or a small town/city? There is no provision on boundaries, on municipal personnel and reorganisation of municipal services and on the representation of the former communities.

way: public transport, waste collection and disposal, libraries, sports facilities, police, etc. There can be a synergy between a city and small neighbouring communities for development policy, use of public equipment, and sharing of certain costs. Next, there are large cities with a belt of smaller communities. A merger can be twofold: the town gets a larger territory for its development (business districts, housing), at a lower cost for the buyers. And the population of small communities gets access to the city services. Two neighbouring cities may decide to cooperate on specific projects: hospital, waste, schools, transport, promotion of tourism.

Merger and IMC should be open procedures offered to all local governments in order to allow them to choose the best way to fulfil their tasks and organise their development. **Most of the rules should be common and general for all types of municipalities, rural and urban.**

3. Financial incentives for amalgamation and cooperation?

The draft law has important provisions on financial incentives for communities starting a merger process, with figures that are higher than those generally given in other countries, which demonstrates the importance of this policy for the government. Financial incentives from the State budget for amalgamation or cooperation are justified for at least four reasons:

1) These reforms have a cost for the participating municipalities: for research and consultancy (economists, lawyers, specialist on organisation, taxes, budgeting, etc); for reorganisation of the administrations, organisation of a local referendum. There should, in which case, be a specific grant for launching the procedure.
2) Creation of a new entity is not only of local interest but also of regional and national one, because it can improve the overall territorial administration.
3) A large new municipality or a new IMC entity will have the critical size for spending public money more efficiently in investment or public services.
4) Financial incentives can speed up the creation of IMC or merger processes[6]. The financial motivation will become more and more important in a lasting fiscal stress for local administrations. More money is not the only important factor; competition between the communities is even more important. Those that do not cooperate or merge will obtain significantly less in terms of development than those which do. The competitiveness mechanism is very well understood by local government managers and politicians.

[6] Financial incentives contributed greatly to the success of IMC in France after the 1999: 2600 new highly integrated communities were created in a couple of years.

III. Analytical Assessment of the Draft Law

The following issues should be discussed by the authorities and revised in the draft.

1. Guidance and coordination by central government (Article 3.)

LSG units absolutely need support for any unification or cooperation process[7]. There is a need for methodology, legal guidance, and financial support, where state administrations have important responsibilities. However, the law must be precise and should say what bylaws should be issued and what kind of support the government can give, because the draft law cannot become an indirect way of limiting the autonomy of local authorities. The commission to be established within the specially authorized central executive authority in charge of regional policy issues may not include exclusively representatives of central authorities and scientific institutions. It must also include local government representatives, including *rayons*. This is a requirement of the ECLSG Art. 4 para 6[8], and it will be politically wise in order to facilitate consensus.

2. Conditions and criteria for the merger of rural territorial communities (Article 4.)

Article 4 of the draft defines several criteria and conditions that should be respected by the founders of a new united community. The CoE experts support the idea that the creation of new administrative structures cannot be left to the discretionary decision of local authorities. It is a public interest to create long-lasting entities of optimal size, which will improve local institutions. Experience of other countries demonstrates that geographic or demographic limits generate "perverse effects," which are never relevant for all situations. The draft law states that a united community must include at least 4000 persons. The distance from the administrative centre of a territorial community to the most remote village of this community may not exceed 20 km and, to determine the new administrative centre, the population and the service capacity are considered. It is not clear how this distance will be measured: boundary to boundary, village centre to village centre, and what is a village centre?

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[7] See the toolkit published by the CoE, UNDP and LGI for IMC. The same recommendations are also pertinent for mergers.

[8] *"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".*

It is reasonable to suggest a lower limit of the number of inhabitants, because there are cases where IMC entities or merged communes are still too small and don't reach the minimal capacity of resources and a sufficient population to make them viable[9]. On the other hand, in certain circumstances it may be impossible to stay above the limit. With small, remote villages, 4000 inhabitants would be too large, and people might be too far away from the centre and from each other. Alternatively, the proposed union could contain a population over 4000, but during the referendum one or two communes might reject integration, and the figure could fall under 4000, for example 3750. Should the whole process then be stopped? The limit opens up an opportunity for blackmail, or could cause the process to collapse. While it is reasonable to set a limit of 4000, some flexibility should be allowed, depending on each individual case. A special study and a report could be produced proving that the union is improving the capacities of LSG and will still create a viable entity.

The distance criterion also raises some questions. For example, the municipal administration should be close to people, and 20 km might be too far for an aging population in areas lacking an efficient public transport system. Therefore, the law should include an alternative criterion based on the time needed to reach the administrative centre (for example 45 minutes or less than 1 hour by car or motorcycle)[10]. If the new entity is too big and scattered there will never be any sense of solidarity or a community life between the inhabitants. In fact, if the distance between two settlements of the new entity is close to 40 km, few types of equipment could be shared, and too much money would have to be spent on transportation and roads. This has to be a serious consideration when examining the proposals at the *rayon* level.

Do these criteria apply to any merger? Between a city and settlements, for instance? Are there also such criteria for IMC bodies? There is a need for a thorough study showing which municipalities should be merged, for what reasons, and with what benefits. Ideally, instead of listing the criteria, the law should be clearer and more demanding on the background study for initiating the merger process. It should state that the councils decide to merge on the basis of a report, which demonstrates the need for and benefits of a merger. And then the law could authorise the state authorities (at the *oblast* level) to veto proposals that are not rational or do not meet the requirements.

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[9] In France, many IMC communities unite only 3 or 4 small communes with less than 2000 inhabitants in all.
[10] In a big city citizens may also need that much time to go to the central city hall or to specific municipal services.

3. Initiating the merger of rural territorial communities (Article 5.)

This article has been seriously criticised by all experts. The provision of Articles 5 and 6 is not adequate for dealing with such complex issues[11]. They overestimate the capacity of the project to attract full support from citizens. It is an unrealistic statement that "*the unification of rural territorial communities may be initiated by the corresponding village councils and initiative groups with at least 10 members from among the inhabitants of the villages that initiate the unification.*"

Further, the draft does not say to whom this initiative must be sent and where it is registered. A council or several inhabitants from one village cannot ask for a merger with other villages without some discussion or even negotiation with these villages. As other experiences of mergers show, it is unlikely that the ordinary people will organise initiatives for municipal amalgamation or creation of an IMC entity. Then the state *rayon* administration is to formulate a recommendation directed to the *rayon* council for organising a referendum in all these localities. This type of procedure also raises concerns.

How can a council decide to initiate a process for unification if there is no concrete project describing the list of communities involved, the agenda, the financial consequences, the new organisation, possible development policies or new investments to be created? First, the initiative has to be credible and to be based on the previous agreements of several local councils, or on the initiative of inhabitants, but in this case there should be a minimum percentage of *voters* (a more appropriate term than *inhabitants*) from the different localities. Then, the unification process will build on this core agreement.

Secondly, the main question is determining the area in which the referendum will be organised. Article 4 gives criteria on how to determine this area, but there is no clear provision on who is empowered to decide the boundaries. Articles 5 and 6 imply that the area is determined following the submission of the initiative. Logically, it should belong to the head of the *rayon* state administration to decide on the area; but it follows from Article 6 (paragraph 2) that the *rayon* council decides only on the organisation of the referendum, not on the area.

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[11] The CoE-UNDP- LGI Toolkit on IMC contains good recommendations on this subject.

The state *oblast* administration should have a more important role to play in the process. It is unlikely that the qualified staff can be found in all state *rayon* administrations, especially in rural areas. A task force should be established at the *oblast* level in order to assist the *rayon* administrations. Furthermore, if the merger process finds support and is successful, there would be four or five united rural territorial communities in each *rayon*, and this would bring into question the existing territorial division into *rayons*, and the existence of *rayon* state administrations and councils who will not support the reform.

Representatives of local self-government have to be involved in the design of the territory of the future united rural territorial communities from the very beginning, their support is a basic condition for success. Ideally, a local commission elected by all mayors of the *rayon* should be formed. This would facilitate the dialogue between all mayors, and between all mayors and the head of the state administration on the future municipal pattern of the *rayon*[12]. Then, it would be easier to submit the proposals to the voters. This method does not rule out the initiative of some mayors or inhabitants, but it will avoid too many discretionary decisions of the head of the state *rayon* administration on a case-by-case basis, and this will increase the transparency of the process and the legitimacy of the final design.

Several authorities should be enabled to take the initiative. Merger and IMC never occur spontaneously; they need political leadership and technical support. The State as well as the *rayon* should have the possibility of launching a process that is not dependant on the good will of some of the inhabitants over the national territory. The best method would be to organise a systematic study of possible unions at the most appropriate level: this would be one where there is good information; staff and financing for the studies; political capacity of creating consensus with the ability to resist unreasonable projects.

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[12] This problem is well known in France where the municipal pattern is very much fragmented, especially in rural areas. A commission is elected at the department level (a larger constituency than the Ukrainian *rayon*) by all mayors and presidents of joint-authorities; the prefect has to establish a scheme for the development of IMC in consultation with this commission; a vote with special majority may bind the prefect in some circumstances. Several reforms have strengthened the role of this commission and the authority of its decisions, and recently the new local government reform adopted by the parliament on 17 November 2010. This method could be used to prepare a unification plan at the *rayon* level, with proposal of new enlarged communities consistent with each other.

4. Review and summary of proposals and decision for the unification of rural territorial communities (Article 6.)

Article 6 of the draft contains complicated proceedings that are not clearly related to the initiative. It is not clear what happens between the moment when an initiative is registered and these proceedings. It will be the responsibility of the *rayon* state administration to summarise, with the participation of the corresponding local council commissions, proposals for unification of rural territorial communities, develop recommendations on the optimal resolution of this task, observing the main conditions and criteria. The feasibility study and the examination of the project's pertinence may therefore be carried out on the basis of "spontaneous" proposals. But at such a late stage, it would be very difficult for the *rayon* administration to contest the proposals, reshape the territorial limits in a more rational form and form consensus. Discussion with all other authorities will complicate it even more and there is a great risk of decisions being taken in a spirit of hurried compromise that will rapidly prove inefficient. The delay of 7 days is therefore not acceptable and should be at least one month. The whole process should therefore be reformulated with much attention given to the way initiative is launched and how the first outline of the union becomes public and a matter for discussion by political representatives and the population.

As regards the referendum itself, it seems that the Constitution (Article 140) would require that the votes are counted for each territorial community, since the self-governing right belongs to territorial communities. But it would make the reform impossible if the opposition of only one *hromada* was enough to defeat the decision. However it is possible to have a large majority, large enough to launch the new united territorial community on a large-scale basis, without forcing the decision if the project is too controversial or raises too much opposition, and make it possible to overcome isolated opponents[13].

Other points to consider include the need for special financing for organising referendums, and the preference for counting the overall sum of votes for all villages that took part, rather than a separate count for each village. The draft should refer to "direct decision of the citizens" and review the referendum procedure. The separate counting solution will probably

[13] In France, for the creation of an integrated joint-authority ("*communauté*"), there is no referendum, but as a rule the majority within the area of the consultation has to be either 2/3 of municipal councils representing ½ of the population, or alternatively ½ of the municipal councils representing 2/3 of the population. Other majorities can be envisaged.

be supported in the name of the “autonomy” of each village, on the basis of the Constitution and of the Charter. This idea can be challenged because the creation of each local government area and the modification of its boundaries are not exclusive powers of each LSG unit; rather it is a matter for the national administration and of broader interest than for just one group of its current population which has the right to express its opinion.

If the final option is for a separate count, then there should be a protection against sectoral, political, economic or even individual interests. In small districts certain groups can hinder the reform and damage the interests of the larger population. If a merger can only be created with unanimity of all communities, small groups in the villages might have a decisive negative influence and block the merger or use blackmail to make unreasonable demands. The best system would be the one with a double optional majority: either X% (60 or 70) of the villages representing Y% (50; 60?) of the population, or Y% (50, 60) of the villages representing X% (60, 70?) of the population, etc.

5. Budget and financial issues

5.1 Financial unification: taxes, prices, debts

The draft has short provisions for creating a unified budget after the amalgamation has taken place. There are several issues which should be addressed by the law but are missing in the draft. They concern the unification of tax rates and price of services. Each village may have its own figures with important differences. They cannot remain in force indefinitely. What happens after unification? Will there be an average tariff? Or does the new council have to decide on all these figures? What about a transitional period to bring them to an average level? Something more precise should be said on the debt. Logically the debts and properties of the merged *hromadas* become debts and properties of the new *hromada*. Article 8 needs to be expanded and clearer on these issues.

5.2 Financial incentives and special grants for unification

As already mentioned, the grants are important to make merger or cooperation more attractive. Two different types of additional grants should be distinguished. The first one is needed to cover the direct costs of the merger proceedings themselves: the preliminary feasibility studies for the delimitation of the perimeter of the new *hromada* or the IMC and for the definition of its main characteristics, the procedures to create it and the drawing up of the scheme of the new entity. At the end, further support must be provided to pay the costs of the

referendum. These grants are part of the provisions that define the process of initiative and creation. Additional financial support can be of different types, temporary or permanent, partly earmarked and progressive. It should be conceived in a way that helps to bring visible and positive improvement in the LSG organisation and management, and in public services.

There is no need for large amounts of money the first year of the reform – immediate grants would not motivate efficiency; the political direction and the staff of the new entity will not be fully operative to conceive programmes of investment; the leaders at this stage would not have time to prepare a strategy and list their priorities. It would be more expedient to pay, for example, about 35% of the additional grant in the first year, 70% in the second, and the rest in the third year after creation. This would also be an incentive for better planning of the creation of new services and investments. It would be easier on the national budget and would allow support to be given to a greater number of initiatives.

The budget of the united rural *hromada* gets additional subsidies, 25% of the budget of the united *hromada*. Depending on the number of communes and size of population this percentage can reach 50, 75 or even 100%. The philosophy is to motivate a greater number of villages with a bigger population to merge. Albeit a positive idea, it could result in wrong decisions if the size and shape of the united community are chosen to meet the criteria of subsidy rather than the criteria of rational territorial management.

The time limit of 3 years is not clear. The draft does not specify how it is calculated: is it from the date of the creation of the united rural *hromada*? Or from the election of the new council? Or the adoption of the first "unified budget"? Three years is not long for investment and development policies, considering in particular that the first year will be spent on formalities. Ideally, a progressive payment should be stretched over 5 years. The total amount of these subsidies for the three years may not be enough to finance an ambitious programme. The risk is that the money will be used for current expenditure. The administrative supervision of the efficient use of subsidies carried out by the specially authorised central executive authority in charge of regional policy issues might not be sufficient for avoiding this.

More sophisticated criteria could be used for calculating the amount of subsidies: an equalisation model would favour grants for "poor" *hromadas*; a development model would

favour economic programmes; grants could also be modelled in relation to the level of existing equipment in the enlarged *hromada* etc.[14]

The estimates in the Explanatory Note to the draft are not very convincing. There will be many diverse situations depending on the wealth of the amalgamated villages. The merger of poor villages heavily dependent on subsidies will not make them less dependent. And merging poor villages with wealthier ones supposes that these latter exist in the region and will accept the merger; they may prefer to stay "independent" rather than to share their resources. This is also a reason why mergers must be formed following a majority vote of the villagers and not a unanimous one.

It would be too optimistic to hope that a merger can really save money for the budget, at least in the short term. A larger community has "structural costs" that may be important, including travel expenses for the employees and council members, etc. The probability is that the implementation of the reform will generate new costs. So it is not sure that the total amount of additional grants may be earmarked for investment alone.

The whole reform should not be presented as a means to reduce expenditure and to make savings directly in the budgets, even if this can be the case for marginal amounts. The real objective is to make the decision process in this area more efficient and improve the capacity of development policies and public services in a more efficient way. Budgetary cuts based on the forecasts of the Explanatory Note could severely undermine the success of the reform.

6. Absence of provisions on employees and on a permanent territorial representation

The draft does not deal with the situation of the village employees. Do they automatically become union employees, with the same salary, which can be different from one entity to another? What about their career and pensions? There is no provision on the representation of the former *hromadas*. International experience has shown that successful amalgamation policies generally include a form of representation of the former communities in the new one;

[14] Costs *per capita* for infrastructures increase in areas of low density. This will be the case in many regions that the reform is supposed to help. In a number of such areas, it will not be possible to increase the number of unified communities and their population without generating excessive remoteness. Therefore, the law should introduce another variable based on the number of inhabitants per km². This requires obviously careful statistical estimates. It could be suggested to link the expenditure with these subsidies and the implementation of the Reform programme of housing and municipal economy. This would make it possible to show the improvements for people to be expected nationally by the implementation of both reforms. This would also facilitate the planning of the development of the various sectors of the municipal economy.

the villages should be able to elect a representative to the new city council and sometimes keep some services in their city halls.

IV. Integrating a Chapter on IMC into the Basic Law on Local Self-Government

The purpose of inter-municipal cooperation

When the municipal territorial pattern is fragmented, the development of new tasks that need to be organised for a larger population area cannot be undertaken at the level of traditional settlements upon which municipalities are based in most countries (there are important exceptions). Alternatively, the amalgamation (or consolidation) of municipalities makes it possible to raise the municipal dimension to the scale of the new needs. Various countries, especially in Northern Europe have followed this path. However, territorial reform based on amalgamation does not render IMC unnecessary. First of all, in urban areas, the urban development cannot be contained in administrative boundaries, and beyond the consolidation of the core, cooperation is again necessary for urban transport systems, strategic planning, and land development. In rural areas, new problems arise with an aging population and the decline of the economic basis, further consolidation steps may create new problems of remoteness, and cooperation can be a relevant alternative for a number of functions.

But the territorial reform is not only a matter of administrative rationalisation and management. Everything depends on the general organisation of the state, on the perception of what is local in the political culture, whether the local is identified with the city or with the village, whether the main service provider is the state or the local authorities. All these factors influence the path and even the possibility of territorial reform. In various countries where territorial reform through amalgamation has proved politically impossible, the development of more integrated forms of IMC has been used as a practical alternative. This path has been followed in France, and the new law on the local government reform adopted on 17 November 2010 is aimed at completing the setting up of "inter-municipalities" until the end of 2013. A similar path has been followed by Hungary and Italy and is on the agenda in Spain, despite the fact that it is more difficult to implement because of the power of the autonomous regions. However, in both cases, the IMC bodies develop from the municipalities or from the municipal community, e.g. they are public powers and not private associations or contractual arrangements, although these might be used in order to deal with specific needs. In the UK, as in Germany or in France, IMC bodies are public law corporations.

