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Opinion on the Draft Law of Ukraine

"On Amendments to Certain Legislative Acts on Creating Legal Grounds for Establishing an Agglomeration as a Form of Cooperation of Territorial Communities"

(Registration No. 2637 as of 19 December 2019)

The present Overview was prepared by the Centre of Expertise for Good Governance, Democratic Governance Department of Directorate General II – Democracy

1. Introduction

1. On 3 January 2020, the Chair of the Verkhovna Rada of Ukraine Committee on State Building, Local Governance, Regional and Urban Development, Mr Andriy Klochko, requested, in a letter addressed to the Director General on Democracy, Ms Snezana Samardzic-Markovic, the support of the Council of Europe in providing legal expertise of the Draft Law of Ukraine "On Amendments to Certain Legislative Acts on Creating Legal Grounds for Establishing an Agglomeration as a Form of Cooperation of Territorial Communities" (registration No. 2637 as of 19 December 2019).

2. This is an opinion of the Council of Europe on the above-mentioned draft law prepared with the assistance of Robert Hertzog, Professor em. University of Strasbourg, expert of the Council of Europe. The opinion refers to various matters related to the creation and the organisation of an Agglomeration, as defined in the text, with reference to the respective articles of the draft law.

2. Analysis of the draft Law

2.1 The Legal Nature of the Agglomeration

3. The draft introduces the Agglomeration as a new form of cooperation of local self-government entities by adding specific provisions to the Law of Ukraine on co-operation of local communities. It falls both under the provisions exclusively dedicated to Agglomerations and general provisions common to several other cooperation models.

4. According to the draft law the Agglomeration (or rather its council) will be an institution, a legal person, separate from those of its members. Consequently, it will enjoy a certain autonomy by having its own competences and authorities, a budget, properties, capacity to contract. It will manage services and finances of greater importance than those of many communities.

5. Therefore, it must have a solid legal basis, institutional architecture and a clear and appropriate financial frame. At the same time, it requires integration in the Constitution allowing the creation of such a form of cooperation of local self-government entities with its own competences and financial autonomy.

6. It is clear from the current law that the other models of cooperation are mainly contractual ones; they are based on an agreement that arranges cooperation by defining its domains and procedures. However, an agglomeration cannot be considered as a simple form of "cooperation". Political cooperation is reflected in the procedure of the creation of the Agglomeration and in the participation of communities' representatives in its council. But the policies in the matters that are transferred to the Agglomeration are decided by its authorities in domains pertaining to its own powers and are not managed in cooperation with the member communities.

7. Legal provisions on the Agglomeration should explicitly show the differences with the other forms of cooperation. This is not the case at the moment. It is recommended to have a special article in the law enlisting the general articles on cooperation that apply to Agglomerations. The latter will become an important part of the local self-government system of Ukraine. Thus, the management of the services transferred to these institutions cannot be exempt from the principles of local self-government and especially of the standards of the European Charter of Local Self-Government (ECLSG).

8. The autonomous nature of the Agglomeration is not very apparent in the current draft law. The text is poor on financial autonomy; there is also a mixture of authorities (the executive, the chair of the council), and between the personnel and finances of the Centre City and of the Agglomeration.

9. Paragraph 7 of the draft Article 14-1 states that "The Agglomeration Council shall be a legal entity and subject to state registration in accordance with the procedure established by law". This draft article defines inter alia different authorities of the Agglomeration; so, the "council" is referring to the assembly with deliberative functions. This is in line with the draft Article 1, part 1 (6) which provides that "agglomeration council shall mean a body established to formulate and implement local policies on issues of common strategic importance to the territorial communities – members of the agglomeration". In Ukraine, under the current Constitution, it is the council which is the legal entity. The current opinion preserves this frame, although it strongly encourages Ukrainian authorities to grant legal personality to communities, not to bodies, as proposed by the draft constitutional amendments introduced by the President of Ukraine.

2.2 The Procedure for the Creation of an Agglomeration

10. This is a very sensitive question because political opposition to the creation of an Agglomeration will always exist, for diverse reasons. Therefore, it is essential that the procedure is easily understood by all partners, provides fair information, builds a consensus and avoids conflicts.

2.2.1 The initiative of creating an Agglomeration

11. The list of communities that will be invited to join an Agglomeration, *i.e.* to join the preparatory commission (Article 7), results from draft Article 14-1 that mentions the communes, that are situated in the zone of influence of a city that has the characteristics defined by the law.

12. The methodology for determining the zone of influence of the agglomeration centre shall be approved by the Cabinet of Ministers of Ukraine within three months from the day the Law on Local Self-Government in Ukraine comes to an effect.

13. The following step is under the responsibility of the leaders of large cities. According to the draft Article 14-2 (2) "The zone of influence of the agglomeration centre shall be determined by the executive body of the territorial community council of the agglomeration centre and approved by the Cabinet of Ministers of Ukraine". So, it is up to each "Central city", in the sense of this law, to establish a map. The law leaves this as an option (Article 14-1 (1) "Agglomeration may be established") and does not require that all possible agglomerations in the country have their "zone of influence" formally defined. Thus, reluctant cities may stay out

of this process. Giving the responsibility to the cities may also accelerate the decision in urban areas where a special concern for becoming an Agglomeration exists. It may even