IMC provisions in the 2010 draft law amending the 1997 Law on Local Self-Government

First of all, the concepts of *hromada* reflected in this draft law and in the draft law on the Stimulation of State Support of Unification of Rural Territorial Hromadas are not the same. As emphasised above, the result of the unification will be the formation of a new territorial community called the "united rural territorial community". In contrast, under Article 6, paragraph 4 of the amending draft law, the voluntary unification will result only in the formation of joint bodies for several communities, but not of a new enlarged community in place of the former ones. This second option is less ambitious, but makes it possible also to rationalise the municipal pattern. Whatever the political choice, any contradiction or divergence between both pieces of legislation should be avoided.

In the amending draft law, the IMC provisions are scant and do not meet the needs of Ukraine. Article 11 is the only article specifically dedicated to the subject, and financial matters are addressed in articles 60, paragraph 7, and 61, paragraph 4. IMC cannot be developed using these provisions. Article 11 does not give an adequate basis for the IMC development because it is based on a wrong concept: it uses two instruments; the association and the agreement, and the association itself is established through an agreement. Both are instruments of private, not public law. First, the association can be used both to solve management issues for some tasks and to represent rights and interests of the member territorial communities. Second, under paragraph 7, no power of an LSG body may be transferred to an association; this is understandable only if the association is a legal body of private law. Third, they are subject to registration by the Ministry of Justice, just as any private association or private legal person. The use of agreements is also regulated by Article 60.7: an agreement between several territorial communities can be passed to establish a co-ownership right on an object of municipal property or to join municipal funds for a joint project or for the joint financing of a joint communal enterprise or institution. Article 61.4 is identical in its budget rules to the previous one: it provides that the budgetary funds of several territorial communities may be amalgamated on a contractual basis.

These provisions do not meet the needs, whatever the political choice for the territorial reform. IMC cannot solve major problems of performance of municipal functions if territorial communities are not entitled to delegate powers to the joint bodies. This limitation can only be overcome by providing for specific public law corporations that can be established on the

basis of an agreement of member municipalities (eventually a majority thereof) by an administrative act, e.g. an act of public power. Then, the duties and the powers of the local authorities will be the same in relation to the task, whether they are exercised by the territorial community itself or through a joint body.

Therefore, it is not an article that the Law needs , but **a chapter** determining, in particular:

- the procedure for establishing IMC;
- the legal status of such a public law corporation;
- its governance;
- the financing (contributions of member municipalities or own resources from taxes, fees, duties, charges);
- the tasks that have to be exercised through the IMC, and the conditions according to which such tasks may be delegated;
- the supervision by member municipalities and the state supervision (that should be the same as for the territorial communities themselves);
- the rules on the transfer of personnel and of property;
- the relationships with municipal enterprises and institutions subject to the jurisdiction of the inter-municipal corporation.

As regards governance, the recommendation is for direct election of the board of an inter-municipal corporation in order to involve the citizens in the reform from the beginning.[15] Such a step should be undertaken on the basis of a broad consensus with the associations of territorial communities.

[15] The French experience shows that it is extremely difficult to replace election by municipal council with direct election by citizens. But this can be a very much politicised issue.

SECRETARIAT GENERAL

DIRECTORATE GENERAL OF DEMOCRACY AND POLITICAL AFFAIRS

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APPRAISAL OF THE DRAFT LAW OF UKRAINE ON STIMULATION AND STATE SUPPORT OF UNIFICATION OF RURAL TERRITORIAL COMMUNITIES

The present report was prepared by the Directorate of Democratic Institutions, Directorate General of Democracy and Political Affairs, in co-operation with Prof. Gérard Marcou, University Paris 1 Panthéon-Sorbonne, Director of GRALE (Research Group on Local Administration in Europe), and Prof Robert HERTZOG, University of Strasbourg France.

Introduction

The present legal appraisal was requested by the Ministry of Regional Development and Construction within the framework of the Council of Europe Programme to Strengthen Local Democracy in Ukraine (2010-2013, funded by the Swedish International Development Cooperation Agency Sida). The draft law on "*Stimulation and State Support of Unification of Rural Territorial Communities"* should become a part of the legal basis for implementing an ambitious local self-government reform, together with the draft laws "On Local Self Government" and "On Local State Administration". An introductory sentence of the draft explains that "*this Law establishes the procedure for the resolution of issues related to the unification of rural territorial communities."*

The draft law provides for a legal framework for amalgamating rural communities (*hromadas*) in order to improve service provision and save administrative costs. This is a law on procedure and State financial support. It reflects the idea that, according to the Government, rural areas are the priority in local government reform. It is therefore submitted before the general Strategy for local self-government reform in Ukraine is adopted, although the need for the Strategy has been discussed for more than ten years and has given rise to many reform projects under all governments. It is, however, important to have a wider perspective in order to avoid inconsistencies or unforeseen and undesired consequences.

Inter-municipal cooperation (IMC) institutions can be an alternative to amalgamation when the latter proves to be impossible or politically too difficult, or a supplement to amalgamation, where a number of services can be organised on a wider scale, without the disadvantage of creating municipalities that are too large, since this may hamper citizen access to municipal administration.

A Conference on Legislative Support to IMC was organised in Kyiv on 17 December 2010 by the Council of Europe (CoE) Programme to Strengthen Local Democracy in Ukraine and the Parliamentary Committee on State Building and Local Self-Government in order to discuss the draft and the options for IMC policy. This paper is a consolidated appraisal taking into account the comments of other experts and the discussion of the conference. The Conference participants agreed on three statements:

1. Territorial reform is important for Ukraine for administrative and political reasons; but there are also economic and social reasons that make it more urgent today.
2. It is a difficult and complicated task, that has been postponed several times because of resistance, including from the population, which is often unaware of all the benefits of the reform; so there is a need for greater explanation in order to reach political consensus;
3. A law is needed because the existing provisions of the Law on local self-government are not sufficiently precise on this subject and have not been implemented; a new law will create an opportunity for a national debate on the subject so that the stakes become more visible and understandable for the citizens. The government should announce the reform among its priorities. The law is also needed to create specific incentives that will accelerate the process of unification/amalgamation, as in other countries.

I. The need for territorial consolidation in Ukraine: merger and cooperation

The general problem of Ukrainian local self-government (LSG) is owing to the very specific and complicated organisation of the first level of LSG. This situation is unknown in Western European countries. The first level of LSG in Ukraine is based on the notion of "settlement". Villages and cities may be one or several settlements, and they form the territorial basis of the *hromada*, which is considered an "administrative territorial unit" (1997 Law on LSG, Article 1: there are administrative territorial units of different levels, and some inside of a city). As a result, instead of one type of first level LSG unit (which is the practice of most European countries), there are several kinds of first level LSG units.

This creates complexity for the actors themselves, both the ones in charge of a given territory and its citizens. As in other countries, many of these first level LSG units are very small in territory and population, and lack the resources needed to provide services, or to attract enterprises and investment. Thus Ukraine is faced with the same options as all other European countries at a certain point in their history: *status quo*, amalgamation, or IMC. In fact, these options are generally mixed because cooperation and amalgamation can be alternatives to each other but are also complementary.

Previous experience demonstrates that fragmentation can be a real handicap for development policies and for provision of public services to the population. The explanatory note to the draft Law lists the negative effects and weaknesses of many LSG units due to fragmentation of the territorial administration, especially in rural areas: absence or low quality of basic public services (water distribution, sewage, waste collection and disposal, roads), little or no social assistance, culture, health, education services, etc. This results in the absence of farming on large agricultural territories, poverty and emigration, etc. These economic and social problems are not directly caused by municipal fragmentation, but the absence of strong local government deprives *hromadas* of any capacity to solve problems and to launch efficient policies. Many *hromadas* are not able to initiate cooperation with other administrations and to draw up programmes that could attract investment or external financial support.

The policy of territorial consolidation in Ukraine may be seen from two perspectives: the modernisation and improvement of public entities, through clarification and rationalisation of the administrative map, better distribution of competences and resources on the one hand; and the economic and financial crisis that pushes today towards territorial consolidation on the other. Ukraine receives important support from the IMF, so there is an urgent obligation to make public administration work more efficiently.

Reshaping territorial administration in rural areas should be a high priority for government and parliament. But issues surrounding rural territories are part of a more general issue of territorial organisation in Ukraine, which has been discussed for many years with no results. Amalgamation or creation of IMC entities should not be considered separately but as an important part of a general strategy of territorial consolidation and LSG reform.

The present territorial organisation was conceived at a time when it was coherent with political and administrative centralisation, in which the economic and social policies were conducted by a central planning body. All LSG units were parts of the State administration in a “matrioshka” architecture. This is no longer the case. *Hromadas* must comply with the principles of the European Charter of Local Self-Government (ECLSG) and are autonomous actors of development policies. LSG units should have a size that allows them to have sufficient human and financial resources to produce a fair society, economic services and provide social welfare. The ECLSG not only promotes formal democracy; its spirit is in the organisation of LSG, which brings the best services to all people.

Another issue of the LSG system in Ukraine is that certain areas of the territories are not included in the boundaries of a *hromada,* and they are directly ruled by the second LSG level, the *rayon*. Such situations exist in other countries, but under condition of amalgamation of two tiers of LSG, mainly in metropolitan areas, and the second level enjoys full decentralisation[1]. The situation in Ukraine whereby the second level has *rayon* competences for the whole territory and municipal competencies for only parts of it - notably rural ones that need special care - is complicated. There is a great risk of inequality in such cases: the population of these territories is separated from the service delivering authorities, while the "central" *rayon* authorities neglect their management. This situation could become even more complicated if, after the merger of villages, some rural territories have the status of a unified municipality and some territories are left without any neighbouring administration. [2]

There should be an explicit choice, expressed in a clear political statement, that the objective in the medium- or long-term is to have a unified form of organisation at the first level of LSG addressing three different situations:

- Municipalities with an adequate size and perimeter remain unchanged;
- Municipalities which are too small merge (mainly but not exclusively rural ones);
- areas where merger is not possible (or not accepted) create adequate IMC entities.

The IMC provisions should be included in the same text as the merger provisions, and they should be discussed at the same time, because of their interdependence.

II. Three Issues to Consider

The discussions on the draft law concentrate on three major issues analysed below.

1. Should there be a separate Law or a Chapter in the basic Law on LSG?

Since the revision of the current basic Law on LSG is under preparation, it could be wise to include a chapter on amalgamation and IMC in this law, rather than having a separate

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[1] *Kreifreiestadt* in Germany, when the commune and Kreis are merged in one entity in big cities. In France, Paris; a new law of December 16th 2010 allows other amalgamations if the concerned LG decide them.

[2] This depends on the size of the different tiers. If a new commune is created with settlements that may be more than 20 kilometres away one from another, its size may be the same, or at least nearly, with the size of certain *rayons*.

legislation. A separate law on amalgamation can be adopted quite quickly if there is sufficient political consensus on its objectives. The basic law on LSG may take more time because of disagreement on other issues. However, in view of the substance of the law, **the recommendation would be to integrate joint provisions on amalgamation and IMC into the basic law**. This option should be considered by the government. It creates an opportunity to inform the citizens on the stakes of a more rational and efficient territorial organization. A separate law will be needed to establish pertinent procedures and other rules for amalgamation and IMC. But the rules should not appear as exceptional, separated from the other provisions on LSG entities. Merger and IMC must be seen as part of the ongoing developments of a decentralised State.[3] They should be an integral part of the LSG system, and they should be ruled by permanent provisions in the basic law.[4] Specific government policies to encourage local governments to accelerate the creation of united or IMC entities do not need new procedures. The political will can be expressed in incentives, legal and financial support, in addition to the ordinary provisions.

2. Separate provisions for rural hromadas?

The present draft is meant to bring together small rural communities. Clearly, this is a very important stake in the creation of bigger and stronger LSG units at the first level. The new communities will remain rural, because of the geographical, sociological and economic make-up of the municipality, and not because of the number of inhabitants. Specific rules may take this into account, if there is a need for them. Yet the current definition of rural communities is not clear.[5]

Amalgamation or cooperation with a city is also an option that should be considered. Villages that merge with a medium-size city have access to more services in an easy and cost effective

[3] In the Netherlands there is an ongoing trend of merging communes on a voluntary basis because new political leaders consider this useful. In France, which has many IMC entities, there is a continuous creation, winding up or modification of IMC bodies, etc.

[4] This is the case in most countries. In France, the rules on amalgamation and IMC are in the *General Code of LSG*. In Germany, the municipal law is a competence of the Land; so there are a variety of situations, but IMC is considered as fully part of municipal law.

[5] The draft does not explain a "rural territorial community". Article 140 of the Constitution and the terminology of the recent draft law to amend the local self-government law imply that this should be a village or rural settlement, as opposed to a city. But, is a borough a big village or a small town/city? There is no provision on boundaries, on municipal personnel and reorganisation of municipal services and on the representation of the former communities.

way: public transport, waste collection and disposal, libraries, sports facilities, police, etc. There can be a synergy between a city and small neighbouring communities for development policy, use of public equipment, and sharing of certain costs. Next, there are large cities with a belt of smaller communities. A merger can be twofold: the town gets a larger territory for its development (business districts, housing), at a lower cost for the buyers. And the population of small communities gets access to the city services. Two neighbouring cities may decide to cooperate on specific projects: hospital, waste, schools, transport, promotion of tourism.

Merger and IMC should be open procedures offered to all local governments in order to allow them to choose the best way to fulfil their tasks and organise their development. **Most of the rules should be common and general for all types of municipalities, rural and urban.**

3. Financial incentives for amalgamation and cooperation?

The draft law has important provisions on financial incentives for communities starting a merger process, with figures that are higher than those generally given in other countries, which demonstrates the importance of this policy for the government. Financial incentives from the State budget for amalgamation or cooperation are justified for at least four reasons:

1) These reforms have a cost for the participating municipalities: for research and consultancy (economists, lawyers, specialist on organisation, taxes, budgeting, etc); for reorganisation of the administrations, organisation of a local referendum. There should, in which case, be a specific grant for launching the procedure.
2) Creation of a new entity is not only of local interest but also of regional and national one, because it can improve the overall territorial administration.
3) A large new municipality or a new IMC entity will have the critical size for spending public money more efficiently in investment or public services.
4) Financial incentives can speed up the creation of IMC or merger processes[6]. The financial motivation will become more and more important in a lasting fiscal stress for local administrations. More money is not the only important factor; competition between the communities is even more important. Those that do not cooperate or merge will obtain significantly less in terms of development than those which do. The competitiveness mechanism is very well understood by local government managers and politicians.

[6] Financial incentives contributed greatly to the success of IMC in France after the 1999: 2600 new highly integrated communities were created in a couple of years.

III. Analytical Assessment of the Draft Law

The following issues should be discussed by the authorities and revised in the draft.

1. Guidance and coordination by central government (Article 3.)

LSG units absolutely need support for any unification or cooperation process[7]. There is a need for methodology, legal guidance, and financial support, where state administrations have important responsibilities. However, the law must be precise and should say what bylaws should be issued and what kind of support the government can give, because the draft law cannot become an indirect way of limiting the autonomy of local authorities. The commission to be established within the specially authorized central executive authority in charge of regional policy issues may not include exclusively representatives of central authorities and scientific institutions. It must also include local government representatives, including *rayons*. This is a requirement of the ECLSG Art. 4 para 6[8], and it will be politically wise in order to facilitate consensus.

2. Conditions and criteria for the merger of rural territorial communities (Article 4.)

Article 4 of the draft defines several criteria and conditions that should be respected by the founders of a new united community. The CoE experts support the idea that the creation of new administrative structures cannot be left to the discretionary decision of local authorities. It is a public interest to create long-lasting entities of optimal size, which will improve local institutions. Experience of other countries demonstrates that geographic or demographic limits generate "perverse effects," which are never relevant for all situations. The draft law states that a united community must include at least 4000 persons. The distance from the administrative centre of a territorial community to the most remote village of this community may not exceed 20 km and, to determine the new administrative centre, the population and the service capacity are considered. It is not clear how this distance will be measured: boundary to boundary, village centre to village centre, and what is a village centre?

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[7] See the toolkit published by the CoE, UNDP and LGI for IMC. The same recommendations are also pertinent for mergers.

[8] *"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".*

It is reasonable to suggest a lower limit of the number of inhabitants, because there are cases where IMC entities or merged communes are still too small and don't reach the minimal capacity of resources and a sufficient population to make them viable[9]. On the other hand, in certain circumstances it may be impossible to stay above the limit. With small, remote villages, 4000 inhabitants would be too large, and people might be too far away from the centre and from each other. Alternatively, the proposed union could contain a population over 4000, but during the referendum one or two communes might reject integration, and the figure could fall under 4000, for example 3750. Should the whole process then be stopped? The limit opens up an opportunity for blackmail, or could cause the process to collapse. While it is reasonable to set a limit of 4000, some flexibility should be allowed, depending on each individual case. A special study and a report could be produced proving that the union is improving the capacities of LSG and will still create a viable entity.

The distance criterion also raises some questions. For example, the municipal administration should be close to people, and 20 km might be too far for an aging population in areas lacking an efficient public transport system. Therefore, the law should include an alternative criterion based on the time needed to reach the administrative centre (for example 45 minutes or less than 1 hour by car or motorcycle)[10]. If the new entity is too big and scattered there will never be any sense of solidarity or a community life between the inhabitants. In fact, if the distance between two settlements of the new entity is close to 40 km, few types of equipment could be shared, and too much money would have to be spent on transportation and roads. This has to be a serious consideration when examining the proposals at the *rayon* level.

Do these criteria apply to any merger? Between a city and settlements, for instance? Are there also such criteria for IMC bodies? There is a need for a thorough study showing which municipalities should be merged, for what reasons, and with what benefits. Ideally, instead of listing the criteria, the law should be clearer and more demanding on the background study for initiating the merger process. It should state that the councils decide to merge on the basis of a report, which demonstrates the need for and benefits of a merger. And then the law could authorise the state authorities (at the *oblast* level) to veto proposals that are not rational or do not meet the requirements.

[9] In France, many IMC communities unite only 3 or 4 small communes with less than 2000 inhabitants in all.
[10] In a big city citizens may also need that much time to go to the central city hall or to specific municipal services.

3. Initiating the merger of rural territorial communities (Article 5.)

This article has been seriously criticised by all experts. The provision of Articles 5 and 6 is not adequate for dealing with such complex issues[11]. They overestimate the capacity of the project to attract full support from citizens. It is an unrealistic statement that "*the unification of rural territorial communities may be initiated by the corresponding village councils and initiative groups with at least 10 members from among the inhabitants of the villages that initiate the unification.*"

Further, the draft does not say to whom this initiative must be sent and where it is registered. A council or several inhabitants from one village cannot ask for a merger with other villages without some discussion or even negotiation with these villages. As other experiences of mergers show, it is unlikely that the ordinary people will organise initiatives for municipal amalgamation or creation of an IMC entity. Then the state *rayon* administration is to formulate a recommendation directed to the *rayon* council for organising a referendum in all these localities. This type of procedure also raises concerns.

How can a council decide to initiate a process for unification if there is no concrete project describing the list of communities involved, the agenda, the financial consequences, the new organisation, possible development policies or new investments to be created? First, the initiative has to be credible and to be based on the previous agreements of several local councils, or on the initiative of inhabitants, but in this case there should be a minimum percentage of *voters* (a more appropriate term than *inhabitants*) from the different localities. Then, the unification process will build on this core agreement.

Secondly, the main question is determining the area in which the referendum will be organised. Article 4 gives criteria on how to determine this area, but there is no clear provision on who is empowered to decide the boundaries. Articles 5 and 6 imply that the area is determined following the submission of the initiative. Logically, it should belong to the head of the *rayon* state administration to decide on the area; but it follows from Article 6 (paragraph 2) that the *rayon* council decides only on the organisation of the referendum, not on the area.

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[11] The CoE-UNDP- LGI Toolkit on IMC contains good recommendations on this subject.

The state *oblast* administration should have a more important role to play in the process. It is unlikely that the qualified staff can be found in all state *rayon* administrations, especially in rural areas. A task force should be established at the *oblast* level in order to assist the *rayon* administrations. Furthermore, if the merger process finds support and is successful, there would be four or five united rural territorial communities in each *rayon*, and this would bring into question the existing territorial division into *rayons*, and the existence of *rayon* state administrations and councils who will not support the reform.

Representatives of local self-government have to be involved in the design of the territory of the future united rural territorial communities from the very beginning, their support is a basic condition for success. Ideally, a local commission elected by all mayors of the *rayon* should be formed. This would facilitate the dialogue between all mayors, and between all mayors and the head of the state administration on the future municipal pattern of the *rayon*[12]. Then, it would be easier to submit the proposals to the voters. This method does not rule out the initiative of some mayors or inhabitants, but it will avoid too many discretionary decisions of the head of the state *rayon* administration on a case-by-case basis, and this will increase the transparency of the process and the legitimacy of the final design.

Several authorities should be enabled to take the initiative. Merger and IMC never occur spontaneously; they need political leadership and technical support. The State as well as the *rayon* should have the possibility of launching a process that is not dependant on the good will of some of the inhabitants over the national territory. The best method would be to organise a systematic study of possible unions at the most appropriate level: this would be one where there is good information; staff and financing for the studies; political capacity of creating consensus with the ability to resist unreasonable projects.

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[12] This problem is well known in France where the municipal pattern is very much fragmented, especially in rural areas. A commission is elected at the department level (a larger constituency than the Ukrainian *rayon*) by all mayors and presidents of joint-authorities; the prefect has to establish a scheme for the development of IMC in consultation with this commission; a vote with special majority may bind the prefect in some circumstances. Several reforms have strengthened the role of this commission and the authority of its decisions, and recently the new local government reform adopted by the parliament on 17 November 2010. This method could be used to prepare a unification plan at the *rayon* level, with proposal of new enlarged communities consistent with each other.

4. Review and summary of proposals and decision for the unification of rural territorial communities (Article 6.)

Article 6 of the draft contains complicated proceedings that are not clearly related to the initiative. It is not clear what happens between the moment when an initiative is registered and these proceedings. It will be the responsibility of the *rayon* state administration to summarise, with the participation of the corresponding local council commissions, proposals for unification of rural territorial communities, develop recommendations on the optimal resolution of this task, observing the main conditions and criteria. The feasibility study and the examination of the project's pertinence may therefore be carried out on the basis of "spontaneous" proposals. But at such a late stage, it would be very difficult for the *rayon* administration to contest the proposals, reshape the territorial limits in a more rational form and form consensus. Discussion with all other authorities will complicate it even more and there is a great risk of decisions being taken in a spirit of hurried compromise that will rapidly prove inefficient. The delay of 7 days is therefore not acceptable and should be at least one month. The whole process should therefore be reformulated with much attention given to the way initiative is launched and how the first outline of the union becomes public and a matter for discussion by political representatives and the population.

As regards the referendum itself, it seems that the Constitution (Article 140) would require that the votes are counted for each territorial community, since the self-governing right belongs to territorial communities. But it would make the reform impossible if the opposition of only one *hromada* was enough to defeat the decision. However it is possible to have a large majority, large enough to launch the new united territorial community on a large-scale basis, without forcing the decision if the project is too controversial or raises too much opposition, and make it possible to overcome isolated opponents[13].

Other points to consider include the need for special financing for organising referendums, and the preference for counting the overall sum of votes for all villages that took part, rather than a separate count for each village. The draft should refer to "direct decision of the citizens" and review the referendum procedure. The separate counting solution will probably

[13] In France, for the creation of an integrated joint-authority ("*communauté*"), there is no referendum, but as a rule the majority within the area of the consultation has to be either 2/3 of municipal councils representing ½ of the population, or alternatively ½ of the municipal councils representing 2/3 of the population. Other majorities can be envisaged.

be supported in the name of the “autonomy” of each village, on the basis of the Constitution and of the Charter. This idea can be challenged because the creation of each local government area and the modification of its boundaries are not exclusive powers of each LSG unit; rather it is a matter for the national administration and of broader interest than for just one group of its current population which has the right to express its opinion.

If the final option is for a separate count, then there should be a protection against sectoral, political, economic or even individual interests. In small districts certain groups can hinder the reform and damage the interests of the larger population. If a merger can only be created with unanimity of all communities, small groups in the villages might have a decisive negative influence and block the merger or use blackmail to make unreasonable demands. The best system would be the one with a double optional majority: either X% (60 or 70) of the villages representing Y% (50; 60?) of the population, or Y% (50, 60) of the villages representing X% (60, 70?) of the population, etc.

5. Budget and financial issues

5.1 Financial unification: taxes, prices, debts

The draft has short provisions for creating a unified budget after the amalgamation has taken place. There are several issues which should be addressed by the law but are missing in the draft. They concern the unification of tax rates and price of services. Each village may have its own figures with important differences. They cannot remain in force indefinitely. What happens after unification? Will there be an average tariff? Or does the new council have to decide on all these figures? What about a transitional period to bring them to an average level? Something more precise should be said on the debt. Logically the debts and properties of the merged *hromadas* become debts and properties of the new *hromada*. Article 8 needs to be expanded and clearer on these issues.

5.2 Financial incentives and special grants for unification

As already mentioned, the grants are important to make merger or cooperation more attractive. Two different types of additional grants should be distinguished. The first one is needed to cover the direct costs of the merger proceedings themselves: the preliminary feasibility studies for the delimitation of the perimeter of the new *hromada* or the IMC and for the definition of its main characteristics, the procedures to create it and the drawing up of the scheme of the new entity. At the end, further support must be provided to pay the costs of the

referendum. These grants are part of the provisions that define the process of initiative and creation. Additional financial support can be of different types, temporary or permanent, partly earmarked and progressive. It should be conceived in a way that helps to bring visible and positive improvement in the LSG organisation and management, and in public services.

There is no need for large amounts of money the first year of the reform – immediate grants would not motivate efficiency; the political direction and the staff of the new entity will not be fully operative to conceive programmes of investment; the leaders at this stage would not have time to prepare a strategy and list their priorities. It would be more expedient to pay, for example, about 35% of the additional grant in the first year, 70% in the second, and the rest in the third year after creation. This would also be an incentive for better planning of the creation of new services and investments. It would be easier on the national budget and would allow support to be given to a greater number of initiatives.

The budget of the united rural *hromada* gets additional subsidies, 25% of the budget of the united *hromada*. Depending on the number of communes and size of population this percentage can reach 50, 75 or even 100%. The philosophy is to motivate a greater number of villages with a bigger population to merge. Albeit a positive idea, it could result in wrong decisions if the size and shape of the united community are chosen to meet the criteria of subsidy rather than the criteria of rational territorial management.

The time limit of 3 years is not clear. The draft does not specify how it is calculated: is it from the date of the creation of the united rural *hromada*? Or from the election of the new council? Or the adoption of the first "unified budget"? Three years is not long for investment and development policies, considering in particular that the first year will be spent on formalities. Ideally, a progressive payment should be stretched over 5 years. The total amount of these subsidies for the three years may not be enough to finance an ambitious programme. The risk is that the money will be used for current expenditure. The administrative supervision of the efficient use of subsidies carried out by the specially authorised central executive authority in charge of regional policy issues might not be sufficient for avoiding this.

More sophisticated criteria could be used for calculating the amount of subsidies: an equalisation model would favour grants for "poor" *hromadas*; a development model would

favour economic programmes; grants could also be modelled in relation to the level of existing equipment in the enlarged *hromada* etc.[14]

The estimates in the Explanatory Note to the draft are not very convincing. There will be many diverse situations depending on the wealth of the amalgamated villages. The merger of poor villages heavily dependent on subsidies will not make them less dependent. And merging poor villages with wealthier ones supposes that these latter exist in the region and will accept the merger; they may prefer to stay "independent" rather than to share their resources. This is also a reason why mergers must be formed following a majority vote of the villagers and not a unanimous one.

It would be too optimistic to hope that a merger can really save money for the budget, at least in the short term. A larger community has "structural costs" that may be important, including travel expenses for the employees and council members, etc. The probability is that the implementation of the reform will generate new costs. So it is not sure that the total amount of additional grants may be earmarked for investment alone.

The whole reform should not be presented as a means to reduce expenditure and to make savings directly in the budgets, even if this can be the case for marginal amounts. The real objective is to make the decision process in this area more efficient and improve the capacity of development policies and public services in a more efficient way. Budgetary cuts based on the forecasts of the Explanatory Note could severely undermine the success of the reform.

6. Absence of provisions on employees and on a permanent territorial representation

The draft does not deal with the situation of the village employees. Do they automatically become union employees, with the same salary, which can be different from one entity to another? What about their career and pensions? There is no provision on the representation of the former *hromadas*. International experience has shown that successful amalgamation policies generally include a form of representation of the former communities in the new one;

[14] Costs *per capita* for infrastructures increase in areas of low density. This will be the case in many regions that the reform is supposed to help. In a number of such areas, it will not be possible to increase the number of unified communities and their population without generating excessive remoteness. Therefore, the law should introduce another variable based on the number of inhabitants per km². This requires obviously careful statistical estimates. It could be suggested to link the expenditure with these subsidies and the implementation of the Reform programme of housing and municipal economy. This would make it possible to show the improvements for people to be expected nationally by the implementation of both reforms. This would also facilitate the planning of the development of the various sectors of the municipal economy.

the villages should be able to elect a representative to the new city council and sometimes keep some services in their city halls.

IV. Integrating a Chapter on IMC into the Basic Law on Local Self-Government

The purpose of inter-municipal cooperation

When the municipal territorial pattern is fragmented, the development of new tasks that need to be organised for a larger population area cannot be undertaken at the level of traditional settlements upon which municipalities are based in most countries (there are important exceptions). Alternatively, the amalgamation (or consolidation) of municipalities makes it possible to raise the municipal dimension to the scale of the new needs. Various countries, especially in Northern Europe have followed this path. However, territorial reform based on amalgamation does not render IMC unnecessary. First of all, in urban areas, the urban development cannot be contained in administrative boundaries, and beyond the consolidation of the core, cooperation is again necessary for urban transport systems, strategic planning, and land development. In rural areas, new problems arise with an aging population and the decline of the economic basis, further consolidation steps may create new problems of remoteness, and cooperation can be a relevant alternative for a number of functions.

But the territorial reform is not only a matter of administrative rationalisation and management. Everything depends on the general organisation of the state, on the perception of what is local in the political culture, whether the local is identified with the city or with the village, whether the main service provider is the state or the local authorities. All these factors influence the path and even the possibility of territorial reform. In various countries where territorial reform through amalgamation has proved politically impossible, the development of more integrated forms of IMC has been used as a practical alternative. This path has been followed in France, and the new law on the local government reform adopted on 17 November 2010 is aimed at completing the setting up of “inter-municipalities” until the end of 2013. A similar path has been followed by Hungary and Italy and is on the agenda in Spain, despite the fact that it is more difficult to implement because of the power of the autonomous regions. However, in both cases, the IMC bodies develop from the municipalities or from the municipal community, e.g. they are public powers and not private associations or contractual arrangements, although these might be used in order to deal with specific needs. In the UK, as in Germany or in France, IMC bodies are public law corporations.

IMC provisions in the 2010 draft law amending the 1997 Law on Local Self-Government

First of all, the concepts of *hromada* reflected in this draft law and in the draft law on the Stimulation of State Support of Unification of Rural Territorial Hromadas are not the same. As emphasised above, the result of the unification will be the formation of a new territorial community called the "united rural territorial community". In contrast, under Article 6, paragraph 4 of the amending draft law, the voluntary unification will result only in the formation of joint bodies for several communities, but not of a new enlarged community in place of the former ones. This second option is less ambitious, but makes it possible also to rationalise the municipal pattern. Whatever the political choice, any contradiction or divergence between both pieces of legislation should be avoided.

In the amending draft law, the IMC provisions are scant and do not meet the needs of Ukraine. Article 11 is the only article specifically dedicated to the subject, and financial matters are addressed in articles 60, paragraph 7, and 61, paragraph 4. IMC cannot be developed using these provisions. Article 11 does not give an adequate basis for the IMC development because it is based on a wrong concept: it uses two instruments; the association and the agreement, and the association itself is established through an agreement. Both are instruments of private, not public law. First, the association can be used both to solve management issues for some tasks and to represent rights and interests of the member territorial communities. Second, under paragraph 7, no power of an LSG body may be transferred to an association; this is understandable only if the association is a legal body of private law. Third, they are subject to registration by the Ministry of Justice, just as any private association or private legal person. The use of agreements is also regulated by Article 60.7: an agreement between several territorial communities can be passed to establish a co-ownership right on an object of municipal property or to join municipal funds for a joint project or for the joint financing of a joint communal enterprise or institution. Article 61.4 is identical in its budget rules to the previous one: it provides that the budgetary funds of several territorial communities may be amalgamated on a contractual basis.

These provisions do not meet the needs, whatever the political choice for the territorial reform. IMC cannot solve major problems of performance of municipal functions if territorial communities are not entitled to delegate powers to the joint bodies. This limitation can only be overcome by providing for specific public law corporations that can be established on the

basis of an agreement of member municipalities (eventually a majority thereof) by an administrative act, e.g. an act of public power. Then, the duties and the powers of the local authorities will be the same in relation to the task, whether they are exercised by the territorial community itself or through a joint body.

Therefore, it is not an article that the Law needs , but **a chapter** determining, in particular:

- the procedure for establishing IMC;
- the legal status of such a public law corporation;
- its governance;
- the financing (contributions of member municipalities or own resources from taxes, fees, duties, charges);
- the tasks that have to be exercised through the IMC, and the conditions according to which such tasks may be delegated;
- the supervision by member municipalities and the state supervision (that should be the same as for the territorial communities themselves);
- the rules on the transfer of personnel and of property;
- the relationships with municipal enterprises and institutions subject to the jurisdiction of the inter-municipal corporation.

As regards governance, the recommendation is for direct election of the board of an inter-municipal corporation in order to involve the citizens in the reform from the beginning.[15] Such a step should be undertaken on the basis of a broad consensus with the associations of territorial communities.

[15] The French experience shows that it is extremely difficult to replace election by municipal council with direct election by citizens. But this can be a very much politicised issue.

SECRETARIAT GENERAL

DIRECTORATE GENERAL OF DEMOCRACY AND POLITICAL AFFAIRS

DIRECTORATE OF DEMOCRATIC INSTITUTIONS

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APPRAISAL OF THE DRAFT LAW OF UKRAINE ON STIMULATION AND STATE SUPPORT OF UNIFICATION OF RURAL TERRITORIAL COMMUNITIES

The present report was prepared by the Directorate of Democratic Institutions, Directorate General of Democracy and Political Affairs, in co-operation with Prof. Gérard Marcou, University Paris 1 Panthéon-Sorbonne, Director of GRALE (Research Group on Local Administration in Europe), and Prof Robert HERTZOG, University of Strasbourg France.

Introduction

The present legal appraisal was requested by the Ministry of Regional Development and Construction within the framework of the Council of Europe Programme to Strengthen Local Democracy in Ukraine (2010-2013, funded by the Swedish International Development Cooperation Agency Sida). The draft law on "*Stimulation and State Support of Unification of Rural Territorial Communities"* should become a part of the legal basis for implementing an ambitious local self-government reform, together with the draft laws "On Local Self Government" and "On Local State Administration". An introductory sentence of the draft explains that "*this Law establishes the procedure for the resolution of issues related to the unification of rural territorial communities."*

The draft law provides for a legal framework for amalgamating rural communities (*hromadas*) in order to improve service provision and save administrative costs. This is a law on procedure and State financial support. It reflects the idea that, according to the Government, rural areas are the priority in local government reform. It is therefore submitted before the general Strategy for local self-government reform in Ukraine is adopted, although the need for the Strategy has been discussed for more than ten years and has given rise to many reform projects under all governments. It is, however, important to have a wider perspective in order to avoid inconsistencies or unforeseen and undesired consequences.

Inter-municipal cooperation (IMC) institutions can be an alternative to amalgamation when the latter proves to be impossible or politically too difficult, or a supplement to amalgamation, where a number of services can be organised on a wider scale, without the disadvantage of creating municipalities that are too large, since this may hamper citizen access to municipal administration.

A Conference on Legislative Support to IMC was organised in Kyiv on 17 December 2010 by the Council of Europe (CoE) Programme to Strengthen Local Democracy in Ukraine and the Parliamentary Committee on State Building and Local Self-Government in order to discuss the draft and the options for IMC policy. This paper is a consolidated appraisal taking into account the comments of other experts and the discussion of the conference. The Conference participants agreed on three statements:

1. Territorial reform is important for Ukraine for administrative and political reasons; but there are also economic and social reasons that make it more urgent today.
2. It is a difficult and complicated task, that has been postponed several times because of resistance, including from the population, which is often unaware of all the benefits of the reform; so there is a need for greater explanation in order to reach political consensus;
3. A law is needed because the existing provisions of the Law on local self-government are not sufficiently precise on this subject and have not been implemented; a new law will create an opportunity for a national debate on the subject so that the stakes become more visible and understandable for the citizens. The government should announce the reform among its priorities. The law is also needed to create specific incentives that will accelerate the process of unification/amalgamation, as in other countries.

I. The need for territorial consolidation in Ukraine: merger and cooperation

The general problem of Ukrainian local self-government (LSG) is owing to the very specific and complicated organisation of the first level of LSG. This situation is unknown in Western European countries. The first level of LSG in Ukraine is based on the notion of "settlement". Villages and cities may be one or several settlements, and they form the territorial basis of the *hromada*, which is considered an "administrative territorial unit" (1997 Law on LSG, Article 1: there are administrative territorial units of different levels, and some inside of a city). As a result, instead of one type of first level LSG unit (which is the practice of most European countries), there are several kinds of first level LSG units.

This creates complexity for the actors themselves, both the ones in charge of a given territory and its citizens. As in other countries, many of these first level LSG units are very small in territory and population, and lack the resources needed to provide services, or to attract enterprises and investment. Thus Ukraine is faced with the same options as all other European countries at a certain point in their history: *status quo*, amalgamation, or IMC. In fact, these options are generally mixed because cooperation and amalgamation can be alternatives to each other but are also complementary.

Previous experience demonstrates that fragmentation can be a real handicap for development policies and for provision of public services to the population. The explanatory note to the draft Law lists the negative effects and weaknesses of many LSG units due to fragmentation of the territorial administration, especially in rural areas: absence or low quality of basic public services (water distribution, sewage, waste collection and disposal, roads), little or no social assistance, culture, health, education services, etc. This results in the absence of farming on large agricultural territories, poverty and emigration, etc. These economic and social problems are not directly caused by municipal fragmentation, but the absence of strong local government deprives *hromadas* of any capacity to solve problems and to launch efficient policies. Many *hromadas* are not able to initiate cooperation with other administrations and to draw up programmes that could attract investment or external financial support.

The policy of territorial consolidation in Ukraine may be seen from two perspectives: the modernisation and improvement of public entities, through clarification and rationalisation of the administrative map, better distribution of competences and resources on the one hand; and the economic and financial crisis that pushes today towards territorial consolidation on the other. Ukraine receives important support from the IMF, so there is an urgent obligation to make public administration work more efficiently.

Reshaping territorial administration in rural areas should be a high priority for government and parliament. But issues surrounding rural territories are part of a more general issue of territorial organisation in Ukraine, which has been discussed for many years with no results. Amalgamation or creation of IMC entities should not be considered separately but as an important part of a general strategy of territorial consolidation and LSG reform.

The present territorial organisation was conceived at a time when it was coherent with political and administrative centralisation, in which the economic and social policies were conducted by a central planning body. All LSG units were parts of the State administration in a “matrioshka” architecture. This is no longer the case. *Hromadas* must comply with the principles of the European Charter of Local Self-Government (ECLSG) and are autonomous actors of development policies. LSG units should have a size that allows them to have sufficient human and financial resources to produce a fair society, economic services and provide social welfare. The ECLSG not only promotes formal democracy; its spirit is in the organisation of LSG, which brings the best services to all people.

Another issue of the LSG system in Ukraine is that certain areas of the territories are not included in the boundaries of a *hromada,* and they are directly ruled by the second LSG level, the *rayon*. Such situations exist in other countries, but under condition of amalgamation of two tiers of LSG, mainly in metropolitan areas, and the second level enjoys full decentralisation[1]. The situation in Ukraine whereby the second level has *rayon* competences for the whole territory and municipal competencies for only parts of it - notably rural ones that need special care - is complicated. There is a great risk of inequality in such cases: the population of these territories is separated from the service delivering authorities, while the "central" *rayon* authorities neglect their management. This situation could become even more complicated if, after the merger of villages, some rural territories have the status of a unified municipality and some territories are left without any neighbouring administration. [2]

There should be an explicit choice, expressed in a clear political statement, that the objective in the medium- or long-term is to have a unified form of organisation at the first level of LSG addressing three different situations:

- Municipalities with an adequate size and perimeter remain unchanged;
- Municipalities which are too small merge (mainly but not exclusively rural ones);
- areas where merger is not possible (or not accepted) create adequate IMC entities.

The IMC provisions should be included in the same text as the merger provisions, and they should be discussed at the same time, because of their interdependence.

II. Three Issues to Consider

The discussions on the draft law concentrate on three major issues analysed below.

1. Should there be a separate Law or a Chapter in the basic Law on LSG?

Since the revision of the current basic Law on LSG is under preparation, it could be wise to include a chapter on amalgamation and IMC in this law, rather than having a separate

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[1] *Kreifreiestadt* in Germany, when the commune and Kreis are merged in one entity in big cities. In France, Paris; a new law of December 16th 2010 allows other amalgamations if the concerned LG decide them.

[2] This depends on the size of the different tiers. If a new commune is created with settlements that may be more than 20 kilometres away one from another, its size may be the same, or at least nearly, with the size of certain *rayons*.

legislation. A separate law on amalgamation can be adopted quite quickly if there is sufficient political consensus on its objectives. The basic law on LSG may take more time because of disagreement on other issues. However, in view of the substance of the law, **the recommendation would be to integrate joint provisions on amalgamation and IMC into the basic law**. This option should be considered by the government. It creates an opportunity to inform the citizens on the stakes of a more rational and efficient territorial organization. A separate law will be needed to establish pertinent procedures and other rules for amalgamation and IMC. But the rules should not appear as exceptional, separated from the other provisions on LSG entities. Merger and IMC must be seen as part of the ongoing developments of a decentralised State.[3] They should be an integral part of the LSG system, and they should be ruled by permanent provisions in the basic law.[4] Specific government policies to encourage local governments to accelerate the creation of united or IMC entities do not need new procedures. The political will can be expressed in incentives, legal and financial support, in addition to the ordinary provisions.

2. Separate provisions for rural hromadas?

The present draft is meant to bring together small rural communities. Clearly, this is a very important stake in the creation of bigger and stronger LSG units at the first level. The new communities will remain rural, because of the geographical, sociological and economic make-up of the municipality, and not because of the number of inhabitants. Specific rules may take this into account, if there is a need for them. Yet the current definition of rural communities is not clear.[5]

Amalgamation or cooperation with a city is also an option that should be considered. Villages that merge with a medium-size city have access to more services in an easy and cost effective

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[3] In the Netherlands there is an ongoing trend of merging communes on a voluntary basis because new political leaders consider this useful. In France, which has many IMC entities, there is a continuous creation, winding up or modification of IMC bodies, etc.

[4] This is the case in most countries. In France, the rules on amalgamation and IMC are in the *General Code of LSG*. In Germany, the municipal law is a competence of the Land; so there are a variety of situations, but IMC is considered as fully part of municipal law.

[5] The draft does not explain a "rural territorial community". Article 140 of the Constitution and the terminology of the recent draft law to amend the local self-government law imply that this should be a village or rural settlement, as opposed to a city. But, is a borough a big village or a small town/city? There is no provision on boundaries, on municipal personnel and reorganisation of municipal services and on the representation of the former communities.

way: public transport, waste collection and disposal, libraries, sports facilities, police, etc. There can be a synergy between a city and small neighbouring communities for development policy, use of public equipment, and sharing of certain costs. Next, there are large cities with a belt of smaller communities. A merger can be twofold: the town gets a larger territory for its development (business districts, housing), at a lower cost for the buyers. And the population of small communities gets access to the city services. Two neighbouring cities may decide to cooperate on specific projects: hospital, waste, schools, transport, promotion of tourism.

Merger and IMC should be open procedures offered to all local governments in order to allow them to choose the best way to fulfil their tasks and organise their development. **Most of the rules should be common and general for all types of municipalities, rural and urban.**

3. Financial incentives for amalgamation and cooperation?

The draft law has important provisions on financial incentives for communities starting a merger process, with figures that are higher than those generally given in other countries, which demonstrates the importance of this policy for the government. Financial incentives from the State budget for amalgamation or cooperation are justified for at least four reasons:

1) These reforms have a cost for the participating municipalities: for research and consultancy (economists, lawyers, specialist on organisation, taxes, budgeting, etc); for reorganisation of the administrations, organisation of a local referendum. There should, in which case, be a specific grant for launching the procedure.
2) Creation of a new entity is not only of local interest but also of regional and national one, because it can improve the overall territorial administration.
3) A large new municipality or a new IMC entity will have the critical size for spending public money more efficiently in investment or public services.
4) Financial incentives can speed up the creation of IMC or merger processes[6]. The financial motivation will become more and more important in a lasting fiscal stress for local administrations. More money is not the only important factor; competition between the communities is even more important. Those that do not cooperate or merge will obtain significantly less in terms of development than those which do. The competitiveness mechanism is very well understood by local government managers and politicians.

[6] Financial incentives contributed greatly to the success of IMC in France after the 1999: 2600 new highly integrated communities were created in a couple of years.

III. Analytical Assessment of the Draft Law

The following issues should be discussed by the authorities and revised in the draft.

1. Guidance and coordination by central government (Article 3.)

LSG units absolutely need support for any unification or cooperation process[7]. There is a need for methodology, legal guidance, and financial support, where state administrations have important responsibilities. However, the law must be precise and should say what bylaws should be issued and what kind of support the government can give, because the draft law cannot become an indirect way of limiting the autonomy of local authorities. The commission to be established within the specially authorized central executive authority in charge of regional policy issues may not include exclusively representatives of central authorities and scientific institutions. It must also include local government representatives, including *rayons*. This is a requirement of the ECLSG Art. 4 para 6[8], and it will be politically wise in order to facilitate consensus.

2. Conditions and criteria for the merger of rural territorial communities (Article 4.)

Article 4 of the draft defines several criteria and conditions that should be respected by the founders of a new united community. The CoE experts support the idea that the creation of new administrative structures cannot be left to the discretionary decision of local authorities. It is a public interest to create long-lasting entities of optimal size, which will improve local institutions. Experience of other countries demonstrates that geographic or demographic limits generate "perverse effects," which are never relevant for all situations. The draft law states that a united community must include at least 4000 persons. The distance from the administrative centre of a territorial community to the most remote village of this community may not exceed 20 km and, to determine the new administrative centre, the population and the service capacity are considered. It is not clear how this distance will be measured: boundary to boundary, village centre to village centre, and what is a village centre?

[7] See the toolkit published by the CoE, UNDP and LGI for IMC. The same recommendations are also pertinent for mergers.

[8] *"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".*

It is reasonable to suggest a lower limit of the number of inhabitants, because there are cases where IMC entities or merged communes are still too small and don't reach the minimal capacity of resources and a sufficient population to make them viable[9]. On the other hand, in certain circumstances it may be impossible to stay above the limit. With small, remote villages, 4000 inhabitants would be too large, and people might be too far away from the centre and from each other. Alternatively, the proposed union could contain a population over 4000, but during the referendum one or two communes might reject integration, and the figure could fall under 4000, for example 3750. Should the whole process then be stopped? The limit opens up an opportunity for blackmail, or could cause the process to collapse. While it is reasonable to set a limit of 4000, some flexibility should be allowed, depending on each individual case. A special study and a report could be produced proving that the union is improving the capacities of LSG and will still create a viable entity.

The distance criterion also raises some questions. For example, the municipal administration should be close to people, and 20 km might be too far for an aging population in areas lacking an efficient public transport system. Therefore, the law should include an alternative criterion based on the time needed to reach the administrative centre (for example 45 minutes or less than 1 hour by car or motorcycle)[10]. If the new entity is too big and scattered there will never be any sense of solidarity or a community life between the inhabitants. In fact, if the distance between two settlements of the new entity is close to 40 km, few types of equipment could be shared, and too much money would have to be spent on transportation and roads. This has to be a serious consideration when examining the proposals at the *rayon* level.

Do these criteria apply to any merger? Between a city and settlements, for instance? Are there also such criteria for IMC bodies? There is a need for a thorough study showing which municipalities should be merged, for what reasons, and with what benefits. Ideally, instead of listing the criteria, the law should be clearer and more demanding on the background study for initiating the merger process. It should state that the councils decide to merge on the basis of a report, which demonstrates the need for and benefits of a merger. And then the law could authorise the state authorities (at the *oblast* level) to veto proposals that are not rational or do not meet the requirements.

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[9] In France, many IMC communities unite only 3 or 4 small communes with less than 2000 inhabitants in all.
[10] In a big city citizens may also need that much time to go to the central city hall or to specific municipal services.

3. Initiating the merger of rural territorial communities (Article 5.)

This article has been seriously criticised by all experts. The provision of Articles 5 and 6 is not adequate for dealing with such complex issues[11]. They overestimate the capacity of the project to attract full support from citizens. It is an unrealistic statement that "*the unification of rural territorial communities may be initiated by the corresponding village councils and initiative groups with at least 10 members from among the inhabitants of the villages that initiate the unification.*"

Further, the draft does not say to whom this initiative must be sent and where it is registered. A council or several inhabitants from one village cannot ask for a merger with other villages without some discussion or even negotiation with these villages. As other experiences of mergers show, it is unlikely that the ordinary people will organise initiatives for municipal amalgamation or creation of an IMC entity. Then the state *rayon* administration is to formulate a recommendation directed to the *rayon* council for organising a referendum in all these localities. This type of procedure also raises concerns.

How can a council decide to initiate a process for unification if there is no concrete project describing the list of communities involved, the agenda, the financial consequences, the new organisation, possible development policies or new investments to be created? First, the initiative has to be credible and to be based on the previous agreements of several local councils, or on the initiative of inhabitants, but in this case there should be a minimum percentage of *voters* (a more appropriate term than *inhabitants*) from the different localities. Then, the unification process will build on this core agreement.

Secondly, the main question is determining the area in which the referendum will be organised. Article 4 gives criteria on how to determine this area, but there is no clear provision on who is empowered to decide the boundaries. Articles 5 and 6 imply that the area is determined following the submission of the initiative. Logically, it should belong to the head of the *rayon* state administration to decide on the area; but it follows from Article 6 (paragraph 2) that the *rayon* council decides only on the organisation of the referendum, not on the area.

[11] The CoE-UNDP- LGI Toolkit on IMC contains good recommendations on this subject.

The state *oblast* administration should have a more important role to play in the process. It is unlikely that the qualified staff can be found in all state *rayon* administrations, especially in rural areas. A task force should be established at the *oblast* level in order to assist the *rayon* administrations. Furthermore, if the merger process finds support and is successful, there would be four or five united rural territorial communities in each *rayon*, and this would bring into question the existing territorial division into *rayons*, and the existence of *rayon* state administrations and councils who will not support the reform.

Representatives of local self-government have to be involved in the design of the territory of the future united rural territorial communities from the very beginning, their support is a basic condition for success. Ideally, a local commission elected by all mayors of the *rayon* should be formed. This would facilitate the dialogue between all mayors, and between all mayors and the head of the state administration on the future municipal pattern of the *rayon*[12]. Then, it would be easier to submit the proposals to the voters. This method does not rule out the initiative of some mayors or inhabitants, but it will avoid too many discretionary decisions of the head of the state *rayon* administration on a case-by-case basis, and this will increase the transparency of the process and the legitimacy of the final design.

Several authorities should be enabled to take the initiative. Merger and IMC never occur spontaneously; they need political leadership and technical support. The State as well as the *rayon* should have the possibility of launching a process that is not dependant on the good will of some of the inhabitants over the national territory. The best method would be to organise a systematic study of possible unions at the most appropriate level: this would be one where there is good information; staff and financing for the studies; political capacity of creating consensus with the ability to resist unreasonable projects.

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[12] This problem is well known in France where the municipal pattern is very much fragmented, especially in rural areas. A commission is elected at the department level (a larger constituency than the Ukrainian *rayon*) by all mayors and presidents of joint-authorities; the prefect has to establish a scheme for the development of IMC in consultation with this commission; a vote with special majority may bind the prefect in some circumstances. Several reforms have strengthened the role of this commission and the authority of its decisions, and recently the new local government reform adopted by the parliament on 17 November 2010. This method could be used to prepare a unification plan at the *rayon* level, with proposal of new enlarged communities consistent with each other.

4. Review and summary of proposals and decision for the unification of rural territorial communities (Article 6.)

Article 6 of the draft contains complicated proceedings that are not clearly related to the initiative. It is not clear what happens between the moment when an initiative is registered and these proceedings. It will be the responsibility of the *rayon* state administration to summarise, with the participation of the corresponding local council commissions, proposals for unification of rural territorial communities, develop recommendations on the optimal resolution of this task, observing the main conditions and criteria. The feasibility study and the examination of the project's pertinence may therefore be carried out on the basis of "spontaneous" proposals. But at such a late stage, it would be very difficult for the *rayon* administration to contest the proposals, reshape the territorial limits in a more rational form and form consensus. Discussion with all other authorities will complicate it even more and there is a great risk of decisions being taken in a spirit of hurried compromise that will rapidly prove inefficient. The delay of 7 days is therefore not acceptable and should be at least one month. The whole process should therefore be reformulated with much attention given to the way initiative is launched and how the first outline of the union becomes public and a matter for discussion by political representatives and the population.

As regards the referendum itself, it seems that the Constitution (Article 140) would require that the votes are counted for each territorial community, since the self-governing right belongs to territorial communities. But it would make the reform impossible if the opposition of only one *hromada* was enough to defeat the decision. However it is possible to have a large majority, large enough to launch the new united territorial community on a large-scale basis, without forcing the decision if the project is too controversial or raises too much opposition, and make it possible to overcome isolated opponents[13].

Other points to consider include the need for special financing for organising referendums, and the preference for counting the overall sum of votes for all villages that took part, rather than a separate count for each village. The draft should refer to "direct decision of the citizens" and review the referendum procedure. The separate counting solution will probably

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[13] In France, for the creation of an integrated joint-authority ("*communauté*"), there is no referendum, but as a rule the majority within the area of the consultation has to be either 2/3 of municipal councils representing ½ of the population, or alternatively ½ of the municipal councils representing 2/3 of the population. Other majorities can be envisaged.

be supported in the name of the "autonomy" of each village, on the basis of the Constitution and of the Charter. This idea can be challenged because the creation of each local government area and the modification of its boundaries are not exclusive powers of each LSG unit; rather it is a matter for the national administration and of broader interest than for just one group of its current population which has the right to express its opinion.

If the final option is for a separate count, then there should be a protection against sectoral, political, economic or even individual interests. In small districts certain groups can hinder the reform and damage the interests of the larger population. If a merger can only be created with unanimity of all communities, small groups in the villages might have a decisive negative influence and block the merger or use blackmail to make unreasonable demands. The best system would be the one with a double optional majority: either X% (60 or 70) of the villages representing Y% (50; 60?) of the population, or Y% (50, 60) of the villages representing X% (60, 70?) of the population, etc.

5. Budget and financial issues

5.1 Financial unification: taxes, prices, debts

The draft has short provisions for creating a unified budget after the amalgamation has taken place. There are several issues which should be addressed by the law but are missing in the draft. They concern the unification of tax rates and price of services. Each village may have its own figures with important differences. They cannot remain in force indefinitely. What happens after unification? Will there be an average tariff? Or does the new council have to decide on all these figures? What about a transitional period to bring them to an average level? Something more precise should be said on the debt. Logically the debts and properties of the merged *hromadas* become debts and properties of the new *hromada*. Article 8 needs to be expanded and clearer on these issues.

5.2 Financial incentives and special grants for unification

As already mentioned, the grants are important to make merger or cooperation more attractive. Two different types of additional grants should be distinguished. The first one is needed to cover the direct costs of the merger proceedings themselves: the preliminary feasibility studies for the delimitation of the perimeter of the new *hromada* or the IMC and for the definition of its main characteristics, the procedures to create it and the drawing up of the scheme of the new entity. At the end, further support must be provided to pay the costs of the

referendum. These grants are part of the provisions that define the process of initiative and creation. Additional financial support can be of different types, temporary or permanent, partly earmarked and progressive. It should be conceived in a way that helps to bring visible and positive improvement in the LSG organisation and management, and in public services.

There is no need for large amounts of money the first year of the reform – immediate grants would not motivate efficiency; the political direction and the staff of the new entity will not be fully operative to conceive programmes of investment; the leaders at this stage would not have time to prepare a strategy and list their priorities. It would be more expedient to pay, for example, about 35% of the additional grant in the first year, 70% in the second, and the rest in the third year after creation. This would also be an incentive for better planning of the creation of new services and investments. It would be easier on the national budget and would allow support to be given to a greater number of initiatives.

The budget of the united rural *hromada* gets additional subsidies, 25% of the budget of the united *hromada*. Depending on the number of communes and size of population this percentage can reach 50, 75 or even 100%. The philosophy is to motivate a greater number of villages with a bigger population to merge. Albeit a positive idea, it could result in wrong decisions if the size and shape of the united community are chosen to meet the criteria of subsidy rather than the criteria of rational territorial management.

The time limit of 3 years is not clear. The draft does not specify how it is calculated: is it from the date of the creation of the united rural *hromada*? Or from the election of the new council? Or the adoption of the first "unified budget"? Three years is not long for investment and development policies, considering in particular that the first year will be spent on formalities. Ideally, a progressive payment should be stretched over 5 years. The total amount of these subsidies for the three years may not be enough to finance an ambitious programme. The risk is that the money will be used for current expenditure. The administrative supervision of the efficient use of subsidies carried out by the specially authorised central executive authority in charge of regional policy issues might not be sufficient for avoiding this.

More sophisticated criteria could be used for calculating the amount of subsidies: an equalisation model would favour grants for "poor" *hromadas*; a development model would

favour economic programmes; grants could also be modelled in relation to the level of existing equipment in the enlarged *hromada* etc.[14]

The estimates in the Explanatory Note to the draft are not very convincing. There will be many diverse situations depending on the wealth of the amalgamated villages. The merger of poor villages heavily dependent on subsidies will not make them less dependent. And merging poor villages with wealthier ones supposes that these latter exist in the region and will accept the merger; they may prefer to stay "independent" rather than to share their resources. This is also a reason why mergers must be formed following a majority vote of the villagers and not a unanimous one.

It would be too optimistic to hope that a merger can really save money for the budget, at least in the short term. A larger community has "structural costs" that may be important, including travel expenses for the employees and council members, etc. The probability is that the implementation of the reform will generate new costs. So it is not sure that the total amount of additional grants may be earmarked for investment alone.

The whole reform should not be presented as a means to reduce expenditure and to make savings directly in the budgets, even if this can be the case for marginal amounts. The real objective is to make the decision process in this area more efficient and improve the capacity of development policies and public services in a more efficient way. Budgetary cuts based on the forecasts of the Explanatory Note could severely undermine the success of the reform.

6. Absence of provisions on employees and on a permanent territorial representation

The draft does not deal with the situation of the village employees. Do they automatically become union employees, with the same salary, which can be different from one entity to another? What about their career and pensions? There is no provision on the representation of the former *hromadas*. International experience has shown that successful amalgamation policies generally include a form of representation of the former communities in the new one;

[14] Costs *per capita* for infrastructures increase in areas of low density. This will be the case in many regions that the reform is supposed to help. In a number of such areas, it will not be possible to increase the number of unified communities and their population without generating excessive remoteness. Therefore, the law should introduce another variable based on the number of inhabitants per km². This requires obviously careful statistical estimates. It could be suggested to link the expenditure with these subsidies and the implementation of the Reform programme of housing and municipal economy. This would make it possible to show the improvements for people to be expected nationally by the implementation of both reforms. This would also facilitate the planning of the development of the various sectors of the municipal economy.

the villages should be able to elect a representative to the new city council and sometimes keep some services in their city halls.

IV. Integrating a Chapter on IMC into the Basic Law on Local Self-Government

The purpose of inter-municipal cooperation

When the municipal territorial pattern is fragmented, the development of new tasks that need to be organised for a larger population area cannot be undertaken at the level of traditional settlements upon which municipalities are based in most countries (there are important exceptions). Alternatively, the amalgamation (or consolidation) of municipalities makes it possible to raise the municipal dimension to the scale of the new needs. Various countries, especially in Northern Europe have followed this path. However, territorial reform based on amalgamation does not render IMC unnecessary. First of all, in urban areas, the urban development cannot be contained in administrative boundaries, and beyond the consolidation of the core, cooperation is again necessary for urban transport systems, strategic planning, and land development. In rural areas, new problems arise with an aging population and the decline of the economic basis, further consolidation steps may create new problems of remoteness, and cooperation can be a relevant alternative for a number of functions.

But the territorial reform is not only a matter of administrative rationalisation and management. Everything depends on the general organisation of the state, on the perception of what is local in the political culture, whether the local is identified with the city or with the village, whether the main service provider is the state or the local authorities. All these factors influence the path and even the possibility of territorial reform. In various countries where territorial reform through amalgamation has proved politically impossible, the development of more integrated forms of IMC has been used as a practical alternative. This path has been followed in France, and the new law on the local government reform adopted on 17 November 2010 is aimed at completing the setting up of "inter-municipalities" until the end of 2013. A similar path has been followed by Hungary and Italy and is on the agenda in Spain, despite the fact that it is more difficult to implement because of the power of the autonomous regions. However, in both cases, the IMC bodies develop from the municipalities or from the municipal community, e.g. they are public powers and not private associations or contractual arrangements, although these might be used in order to deal with specific needs. In the UK, as in Germany or in France, IMC bodies are public law corporations.

IMC provisions in the 2010 draft law amending the 1997 Law on Local Self-Government

First of all, the concepts of *hromada* reflected in this draft law and in the draft law on the Stimulation of State Support of Unification of Rural Territorial Hromadas are not the same. As emphasised above, the result of the unification will be the formation of a new territorial community called the "united rural territorial community". In contrast, under Article 6, paragraph 4 of the amending draft law, the voluntary unification will result only in the formation of joint bodies for several communities, but not of a new enlarged community in place of the former ones. This second option is less ambitious, but makes it possible also to rationalise the municipal pattern. Whatever the political choice, any contradiction or divergence between both pieces of legislation should be avoided.

In the amending draft law, the IMC provisions are scant and do not meet the needs of Ukraine. Article 11 is the only article specifically dedicated to the subject, and financial matters are addressed in articles 60, paragraph 7, and 61, paragraph 4. IMC cannot be developed using these provisions. Article 11 does not give an adequate basis for the IMC development because it is based on a wrong concept: it uses two instruments; the association and the agreement, and the association itself is established through an agreement. Both are instruments of private, not public law. First, the association can be used both to solve management issues for some tasks and to represent rights and interests of the member territorial communities. Second, under paragraph 7, no power of an LSG body may be transferred to an association; this is understandable only if the association is a legal body of private law. Third, they are subject to registration by the Ministry of Justice, just as any private association or private legal person. The use of agreements is also regulated by Article 60.7: an agreement between several territorial communities can be passed to establish a co-ownership right on an object of municipal property or to join municipal funds for a joint project or for the joint financing of a joint communal enterprise or institution. Article 61.4 is identical in its budget rules to the previous one: it provides that the budgetary funds of several territorial communities may be amalgamated on a contractual basis.

These provisions do not meet the needs, whatever the political choice for the territorial reform. IMC cannot solve major problems of performance of municipal functions if territorial communities are not entitled to delegate powers to the joint bodies. This limitation can only be overcome by providing for specific public law corporations that can be established on the

basis of an agreement of member municipalities (eventually a majority thereof) by an administrative act, e.g. an act of public power. Then, the duties and the powers of the local authorities will be the same in relation to the task, whether they are exercised by the territorial community itself or through a joint body.

Therefore, it is not an article that the Law needs , but **a chapter** determining, in particular:

- the procedure for establishing IMC;
- the legal status of such a public law corporation;
- its governance;
- the financing (contributions of member municipalities or own resources from taxes, fees, duties, charges);
- the tasks that have to be exercised through the IMC, and the conditions according to which such tasks may be delegated;
- the supervision by member municipalities and the state supervision (that should be the same as for the territorial communities themselves);
- the rules on the transfer of personnel and of property;
- the relationships with municipal enterprises and institutions subject to the jurisdiction of the inter-municipal corporation.

As regards governance, the recommendation is for direct election of the board of an inter-municipal corporation in order to involve the citizens in the reform from the beginning.[15] Such a step should be undertaken on the basis of a broad consensus with the associations of territorial communities.

[15] The French experience shows that it is extremely difficult to replace election by municipal council with direct election by citizens. But this can be a very much politicised issue.

SECRETARIAT GENERAL

DIRECTORATE GENERAL OF DEMOCRACY AND POLITICAL AFFAIRS

DIRECTORATE OF DEMOCRATIC INSTITUTIONS

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APPRAISAL OF THE DRAFT LAW OF UKRAINE ON STIMULATION AND STATE SUPPORT OF UNIFICATION OF RURAL TERRITORIAL COMMUNITIES

The present report was prepared by the Directorate of Democratic Institutions, Directorate General of Democracy and Political Affairs, in co-operation with Prof. Gérard Marcou, University Paris 1 Panthéon-Sorbonne, Director of GRALE (Research Group on Local Administration in Europe), and Prof Robert HERTZOG, University of Strasbourg France.

Introduction

The present legal appraisal was requested by the Ministry of Regional Development and Construction within the framework of the Council of Europe Programme to Strengthen Local Democracy in Ukraine (2010-2013, funded by the Swedish International Development Cooperation Agency Sida). The draft law on "*Stimulation and State Support of Unification of Rural Territorial Communities"* should become a part of the legal basis for implementing an ambitious local self-government reform, together with the draft laws "On Local Self Government" and "On Local State Administration". An introductory sentence of the draft explains that "*this Law establishes the procedure for the resolution of issues related to the unification of rural territorial communities."*

The draft law provides for a legal framework for amalgamating rural communities (*hromadas*) in order to improve service provision and save administrative costs. This is a law on procedure and State financial support. It reflects the idea that, according to the Government, rural areas are the priority in local government reform. It is therefore submitted before the general Strategy for local self-government reform in Ukraine is adopted, although the need for the Strategy has been discussed for more than ten years and has given rise to many reform projects under all governments. It is, however, important to have a wider perspective in order to avoid inconsistencies or unforeseen and undesired consequences.

Inter-municipal cooperation (IMC) institutions can be an alternative to amalgamation when the latter proves to be impossible or politically too difficult, or a supplement to amalgamation, where a number of services can be organised on a wider scale, without the disadvantage of creating municipalities that are too large, since this may hamper citizen access to municipal administration.

A Conference on Legislative Support to IMC was organised in Kyiv on 17 December 2010 by the Council of Europe (CoE) Programme to Strengthen Local Democracy in Ukraine and the Parliamentary Committee on State Building and Local Self-Government in order to discuss the draft and the options for IMC policy. This paper is a consolidated appraisal taking into account the comments of other experts and the discussion of the conference. The Conference participants agreed on three statements:

1. Territorial reform is important for Ukraine for administrative and political reasons; but there are also economic and social reasons that make it more urgent today.
2. It is a difficult and complicated task, that has been postponed several times because of resistance, including from the population, which is often unaware of all the benefits of the reform; so there is a need for greater explanation in order to reach political consensus;
3. A law is needed because the existing provisions of the Law on local self-government are not sufficiently precise on this subject and have not been implemented; a new law will create an opportunity for a national debate on the subject so that the stakes become more visible and understandable for the citizens. The government should announce the reform among its priorities. The law is also needed to create specific incentives that will accelerate the process of unification/amalgamation, as in other countries.

I. The need for territorial consolidation in Ukraine: merger and cooperation

The general problem of Ukrainian local self-government (LSG) is owing to the very specific and complicated organisation of the first level of LSG. This situation is unknown in Western European countries. The first level of LSG in Ukraine is based on the notion of “settlement”. Villages and cities may be one or several settlements, and they form the territorial basis of the *hromada*, which is considered an “administrative territorial unit” (1997 Law on LSG, Article 1: there are administrative territorial units of different levels, and some inside of a city). As a result, instead of one type of first level LSG unit (which is the practice of most European countries), there are several kinds of first level LSG units.

This creates complexity for the actors themselves, both the ones in charge of a given territory and its citizens. As in other countries, many of these first level LSG units are very small in territory and population, and lack the resources needed to provide services, or to attract enterprises and investment. Thus Ukraine is faced with the same options as all other European countries at a certain point in their history: *status quo*, amalgamation, or IMC. In fact, these options are generally mixed because cooperation and amalgamation can be alternatives to each other but are also complementary.

Previous experience demonstrates that fragmentation can be a real handicap for development policies and for provision of public services to the population. The explanatory note to the draft Law lists the negative effects and weaknesses of many LSG units due to fragmentation of the territorial administration, especially in rural areas: absence or low quality of basic public services (water distribution, sewage, waste collection and disposal, roads), little or no social assistance, culture, health, education services, etc. This results in the absence of farming on large agricultural territories, poverty and emigration, etc. These economic and social problems are not directly caused by municipal fragmentation, but the absence of strong local government deprives *hromadas* of any capacity to solve problems and to launch efficient policies. Many *hromadas* are not able to initiate cooperation with other administrations and to draw up programmes that could attract investment or external financial support.

The policy of territorial consolidation in Ukraine may be seen from two perspectives: the modernisation and improvement of public entities, through clarification and rationalisation of the administrative map, better distribution of competences and resources on the one hand; and the economic and financial crisis that pushes today towards territorial consolidation on the other. Ukraine receives important support from the IMF, so there is an urgent obligation to make public administration work more efficiently.

Reshaping territorial administration in rural areas should be a high priority for government and parliament. But issues surrounding rural territories are part of a more general issue of territorial organisation in Ukraine, which has been discussed for many years with no results. Amalgamation or creation of IMC entities should not be considered separately but as an important part of a general strategy of territorial consolidation and LSG reform.

The present territorial organisation was conceived at a time when it was coherent with political and administrative centralisation, in which the economic and social policies were conducted by a central planning body. All LSG units were parts of the State administration in a “matrioshka” architecture. This is no longer the case. *Hromadas* must comply with the principles of the European Charter of Local Self-Government (ECLSG) and are autonomous actors of development policies. LSG units should have a size that allows them to have sufficient human and financial resources to produce a fair society, economic services and provide social welfare. The ECLSG not only promotes formal democracy; its spirit is in the organisation of LSG, which brings the best services to all people.

Another issue of the LSG system in Ukraine is that certain areas of the territories are not included in the boundaries of a *hromada,* and they are directly ruled by the second LSG level, the *rayon*. Such situations exist in other countries, but under condition of amalgamation of two tiers of LSG, mainly in metropolitan areas, and the second level enjoys full decentralisation[1]. The situation in Ukraine whereby the second level has *rayon* competences for the whole territory and municipal competencies for only parts of it - notably rural ones that need special care - is complicated. There is a great risk of inequality in such cases: the population of these territories is separated from the service delivering authorities, while the "central" *rayon* authorities neglect their management. This situation could become even more complicated if, after the merger of villages, some rural territories have the status of a unified municipality and some territories are left without any neighbouring administration. [2]

There should be an explicit choice, expressed in a clear political statement, that the objective in the medium- or long-term is to have a unified form of organisation at the first level of LSG addressing three different situations:

- Municipalities with an adequate size and perimeter remain unchanged;
- Municipalities which are too small merge (mainly but not exclusively rural ones);
- areas where merger is not possible (or not accepted) create adequate IMC entities.

The IMC provisions should be included in the same text as the merger provisions, and they should be discussed at the same time, because of their interdependence.

II. Three Issues to Consider

The discussions on the draft law concentrate on three major issues analysed below.

1. Should there be a separate Law or a Chapter in the basic Law on LSG?

Since the revision of the current basic Law on LSG is under preparation, it could be wise to include a chapter on amalgamation and IMC in this law, rather than having a separate

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[1] *Kreifreiestadt* in Germany, when the commune and Kreis are merged in one entity in big cities. In France, Paris; a new law of December 16th 2010 allows other amalgamations if the concerned LG decide them.

[2] This depends on the size of the different tiers. If a new commune is created with settlements that may be more than 20 kilometres away one from another, its size may be the same, or at least nearly, with the size of certain *rayons*.

legislation. A separate law on amalgamation can be adopted quite quickly if there is sufficient political consensus on its objectives. The basic law on LSG may take more time because of disagreement on other issues. However, in view of the substance of the law, **the recommendation would be to integrate joint provisions on amalgamation and IMC into the basic law**. This option should be considered by the government. It creates an opportunity to inform the citizens on the stakes of a more rational and efficient territorial organization. A separate law will be needed to establish pertinent procedures and other rules for amalgamation and IMC. But the rules should not appear as exceptional, separated from the other provisions on LSG entities. Merger and IMC must be seen as part of the ongoing developments of a decentralised State.[3] They should be an integral part of the LSG system, and they should be ruled by permanent provisions in the basic law.[4] Specific government policies to encourage local governments to accelerate the creation of united or IMC entities do not need new procedures. The political will can be expressed in incentives, legal and financial support, in addition to the ordinary provisions.

2. Separate provisions for rural hromadas?

The present draft is meant to bring together small rural communities. Clearly, this is a very important stake in the creation of bigger and stronger LSG units at the first level. The new communities will remain rural, because of the geographical, sociological and economic make-up of the municipality, and not because of the number of inhabitants. Specific rules may take this into account, if there is a need for them. Yet the current definition of rural communities is not clear.[5]

Amalgamation or cooperation with a city is also an option that should be considered. Villages that merge with a medium-size city have access to more services in an easy and cost effective

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[3] In the Netherlands there is an ongoing trend of merging communes on a voluntary basis because new political leaders consider this useful. In France, which has many IMC entities, there is a continuous creation, winding up or modification of IMC bodies, etc.

[4] This is the case in most countries. In France, the rules on amalgamation and IMC are in the *General Code of LSG*. In Germany, the municipal law is a competence of the Land; so there are a variety of situations, but IMC is considered as fully part of municipal law.

[5] The draft does not explain a "rural territorial community". Article 140 of the Constitution and the terminology of the recent draft law to amend the local self-government law imply that this should be a village or rural settlement, as opposed to a city. But, is a borough a big village or a small town/city? There is no provision on boundaries, on municipal personnel and reorganisation of municipal services and on the representation of the former communities.

way: public transport, waste collection and disposal, libraries, sports facilities, police, etc. There can be a synergy between a city and small neighbouring communities for development policy, use of public equipment, and sharing of certain costs. Next, there are large cities with a belt of smaller communities. A merger can be twofold: the town gets a larger territory for its development (business districts, housing), at a lower cost for the buyers. And the population of small communities gets access to the city services. Two neighbouring cities may decide to cooperate on specific projects: hospital, waste, schools, transport, promotion of tourism.

Merger and IMC should be open procedures offered to all local governments in order to allow them to choose the best way to fulfil their tasks and organise their development. **Most of the rules should be common and general for all types of municipalities, rural and urban.**

3. Financial incentives for amalgamation and cooperation?

The draft law has important provisions on financial incentives for communities starting a merger process, with figures that are higher than those generally given in other countries, which demonstrates the importance of this policy for the government. Financial incentives from the State budget for amalgamation or cooperation are justified for at least four reasons:

1) These reforms have a cost for the participating municipalities: for research and consultancy (economists, lawyers, specialist on organisation, taxes, budgeting, etc); for reorganisation of the administrations, organisation of a local referendum. There should, in which case, be a specific grant for launching the procedure.
2) Creation of a new entity is not only of local interest but also of regional and national one, because it can improve the overall territorial administration.
3) A large new municipality or a new IMC entity will have the critical size for spending public money more efficiently in investment or public services.
4) Financial incentives can speed up the creation of IMC or merger processes[6]. The financial motivation will become more and more important in a lasting fiscal stress for local administrations. More money is not the only important factor; competition between the communities is even more important. Those that do not cooperate or merge will obtain significantly less in terms of development than those which do. The competitiveness mechanism is very well understood by local government managers and politicians.

[6] Financial incentives contributed greatly to the success of IMC in France after the 1999: 2600 new highly integrated communities were created in a couple of years.

III. Analytical Assessment of the Draft Law

The following issues should be discussed by the authorities and revised in the draft.

1. Guidance and coordination by central government (Article 3.)

LSG units absolutely need support for any unification or cooperation process[7]. There is a need for methodology, legal guidance, and financial support, where state administrations have important responsibilities. However, the law must be precise and should say what bylaws should be issued and what kind of support the government can give, because the draft law cannot become an indirect way of limiting the autonomy of local authorities. The commission to be established within the specially authorized central executive authority in charge of regional policy issues may not include exclusively representatives of central authorities and scientific institutions. It must also include local government representatives, including *rayons*. This is a requirement of the ECLSG Art. 4 para 6[8], and it will be politically wise in order to facilitate consensus.

2. Conditions and criteria for the merger of rural territorial communities (Article 4.)

Article 4 of the draft defines several criteria and conditions that should be respected by the founders of a new united community. The CoE experts support the idea that the creation of new administrative structures cannot be left to the discretionary decision of local authorities. It is a public interest to create long-lasting entities of optimal size, which will improve local institutions. Experience of other countries demonstrates that geographic or demographic limits generate "perverse effects," which are never relevant for all situations. The draft law states that a united community must include at least 4000 persons. The distance from the administrative centre of a territorial community to the most remote village of this community may not exceed 20 km and, to determine the new administrative centre, the population and the service capacity are considered. It is not clear how this distance will be measured: boundary to boundary, village centre to village centre, and what is a village centre?

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[7] See the toolkit published by the CoE, UNDP and LGI for IMC. The same recommendations are also pertinent for mergers.

[8] *"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".*

It is reasonable to suggest a lower limit of the number of inhabitants, because there are cases where IMC entities or merged communes are still too small and don't reach the minimal capacity of resources and a sufficient population to make them viable[9]. On the other hand, in certain circumstances it may be impossible to stay above the limit. With small, remote villages, 4000 inhabitants would be too large, and people might be too far away from the centre and from each other. Alternatively, the proposed union could contain a population over 4000, but during the referendum one or two communes might reject integration, and the figure could fall under 4000, for example 3750. Should the whole process then be stopped? The limit opens up an opportunity for blackmail, or could cause the process to collapse. While it is reasonable to set a limit of 4000, some flexibility should be allowed, depending on each individual case. A special study and a report could be produced proving that the union is improving the capacities of LSG and will still create a viable entity.

The distance criterion also raises some questions. For example, the municipal administration should be close to people, and 20 km might be too far for an aging population in areas lacking an efficient public transport system. Therefore, the law should include an alternative criterion based on the time needed to reach the administrative centre (for example 45 minutes or less than 1 hour by car or motorcycle)[10]. If the new entity is too big and scattered there will never be any sense of solidarity or a community life between the inhabitants. In fact, if the distance between two settlements of the new entity is close to 40 km, few types of equipment could be shared, and too much money would have to be spent on transportation and roads. This has to be a serious consideration when examining the proposals at the *rayon* level.

Do these criteria apply to any merger? Between a city and settlements, for instance? Are there also such criteria for IMC bodies? There is a need for a thorough study showing which municipalities should be merged, for what reasons, and with what benefits. Ideally, instead of listing the criteria, the law should be clearer and more demanding on the background study for initiating the merger process. It should state that the councils decide to merge on the basis of a report, which demonstrates the need for and benefits of a merger. And then the law could authorise the state authorities (at the *oblast* level) to veto proposals that are not rational or do not meet the requirements.

[9] In France, many IMC communities unite only 3 or 4 small communes with less than 2000 inhabitants in all.
[10] In a big city citizens may also need that much time to go to the central city hall or to specific municipal services.

3. Initiating the merger of rural territorial communities (Article 5.)

This article has been seriously criticised by all experts. The provision of Articles 5 and 6 is not adequate for dealing with such complex issues[11]. They overestimate the capacity of the project to attract full support from citizens. It is an unrealistic statement that "*the unification of rural territorial communities may be initiated by the corresponding village councils and initiative groups with at least 10 members from among the inhabitants of the villages that initiate the unification.*"

Further, the draft does not say to whom this initiative must be sent and where it is registered. A council or several inhabitants from one village cannot ask for a merger with other villages without some discussion or even negotiation with these villages. As other experiences of mergers show, it is unlikely that the ordinary people will organise initiatives for municipal amalgamation or creation of an IMC entity. Then the state *rayon* administration is to formulate a recommendation directed to the *rayon* council for organising a referendum in all these localities. This type of procedure also raises concerns.

How can a council decide to initiate a process for unification if there is no concrete project describing the list of communities involved, the agenda, the financial consequences, the new organisation, possible development policies or new investments to be created? First, the initiative has to be credible and to be based on the previous agreements of several local councils, or on the initiative of inhabitants, but in this case there should be a minimum percentage of *voters* (a more appropriate term than *inhabitants*) from the different localities. Then, the unification process will build on this core agreement.

Secondly, the main question is determining the area in which the referendum will be organised. Article 4 gives criteria on how to determine this area, but there is no clear provision on who is empowered to decide the boundaries. Articles 5 and 6 imply that the area is determined following the submission of the initiative. Logically, it should belong to the head of the *rayon* state administration to decide on the area; but it follows from Article 6 (paragraph 2) that the *rayon* council decides only on the organisation of the referendum, not on the area.

[11] The CoE-UNDP- LGI Toolkit on IMC contains good recommendations on this subject.

The state *oblast* administration should have a more important role to play in the process. It is unlikely that the qualified staff can be found in all state *rayon* administrations, especially in rural areas. A task force should be established at the *oblast* level in order to assist the *rayon* administrations. Furthermore, if the merger process finds support and is successful, there would be four or five united rural territorial communities in each *rayon*, and this would bring into question the existing territorial division into *rayons*, and the existence of *rayon* state administrations and councils who will not support the reform.

Representatives of local self-government have to be involved in the design of the territory of the future united rural territorial communities from the very beginning, their support is a basic condition for success. Ideally, a local commission elected by all mayors of the *rayon* should be formed. This would facilitate the dialogue between all mayors, and between all mayors and the head of the state administration on the future municipal pattern of the *rayon*[12]. Then, it would be easier to submit the proposals to the voters. This method does not rule out the initiative of some mayors or inhabitants, but it will avoid too many discretionary decisions of the head of the state *rayon* administration on a case-by-case basis, and this will increase the transparency of the process and the legitimacy of the final design.

Several authorities should be enabled to take the initiative. Merger and IMC never occur spontaneously; they need political leadership and technical support. The State as well as the *rayon* should have the possibility of launching a process that is not dependant on the good will of some of the inhabitants over the national territory. The best method would be to organise a systematic study of possible unions at the most appropriate level: this would be one where there is good information; staff and financing for the studies; political capacity of creating consensus with the ability to resist unreasonable projects.

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[12] This problem is well known in France where the municipal pattern is very much fragmented, especially in rural areas. A commission is elected at the department level (a larger constituency than the Ukrainian *rayon*) by all mayors and presidents of joint-authorities; the prefect has to establish a scheme for the development of IMC in consultation with this commission; a vote with special majority may bind the prefect in some circumstances. Several reforms have strengthened the role of this commission and the authority of its decisions, and recently the new local government reform adopted by the parliament on 17 November 2010. This method could be used to prepare a unification plan at the *rayon* level, with proposal of new enlarged communities consistent with each other.

4. Review and summary of proposals and decision for the unification of rural territorial communities (Article 6.)

Article 6 of the draft contains complicated proceedings that are not clearly related to the initiative. It is not clear what happens between the moment when an initiative is registered and these proceedings. It will be the responsibility of the *rayon* state administration to summarise, with the participation of the corresponding local council commissions, proposals for unification of rural territorial communities, develop recommendations on the optimal resolution of this task, observing the main conditions and criteria. The feasibility study and the examination of the project's pertinence may therefore be carried out on the basis of "spontaneous" proposals. But at such a late stage, it would be very difficult for the *rayon* administration to contest the proposals, reshape the territorial limits in a more rational form and form consensus. Discussion with all other authorities will complicate it even more and there is a great risk of decisions being taken in a spirit of hurried compromise that will rapidly prove inefficient. The delay of 7 days is therefore not acceptable and should be at least one month. The whole process should therefore be reformulated with much attention given to the way initiative is launched and how the first outline of the union becomes public and a matter for discussion by political representatives and the population.

As regards the referendum itself, it seems that the Constitution (Article 140) would require that the votes are counted for each territorial community, since the self-governing right belongs to territorial communities. But it would make the reform impossible if the opposition of only one *hromada* was enough to defeat the decision. However it is possible to have a large majority, large enough to launch the new united territorial community on a large-scale basis, without forcing the decision if the project is too controversial or raises too much opposition, and make it possible to overcome isolated opponents[13].

Other points to consider include the need for special financing for organising referendums, and the preference for counting the overall sum of votes for all villages that took part, rather than a separate count for each village. The draft should refer to "direct decision of the citizens" and review the referendum procedure. The separate counting solution will probably

[13] In France, for the creation of an integrated joint-authority ("*communauté*"), there is no referendum, but as a rule the majority within the area of the consultation has to be either 2/3 of municipal councils representing ½ of the population, or alternatively ½ of the municipal councils representing 2/3 of the population. Other majorities can be envisaged.

be supported in the name of the “autonomy” of each village, on the basis of the Constitution and of the Charter. This idea can be challenged because the creation of each local government area and the modification of its boundaries are not exclusive powers of each LSG unit; rather it is a matter for the national administration and of broader interest than for just one group of its current population which has the right to express its opinion.

If the final option is for a separate count, then there should be a protection against sectoral, political, economic or even individual interests. In small districts certain groups can hinder the reform and damage the interests of the larger population. If a merger can only be created with unanimity of all communities, small groups in the villages might have a decisive negative influence and block the merger or use blackmail to make unreasonable demands. The best system would be the one with a double optional majority: either X% (60 or 70) of the villages representing Y% (50; 60?) of the population, or Y% (50, 60) of the villages representing X% (60, 70?) of the population, etc.

5. Budget and financial issues

5.1 Financial unification: taxes, prices, debts

The draft has short provisions for creating a unified budget after the amalgamation has taken place. There are several issues which should be addressed by the law but are missing in the draft. They concern the unification of tax rates and price of services. Each village may have its own figures with important differences. They cannot remain in force indefinitely. What happens after unification? Will there be an average tariff? Or does the new council have to decide on all these figures? What about a transitional period to bring them to an average level? Something more precise should be said on the debt. Logically the debts and properties of the merged *hromadas* become debts and properties of the new *hromada*. Article 8 needs to be expanded and clearer on these issues.

5.2 Financial incentives and special grants for unification

As already mentioned, the grants are important to make merger or cooperation more attractive. Two different types of additional grants should be distinguished. The first one is needed to cover the direct costs of the merger proceedings themselves: the preliminary feasibility studies for the delimitation of the perimeter of the new *hromada* or the IMC and for the definition of its main characteristics, the procedures to create it and the drawing up of the scheme of the new entity. At the end, further support must be provided to pay the costs of the

referendum. These grants are part of the provisions that define the process of initiative and creation. Additional financial support can be of different types, temporary or permanent, partly earmarked and progressive. It should be conceived in a way that helps to bring visible and positive improvement in the LSG organisation and management, and in public services.

There is no need for large amounts of money the first year of the reform – immediate grants would not motivate efficiency; the political direction and the staff of the new entity will not be fully operative to conceive programmes of investment; the leaders at this stage would not have time to prepare a strategy and list their priorities. It would be more expedient to pay, for example, about 35% of the additional grant in the first year, 70% in the second, and the rest in the third year after creation. This would also be an incentive for better planning of the creation of new services and investments. It would be easier on the national budget and would allow support to be given to a greater number of initiatives.

The budget of the united rural *hromada* gets additional subsidies, 25% of the budget of the united *hromada*. Depending on the number of communes and size of population this percentage can reach 50, 75 or even 100%. The philosophy is to motivate a greater number of villages with a bigger population to merge. Albeit a positive idea, it could result in wrong decisions if the size and shape of the united community are chosen to meet the criteria of subsidy rather than the criteria of rational territorial management.

The time limit of 3 years is not clear. The draft does not specify how it is calculated: is it from the date of the creation of the united rural *hromada*? Or from the election of the new council? Or the adoption of the first "unified budget"? Three years is not long for investment and development policies, considering in particular that the first year will be spent on formalities. Ideally, a progressive payment should be stretched over 5 years. The total amount of these subsidies for the three years may not be enough to finance an ambitious programme. The risk is that the money will be used for current expenditure. The administrative supervision of the efficient use of subsidies carried out by the specially authorised central executive authority in charge of regional policy issues might not be sufficient for avoiding this.

More sophisticated criteria could be used for calculating the amount of subsidies: an equalisation model would favour grants for "poor" *hromadas*; a development model would

favour economic programmes; grants could also be modelled in relation to the level of existing equipment in the enlarged *hromada* etc.[14]

The estimates in the Explanatory Note to the draft are not very convincing. There will be many diverse situations depending on the wealth of the amalgamated villages. The merger of poor villages heavily dependent on subsidies will not make them less dependent. And merging poor villages with wealthier ones supposes that these latter exist in the region and will accept the merger; they may prefer to stay "independent" rather than to share their resources. This is also a reason why mergers must be formed following a majority vote of the villagers and not a unanimous one.

It would be too optimistic to hope that a merger can really save money for the budget, at least in the short term. A larger community has "structural costs" that may be important, including travel expenses for the employees and council members, etc. The probability is that the implementation of the reform will generate new costs. So it is not sure that the total amount of additional grants may be earmarked for investment alone.

The whole reform should not be presented as a means to reduce expenditure and to make savings directly in the budgets, even if this can be the case for marginal amounts. The real objective is to make the decision process in this area more efficient and improve the capacity of development policies and public services in a more efficient way. Budgetary cuts based on the forecasts of the Explanatory Note could severely undermine the success of the reform.

6. Absence of provisions on employees and on a permanent territorial representation

The draft does not deal with the situation of the village employees. Do they automatically become union employees, with the same salary, which can be different from one entity to another? What about their career and pensions? There is no provision on the representation of the former *hromadas*. International experience has shown that successful amalgamation policies generally include a form of representation of the former communities in the new one;

[14] Costs *per capita* for infrastructures increase in areas of low density. This will be the case in many regions that the reform is supposed to help. In a number of such areas, it will not be possible to increase the number of unified communities and their population without generating excessive remoteness. Therefore, the law should introduce another variable based on the number of inhabitants per km². This requires obviously careful statistical estimates. It could be suggested to link the expenditure with these subsidies and the implementation of the Reform programme of housing and municipal economy. This would make it possible to show the improvements for people to be expected nationally by the implementation of both reforms. This would also facilitate the planning of the development of the various sectors of the municipal economy.

the villages should be able to elect a representative to the new city council and sometimes keep some services in their city halls.

IV. Integrating a Chapter on IMC into the Basic Law on Local Self-Government

The purpose of inter-municipal cooperation

When the municipal territorial pattern is fragmented, the development of new tasks that need to be organised for a larger population area cannot be undertaken at the level of traditional settlements upon which municipalities are based in most countries (there are important exceptions). Alternatively, the amalgamation (or consolidation) of municipalities makes it possible to raise the municipal dimension to the scale of the new needs. Various countries, especially in Northern Europe have followed this path. However, territorial reform based on amalgamation does not render IMC unnecessary. First of all, in urban areas, the urban development cannot be contained in administrative boundaries, and beyond the consolidation of the core, cooperation is again necessary for urban transport systems, strategic planning, and land development. In rural areas, new problems arise with an aging population and the decline of the economic basis, further consolidation steps may create new problems of remoteness, and cooperation can be a relevant alternative for a number of functions.

But the territorial reform is not only a matter of administrative rationalisation and management. Everything depends on the general organisation of the state, on the perception of what is local in the political culture, whether the local is identified with the city or with the village, whether the main service provider is the state or the local authorities. All these factors influence the path and even the possibility of territorial reform. In various countries where territorial reform through amalgamation has proved politically impossible, the development of more integrated forms of IMC has been used as a practical alternative. This path has been followed in France, and the new law on the local government reform adopted on 17 November 2010 is aimed at completing the setting up of “inter-municipalities” until the end of 2013. A similar path has been followed by Hungary and Italy and is on the agenda in Spain, despite the fact that it is more difficult to implement because of the power of the autonomous regions. However, in both cases, the IMC bodies develop from the municipalities or from the municipal community, e.g. they are public powers and not private associations or contractual arrangements, although these might be used in order to deal with specific needs. In the UK, as in Germany or in France, IMC bodies are public law corporations.

IMC provisions in the 2010 draft law amending the 1997 Law on Local Self-Government

First of all, the concepts of *hromada* reflected in this draft law and in the draft law on the Stimulation of State Support of Unification of Rural Territorial Hromadas are not the same. As emphasised above, the result of the unification will be the formation of a new territorial community called the "united rural territorial community". In contrast, under Article 6, paragraph 4 of the amending draft law, the voluntary unification will result only in the formation of joint bodies for several communities, but not of a new enlarged community in place of the former ones. This second option is less ambitious, but makes it possible also to rationalise the municipal pattern. Whatever the political choice, any contradiction or divergence between both pieces of legislation should be avoided.

In the amending draft law, the IMC provisions are scant and do not meet the needs of Ukraine. Article 11 is the only article specifically dedicated to the subject, and financial matters are addressed in articles 60, paragraph 7, and 61, paragraph 4. IMC cannot be developed using these provisions. Article 11 does not give an adequate basis for the IMC development because it is based on a wrong concept: it uses two instruments; the association and the agreement, and the association itself is established through an agreement. Both are instruments of private, not public law. First, the association can be used both to solve management issues for some tasks and to represent rights and interests of the member territorial communities. Second, under paragraph 7, no power of an LSG body may be transferred to an association; this is understandable only if the association is a legal body of private law. Third, they are subject to registration by the Ministry of Justice, just as any private association or private legal person. The use of agreements is also regulated by Article 60.7: an agreement between several territorial communities can be passed to establish a co-ownership right on an object of municipal property or to join municipal funds for a joint project or for the joint financing of a joint communal enterprise or institution. Article 61.4 is identical in its budget rules to the previous one: it provides that the budgetary funds of several territorial communities may be amalgamated on a contractual basis.

These provisions do not meet the needs, whatever the political choice for the territorial reform. IMC cannot solve major problems of performance of municipal functions if territorial communities are not entitled to delegate powers to the joint bodies. This limitation can only be overcome by providing for specific public law corporations that can be established on the

basis of an agreement of member municipalities (eventually a majority thereof) by an administrative act, e.g. an act of public power. Then, the duties and the powers of the local authorities will be the same in relation to the task, whether they are exercised by the territorial community itself or through a joint body.

Therefore, it is not an article that the Law needs , but **a chapter** determining, in particular:

- the procedure for establishing IMC;
- the legal status of such a public law corporation;
- its governance;
- the financing (contributions of member municipalities or own resources from taxes, fees, duties, charges);
- the tasks that have to be exercised through the IMC, and the conditions according to which such tasks may be delegated;
- the supervision by member municipalities and the state supervision (that should be the same as for the territorial communities themselves);
- the rules on the transfer of personnel and of property;
- the relationships with municipal enterprises and institutions subject to the jurisdiction of the inter-municipal corporation.

As regards governance, the recommendation is for direct election of the board of an inter-municipal corporation in order to involve the citizens in the reform from the beginning.[15] Such a step should be undertaken on the basis of a broad consensus with the associations of territorial communities.

[15] The French experience shows that it is extremely difficult to replace election by municipal council with direct election by citizens. But this can be a very much politicised issue.

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APPRAISAL OF THE DRAFT LAW OF UKRAINE ON STIMULATION AND STATE SUPPORT OF UNIFICATION OF RURAL TERRITORIAL COMMUNITIES

The present report was prepared by the Directorate of Democratic Institutions, Directorate General of Democracy and Political Affairs, in co-operation with Prof. Gérard Marcou, University Paris 1 Panthéon-Sorbonne, Director of GRALE (Research Group on Local Administration in Europe), and Prof Robert HERTZOG, University of Strasbourg France.

Introduction

The present legal appraisal was requested by the Ministry of Regional Development and Construction within the framework of the Council of Europe Programme to Strengthen Local Democracy in Ukraine (2010-2013, funded by the Swedish International Development Cooperation Agency Sida). The draft law on "*Stimulation and State Support of Unification of Rural Territorial Communities"* should become a part of the legal basis for implementing an ambitious local self-government reform, together with the draft laws "On Local Self Government" and "On Local State Administration". An introductory sentence of the draft explains that "*this Law establishes the procedure for the resolution of issues related to the unification of rural territorial communities."*

The draft law provides for a legal framework for amalgamating rural communities (*hromadas*) in order to improve service provision and save administrative costs. This is a law on procedure and State financial support. It reflects the idea that, according to the Government, rural areas are the priority in local government reform. It is therefore submitted before the general Strategy for local self-government reform in Ukraine is adopted, although the need for the Strategy has been discussed for more than ten years and has given rise to many reform projects under all governments. It is, however, important to have a wider perspective in order to avoid inconsistencies or unforeseen and undesired consequences.

Inter-municipal cooperation (IMC) institutions can be an alternative to amalgamation when the latter proves to be impossible or politically too difficult, or a supplement to amalgamation, where a number of services can be organised on a wider scale, without the disadvantage of creating municipalities that are too large, since this may hamper citizen access to municipal administration.

A Conference on Legislative Support to IMC was organised in Kyiv on 17 December 2010 by the Council of Europe (CoE) Programme to Strengthen Local Democracy in Ukraine and the Parliamentary Committee on State Building and Local Self-Government in order to discuss the draft and the options for IMC policy. This paper is a consolidated appraisal taking into account the comments of other experts and the discussion of the conference. The Conference participants agreed on three statements:

1. Territorial reform is important for Ukraine for administrative and political reasons; but there are also economic and social reasons that make it more urgent today.
2. It is a difficult and complicated task, that has been postponed several times because of resistance, including from the population, which is often unaware of all the benefits of the reform; so there is a need for greater explanation in order to reach political consensus;
3. A law is needed because the existing provisions of the Law on local self-government are not sufficiently precise on this subject and have not been implemented; a new law will create an opportunity for a national debate on the subject so that the stakes become more visible and understandable for the citizens. The government should announce the reform among its priorities. The law is also needed to create specific incentives that will accelerate the process of unification/amalgamation, as in other countries.

I. The need for territorial consolidation in Ukraine: merger and cooperation

The general problem of Ukrainian local self-government (LSG) is owing to the very specific and complicated organisation of the first level of LSG. This situation is unknown in Western European countries. The first level of LSG in Ukraine is based on the notion of "settlement". Villages and cities may be one or several settlements, and they form the territorial basis of the *hromada*, which is considered an "administrative territorial unit" (1997 Law on LSG, Article 1: there are administrative territorial units of different levels, and some inside of a city). As a result, instead of one type of first level LSG unit (which is the practice of most European countries), there are several kinds of first level LSG units.

This creates complexity for the actors themselves, both the ones in charge of a given territory and its citizens. As in other countries, many of these first level LSG units are very small in territory and population, and lack the resources needed to provide services, or to attract enterprises and investment. Thus Ukraine is faced with the same options as all other European countries at a certain point in their history: *status quo*, amalgamation, or IMC. In fact, these options are generally mixed because cooperation and amalgamation can be alternatives to each other but are also complementary.

Previous experience demonstrates that fragmentation can be a real handicap for development policies and for provision of public services to the population. The explanatory note to the draft Law lists the negative effects and weaknesses of many LSG units due to fragmentation of the territorial administration, especially in rural areas: absence or low quality of basic public services (water distribution, sewage, waste collection and disposal, roads), little or no social assistance, culture, health, education services, etc. This results in the absence of farming on large agricultural territories, poverty and emigration, etc. These economic and social problems are not directly caused by municipal fragmentation, but the absence of strong local government deprives *hromadas* of any capacity to solve problems and to launch efficient policies. Many *hromadas* are not able to initiate cooperation with other administrations and to draw up programmes that could attract investment or external financial support.

The policy of territorial consolidation in Ukraine may be seen from two perspectives: the modernisation and improvement of public entities, through clarification and rationalisation of the administrative map, better distribution of competences and resources on the one hand; and the economic and financial crisis that pushes today towards territorial consolidation on the other. Ukraine receives important support from the IMF, so there is an urgent obligation to make public administration work more efficiently.

Reshaping territorial administration in rural areas should be a high priority for government and parliament. But issues surrounding rural territories are part of a more general issue of territorial organisation in Ukraine, which has been discussed for many years with no results. Amalgamation or creation of IMC entities should not be considered separately but as an important part of a general strategy of territorial consolidation and LSG reform.

The present territorial organisation was conceived at a time when it was coherent with political and administrative centralisation, in which the economic and social policies were conducted by a central planning body. All LSG units were parts of the State administration in a "matrioshka" architecture. This is no longer the case. *Hromadas* must comply with the principles of the European Charter of Local Self-Government (ECLSG) and are autonomous actors of development policies. LSG units should have a size that allows them to have sufficient human and financial resources to produce a fair society, economic services and provide social welfare. The ECLSG not only promotes formal democracy; its spirit is in the organisation of LSG, which brings the best services to all people.

Another issue of the LSG system in Ukraine is that certain areas of the territories are not included in the boundaries of a *hromada,* and they are directly ruled by the second LSG level, the *rayon*. Such situations exist in other countries, but under condition of amalgamation of two tiers of LSG, mainly in metropolitan areas, and the second level enjoys full decentralisation[1]. The situation in Ukraine whereby the second level has *rayon* competences for the whole territory and municipal competencies for only parts of it - notably rural ones that need special care - is complicated. There is a great risk of inequality in such cases: the population of these territories is separated from the service delivering authorities, while the "central" *rayon* authorities neglect their management. This situation could become even more complicated if, after the merger of villages, some rural territories have the status of a unified municipality and some territories are left without any neighbouring administration. [2]

There should be an explicit choice, expressed in a clear political statement, that the objective in the medium- or long-term is to have a unified form of organisation at the first level of LSG addressing three different situations:

- Municipalities with an adequate size and perimeter remain unchanged;
- Municipalities which are too small merge (mainly but not exclusively rural ones);
- areas where merger is not possible (or not accepted) create adequate IMC entities.

The IMC provisions should be included in the same text as the merger provisions, and they should be discussed at the same time, because of their interdependence.

II. Three Issues to Consider

The discussions on the draft law concentrate on three major issues analysed below.

1. Should there be a separate Law or a Chapter in the basic Law on LSG?

Since the revision of the current basic Law on LSG is under preparation, it could be wise to include a chapter on amalgamation and IMC in this law, rather than having a separate

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[1] *Kreifreiestadt* in Germany, when the commune and Kreis are merged in one entity in big cities. In France, Paris; a new law of December 16th 2010 allows other amalgamations if the concerned LG decide them.

[2] This depends on the size of the different tiers. If a new commune is created with settlements that may be more than 20 kilometres away one from another, its size may be the same, or at least nearly, with the size of certain *rayons*.

legislation. A separate law on amalgamation can be adopted quite quickly if there is sufficient political consensus on its objectives. The basic law on LSG may take more time because of disagreement on other issues. However, in view of the substance of the law, **the recommendation would be to integrate joint provisions on amalgamation and IMC into the basic law**. This option should be considered by the government. It creates an opportunity to inform the citizens on the stakes of a more rational and efficient territorial organization. A separate law will be needed to establish pertinent procedures and other rules for amalgamation and IMC. But the rules should not appear as exceptional, separated from the other provisions on LSG entities. Merger and IMC must be seen as part of the ongoing developments of a decentralised State.[3] They should be an integral part of the LSG system, and they should be ruled by permanent provisions in the basic law.[4] Specific government policies to encourage local governments to accelerate the creation of united or IMC entities do not need new procedures. The political will can be expressed in incentives, legal and financial support, in addition to the ordinary provisions.

2. Separate provisions for rural hromadas?

The present draft is meant to bring together small rural communities. Clearly, this is a very important stake in the creation of bigger and stronger LSG units at the first level. The new communities will remain rural, because of the geographical, sociological and economic make-up of the municipality, and not because of the number of inhabitants. Specific rules may take this into account, if there is a need for them. Yet the current definition of rural communities is not clear.[5]

Amalgamation or cooperation with a city is also an option that should be considered. Villages that merge with a medium-size city have access to more services in an easy and cost effective

[3] In the Netherlands there is an ongoing trend of merging communes on a voluntary basis because new political leaders consider this useful. In France, which has many IMC entities, there is a continuous creation, winding up or modification of IMC bodies, etc.

[4] This is the case in most countries. In France, the rules on amalgamation and IMC are in the *General Code of LSG*. In Germany, the municipal law is a competence of the Land; so there are a variety of situations, but IMC is considered as fully part of municipal law.

[5] The draft does not explain a "rural territorial community". Article 140 of the Constitution and the terminology of the recent draft law to amend the local self-government law imply that this should be a village or rural settlement, as opposed to a city. But, is a borough a big village or a small town/city? There is no provision on boundaries, on municipal personnel and reorganisation of municipal services and on the representation of the former communities.

way: public transport, waste collection and disposal, libraries, sports facilities, police, etc. There can be a synergy between a city and small neighbouring communities for development policy, use of public equipment, and sharing of certain costs. Next, there are large cities with a belt of smaller communities. A merger can be twofold: the town gets a larger territory for its development (business districts, housing), at a lower cost for the buyers. And the population of small communities gets access to the city services. Two neighbouring cities may decide to cooperate on specific projects: hospital, waste, schools, transport, promotion of tourism.

Merger and IMC should be open procedures offered to all local governments in order to allow them to choose the best way to fulfil their tasks and organise their development. **Most of the rules should be common and general for all types of municipalities, rural and urban.**

3. Financial incentives for amalgamation and cooperation?

The draft law has important provisions on financial incentives for communities starting a merger process, with figures that are higher than those generally given in other countries, which demonstrates the importance of this policy for the government. Financial incentives from the State budget for amalgamation or cooperation are justified for at least four reasons:

1) These reforms have a cost for the participating municipalities: for research and consultancy (economists, lawyers, specialist on organisation, taxes, budgeting, etc); for reorganisation of the administrations, organisation of a local referendum. There should, in which case, be a specific grant for launching the procedure.
2) Creation of a new entity is not only of local interest but also of regional and national one, because it can improve the overall territorial administration.
3) A large new municipality or a new IMC entity will have the critical size for spending public money more efficiently in investment or public services.
4) Financial incentives can speed up the creation of IMC or merger processes[6]. The financial motivation will become more and more important in a lasting fiscal stress for local administrations. More money is not the only important factor; competition between the communities is even more important. Those that do not cooperate or merge will obtain significantly less in terms of development than those which do. The competitiveness mechanism is very well understood by local government managers and politicians.

[6] Financial incentives contributed greatly to the success of IMC in France after the 1999: 2600 new highly integrated communities were created in a couple of years.

III. Analytical Assessment of the Draft Law

The following issues should be discussed by the authorities and revised in the draft.

1. Guidance and coordination by central government (Article 3.)

LSG units absolutely need support for any unification or cooperation process[7]. There is a need for methodology, legal guidance, and financial support, where state administrations have important responsibilities. However, the law must be precise and should say what bylaws should be issued and what kind of support the government can give, because the draft law cannot become an indirect way of limiting the autonomy of local authorities. The commission to be established within the specially authorized central executive authority in charge of regional policy issues may not include exclusively representatives of central authorities and scientific institutions. It must also include local government representatives, including *rayons*. This is a requirement of the ECLSG Art. 4 para 6[8], and it will be politically wise in order to facilitate consensus.

2. Conditions and criteria for the merger of rural territorial communities (Article 4.)

Article 4 of the draft defines several criteria and conditions that should be respected by the founders of a new united community. The CoE experts support the idea that the creation of new administrative structures cannot be left to the discretionary decision of local authorities. It is a public interest to create long-lasting entities of optimal size, which will improve local institutions. Experience of other countries demonstrates that geographic or demographic limits generate "perverse effects," which are never relevant for all situations. The draft law states that a united community must include at least 4000 persons. The distance from the administrative centre of a territorial community to the most remote village of this community may not exceed 20 km and, to determine the new administrative centre, the population and the service capacity are considered. It is not clear how this distance will be measured: boundary to boundary, village centre to village centre, and what is a village centre?

[7] See the toolkit published by the CoE, UNDP and LGI for IMC. The same recommendations are also pertinent for mergers.

[8] *"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".*

It is reasonable to suggest a lower limit of the number of inhabitants, because there are cases where IMC entities or merged communes are still too small and don't reach the minimal capacity of resources and a sufficient population to make them viable[9]. On the other hand, in certain circumstances it may be impossible to stay above the limit. With small, remote villages, 4000 inhabitants would be too large, and people might be too far away from the centre and from each other. Alternatively, the proposed union could contain a population over 4000, but during the referendum one or two communes might reject integration, and the figure could fall under 4000, for example 3750. Should the whole process then be stopped? The limit opens up an opportunity for blackmail, or could cause the process to collapse. While it is reasonable to set a limit of 4000, some flexibility should be allowed, depending on each individual case. A special study and a report could be produced proving that the union is improving the capacities of LSG and will still create a viable entity.

The distance criterion also raises some questions. For example, the municipal administration should be close to people, and 20 km might be too far for an aging population in areas lacking an efficient public transport system. Therefore, the law should include an alternative criterion based on the time needed to reach the administrative centre (for example 45 minutes or less than 1 hour by car or motorcycle)[10]. If the new entity is too big and scattered there will never be any sense of solidarity or a community life between the inhabitants. In fact, if the distance between two settlements of the new entity is close to 40 km, few types of equipment could be shared, and too much money would have to be spent on transportation and roads. This has to be a serious consideration when examining the proposals at the *rayon* level.

Do these criteria apply to any merger? Between a city and settlements, for instance? Are there also such criteria for IMC bodies? There is a need for a thorough study showing which municipalities should be merged, for what reasons, and with what benefits. Ideally, instead of listing the criteria, the law should be clearer and more demanding on the background study for initiating the merger process. It should state that the councils decide to merge on the basis of a report, which demonstrates the need for and benefits of a merger. And then the law could authorise the state authorities (at the *oblast* level) to veto proposals that are not rational or do not meet the requirements.

[9] In France, many IMC communities unite only 3 or 4 small communes with less than 2000 inhabitants in all.
[10] In a big city citizens may also need that much time to go to the central city hall or to specific municipal services.

3. Initiating the merger of rural territorial communities (Article 5.)

This article has been seriously criticised by all experts. The provision of Articles 5 and 6 is not adequate for dealing with such complex issues[11]. They overestimate the capacity of the project to attract full support from citizens. It is an unrealistic statement that "*the unification of rural territorial communities may be initiated by the corresponding village councils and initiative groups with at least 10 members from among the inhabitants of the villages that initiate the unification."*

Further, the draft does not say to whom this initiative must be sent and where it is registered. A council or several inhabitants from one village cannot ask for a merger with other villages without some discussion or even negotiation with these villages. As other experiences of mergers show, it is unlikely that the ordinary people will organise initiatives for municipal amalgamation or creation of an IMC entity. Then the state *rayon* administration is to formulate a recommendation directed to the *rayon* council for organising a referendum in all these localities. This type of procedure also raises concerns.

How can a council decide to initiate a process for unification if there is no concrete project describing the list of communities involved, the agenda, the financial consequences, the new organisation, possible development policies or new investments to be created? First, the initiative has to be credible and to be based on the previous agreements of several local councils, or on the initiative of inhabitants, but in this case there should be a minimum percentage of *voters* (a more appropriate term than *inhabitants*) from the different localities. Then, the unification process will build on this core agreement.

Secondly, the main question is determining the area in which the referendum will be organised. Article 4 gives criteria on how to determine this area, but there is no clear provision on who is empowered to decide the boundaries. Articles 5 and 6 imply that the area is determined following the submission of the initiative. Logically, it should belong to the head of the *rayon* state administration to decide on the area; but it follows from Article 6 (paragraph 2) that the *rayon* council decides only on the organisation of the referendum, not on the area.

[11] The CoE-UNDP- LGI Toolkit on IMC contains good recommendations on this subject.

The state *oblast* administration should have a more important role to play in the process. It is unlikely that the qualified staff can be found in all state *rayon* administrations, especially in rural areas. A task force should be established at the *oblast* level in order to assist the *rayon* administrations. Furthermore, if the merger process finds support and is successful, there would be four or five united rural territorial communities in each *rayon*, and this would bring into question the existing territorial division into *rayons*, and the existence of *rayon* state administrations and councils who will not support the reform.

Representatives of local self-government have to be involved in the design of the territory of the future united rural territorial communities from the very beginning, their support is a basic condition for success. Ideally, a local commission elected by all mayors of the *rayon* should be formed. This would facilitate the dialogue between all mayors, and between all mayors and the head of the state administration on the future municipal pattern of the *rayon*[12]. Then, it would be easier to submit the proposals to the voters. This method does not rule out the initiative of some mayors or inhabitants, but it will avoid too many discretionary decisions of the head of the state *rayon* administration on a case-by-case basis, and this will increase the transparency of the process and the legitimacy of the final design.

Several authorities should be enabled to take the initiative. Merger and IMC never occur spontaneously; they need political leadership and technical support. The State as well as the *rayon* should have the possibility of launching a process that is not dependant on the good will of some of the inhabitants over the national territory. The best method would be to organise a systematic study of possible unions at the most appropriate level: this would be one where there is good information; staff and financing for the studies; political capacity of creating consensus with the ability to resist unreasonable projects.

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[12] This problem is well known in France where the municipal pattern is very much fragmented, especially in rural areas. A commission is elected at the department level (a larger constituency than the Ukrainian *rayon*) by all mayors and presidents of joint-authorities; the prefect has to establish a scheme for the development of IMC in consultation with this commission; a vote with special majority may bind the prefect in some circumstances. Several reforms have strengthened the role of this commission and the authority of its decisions, and recently the new local government reform adopted by the parliament on 17 November 2010. This method could be used to prepare a unification plan at the *rayon* level, with proposal of new enlarged communities consistent with each other.

4. Review and summary of proposals and decision for the unification of rural territorial communities (Article 6.)

Article 6 of the draft contains complicated proceedings that are not clearly related to the initiative. It is not clear what happens between the moment when an initiative is registered and these proceedings. It will be the responsibility of the *rayon* state administration to summarise, with the participation of the corresponding local council commissions, proposals for unification of rural territorial communities, develop recommendations on the optimal resolution of this task, observing the main conditions and criteria. The feasibility study and the examination of the project's pertinence may therefore be carried out on the basis of "spontaneous" proposals. But at such a late stage, it would be very difficult for the *rayon* administration to contest the proposals, reshape the territorial limits in a more rational form and form consensus. Discussion with all other authorities will complicate it even more and there is a great risk of decisions being taken in a spirit of hurried compromise that will rapidly prove inefficient. The delay of 7 days is therefore not acceptable and should be at least one month. The whole process should therefore be reformulated with much attention given to the way initiative is launched and how the first outline of the union becomes public and a matter for discussion by political representatives and the population.

As regards the referendum itself, it seems that the Constitution (Article 140) would require that the votes are counted for each territorial community, since the self-governing right belongs to territorial communities. But it would make the reform impossible if the opposition of only one *hromada* was enough to defeat the decision. However it is possible to have a large majority, large enough to launch the new united territorial community on a large-scale basis, without forcing the decision if the project is too controversial or raises too much opposition, and make it possible to overcome isolated opponents[13].

Other points to consider include the need for special financing for organising referendums, and the preference for counting the overall sum of votes for all villages that took part, rather than a separate count for each village. The draft should refer to "direct decision of the citizens" and review the referendum procedure. The separate counting solution will probably

[13] In France, for the creation of an integrated joint-authority ("*communauté*"), there is no referendum, but as a rule the majority within the area of the consultation has to be either 2/3 of municipal councils representing ½ of the population, or alternatively ½ of the municipal councils representing 2/3 of the population. Other majorities can be envisaged.

be supported in the name of the "autonomy" of each village, on the basis of the Constitution and of the Charter. This idea can be challenged because the creation of each local government area and the modification of its boundaries are not exclusive powers of each LSG unit; rather it is a matter for the national administration and of broader interest than for just one group of its current population which has the right to express its opinion.

If the final option is for a separate count, then there should be a protection against sectoral, political, economic or even individual interests. In small districts certain groups can hinder the reform and damage the interests of the larger population. If a merger can only be created with unanimity of all communities, small groups in the villages might have a decisive negative influence and block the merger or use blackmail to make unreasonable demands. The best system would be the one with a double optional majority: either X% (60 or 70) of the villages representing Y% (50; 60?) of the population, or Y% (50, 60) of the villages representing X% (60, 70?) of the population, etc.

5. Budget and financial issues

5.1 Financial unification: taxes, prices, debts

The draft has short provisions for creating a unified budget after the amalgamation has taken place. There are several issues which should be addressed by the law but are missing in the draft. They concern the unification of tax rates and price of services. Each village may have its own figures with important differences. They cannot remain in force indefinitely. What happens after unification? Will there be an average tariff? Or does the new council have to decide on all these figures? What about a transitional period to bring them to an average level? Something more precise should be said on the debt. Logically the debts and properties of the merged *hromadas* become debts and properties of the new *hromada*. Article 8 needs to be expanded and clearer on these issues.

5.2 Financial incentives and special grants for unification

As already mentioned, the grants are important to make merger or cooperation more attractive. Two different types of additional grants should be distinguished. The first one is needed to cover the direct costs of the merger proceedings themselves: the preliminary feasibility studies for the delimitation of the perimeter of the new *hromada* or the IMC and for the definition of its main characteristics, the procedures to create it and the drawing up of the scheme of the new entity. At the end, further support must be provided to pay the costs of the

referendum. These grants are part of the provisions that define the process of initiative and creation. Additional financial support can be of different types, temporary or permanent, partly earmarked and progressive. It should be conceived in a way that helps to bring visible and positive improvement in the LSG organisation and management, and in public services.

There is no need for large amounts of money the first year of the reform – immediate grants would not motivate efficiency; the political direction and the staff of the new entity will not be fully operative to conceive programmes of investment; the leaders at this stage would not have time to prepare a strategy and list their priorities. It would be more expedient to pay, for example, about 35% of the additional grant in the first year, 70% in the second, and the rest in the third year after creation. This would also be an incentive for better planning of the creation of new services and investments. It would be easier on the national budget and would allow support to be given to a greater number of initiatives.

The budget of the united rural *hromada* gets additional subsidies, 25% of the budget of the united *hromada*. Depending on the number of communes and size of population this percentage can reach 50, 75 or even 100%. The philosophy is to motivate a greater number of villages with a bigger population to merge. Albeit a positive idea, it could result in wrong decisions if the size and shape of the united community are chosen to meet the criteria of subsidy rather than the criteria of rational territorial management.

The time limit of 3 years is not clear. The draft does not specify how it is calculated: is it from the date of the creation of the united rural *hromada*? Or from the election of the new council? Or the adoption of the first "unified budget"? Three years is not long for investment and development policies, considering in particular that the first year will be spent on formalities. Ideally, a progressive payment should be stretched over 5 years. The total amount of these subsidies for the three years may not be enough to finance an ambitious programme. The risk is that the money will be used for current expenditure. The administrative supervision of the efficient use of subsidies carried out by the specially authorised central executive authority in charge of regional policy issues might not be sufficient for avoiding this.

More sophisticated criteria could be used for calculating the amount of subsidies: an equalisation model would favour grants for "poor" *hromadas*; a development model would

favour economic programmes; grants could also be modelled in relation to the level of existing equipment in the enlarged *hromada* etc.[14]

The estimates in the Explanatory Note to the draft are not very convincing. There will be many diverse situations depending on the wealth of the amalgamated villages. The merger of poor villages heavily dependent on subsidies will not make them less dependent. And merging poor villages with wealthier ones supposes that these latter exist in the region and will accept the merger; they may prefer to stay "independent" rather than to share their resources. This is also a reason why mergers must be formed following a majority vote of the villagers and not a unanimous one.

It would be too optimistic to hope that a merger can really save money for the budget, at least in the short term. A larger community has "structural costs" that may be important, including travel expenses for the employees and council members, etc. The probability is that the implementation of the reform will generate new costs. So it is not sure that the total amount of additional grants may be earmarked for investment alone.

The whole reform should not be presented as a means to reduce expenditure and to make savings directly in the budgets, even if this can be the case for marginal amounts. The real objective is to make the decision process in this area more efficient and improve the capacity of development policies and public services in a more efficient way. Budgetary cuts based on the forecasts of the Explanatory Note could severely undermine the success of the reform.

6. Absence of provisions on employees and on a permanent territorial representation

The draft does not deal with the situation of the village employees. Do they automatically become union employees, with the same salary, which can be different from one entity to another? What about their career and pensions? There is no provision on the representation of the former *hromadas*. International experience has shown that successful amalgamation policies generally include a form of representation of the former communities in the new one;

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[14] Costs *per capita* for infrastructures increase in areas of low density. This will be the case in many regions that the reform is supposed to help. In a number of such areas, it will not be possible to increase the number of unified communities and their population without generating excessive remoteness. Therefore, the law should introduce another variable based on the number of inhabitants per km². This requires obviously careful statistical estimates. It could be suggested to link the expenditure with these subsidies and the implementation of the Reform programme of housing and municipal economy. This would make it possible to show the improvements for people to be expected nationally by the implementation of both reforms. This would also facilitate the planning of the development of the various sectors of the municipal economy.

the villages should be able to elect a representative to the new city council and sometimes keep some services in their city halls.

IV. Integrating a Chapter on IMC into the Basic Law on Local Self-Government

The purpose of inter-municipal cooperation

When the municipal territorial pattern is fragmented, the development of new tasks that need to be organised for a larger population area cannot be undertaken at the level of traditional settlements upon which municipalities are based in most countries (there are important exceptions). Alternatively, the amalgamation (or consolidation) of municipalities makes it possible to raise the municipal dimension to the scale of the new needs. Various countries, especially in Northern Europe have followed this path. However, territorial reform based on amalgamation does not render IMC unnecessary. First of all, in urban areas, the urban development cannot be contained in administrative boundaries, and beyond the consolidation of the core, cooperation is again necessary for urban transport systems, strategic planning, and land development. In rural areas, new problems arise with an aging population and the decline of the economic basis, further consolidation steps may create new problems of remoteness, and cooperation can be a relevant alternative for a number of functions.

But the territorial reform is not only a matter of administrative rationalisation and management. Everything depends on the general organisation of the state, on the perception of what is local in the political culture, whether the local is identified with the city or with the village, whether the main service provider is the state or the local authorities. All these factors influence the path and even the possibility of territorial reform. In various countries where territorial reform through amalgamation has proved politically impossible, the development of more integrated forms of IMC has been used as a practical alternative. This path has been followed in France, and the new law on the local government reform adopted on 17 November 2010 is aimed at completing the setting up of “inter-municipalities” until the end of 2013. A similar path has been followed by Hungary and Italy and is on the agenda in Spain, despite the fact that it is more difficult to implement because of the power of the autonomous regions. However, in both cases, the IMC bodies develop from the municipalities or from the municipal community, e.g. they are public powers and not private associations or contractual arrangements, although these might be used in order to deal with specific needs. In the UK, as in Germany or in France, IMC bodies are public law corporations.

IMC provisions in the 2010 draft law amending the 1997 Law on Local Self-Government

First of all, the concepts of *hromada* reflected in this draft law and in the draft law on the Stimulation of State Support of Unification of Rural Territorial Hromadas are not the same. As emphasised above, the result of the unification will be the formation of a new territorial community called the "united rural territorial community". In contrast, under Article 6, paragraph 4 of the amending draft law, the voluntary unification will result only in the formation of joint bodies for several communities, but not of a new enlarged community in place of the former ones. This second option is less ambitious, but makes it possible also to rationalise the municipal pattern. Whatever the political choice, any contradiction or divergence between both pieces of legislation should be avoided.

In the amending draft law, the IMC provisions are scant and do not meet the needs of Ukraine. Article 11 is the only article specifically dedicated to the subject, and financial matters are addressed in articles 60, paragraph 7, and 61, paragraph 4. IMC cannot be developed using these provisions. Article 11 does not give an adequate basis for the IMC development because it is based on a wrong concept: it uses two instruments; the association and the agreement, and the association itself is established through an agreement. Both are instruments of private, not public law. First, the association can be used both to solve management issues for some tasks and to represent rights and interests of the member territorial communities. Second, under paragraph 7, no power of an LSG body may be transferred to an association; this is understandable only if the association is a legal body of private law. Third, they are subject to registration by the Ministry of Justice, just as any private association or private legal person. The use of agreements is also regulated by Article 60.7: an agreement between several territorial communities can be passed to establish a co-ownership right on an object of municipal property or to join municipal funds for a joint project or for the joint financing of a joint communal enterprise or institution. Article 61.4 is identical in its budget rules to the previous one: it provides that the budgetary funds of several territorial communities may be amalgamated on a contractual basis.

These provisions do not meet the needs, whatever the political choice for the territorial reform. IMC cannot solve major problems of performance of municipal functions if territorial communities are not entitled to delegate powers to the joint bodies. This limitation can only be overcome by providing for specific public law corporations that can be established on the

basis of an agreement of member municipalities (eventually a majority thereof) by an administrative act, e.g. an act of public power. Then, the duties and the powers of the local authorities will be the same in relation to the task, whether they are exercised by the territorial community itself or through a joint body.

Therefore, it is not an article that the Law needs , but **a chapter** determining, in particular:

- the procedure for establishing IMC;
- the legal status of such a public law corporation;
- its governance;
- the financing (contributions of member municipalities or own resources from taxes, fees, duties, charges);
- the tasks that have to be exercised through the IMC, and the conditions according to which such tasks may be delegated;
- the supervision by member municipalities and the state supervision (that should be the same as for the territorial communities themselves);
- the rules on the transfer of personnel and of property;
- the relationships with municipal enterprises and institutions subject to the jurisdiction of the inter-municipal corporation.

As regards governance, the recommendation is for direct election of the board of an inter-municipal corporation in order to involve the citizens in the reform from the beginning.[15] Such a step should be undertaken on the basis of a broad consensus with the associations of territorial communities.

[15] The French experience shows that it is extremely difficult to replace election by municipal council with direct election by citizens. But this can be a very much politicised issue.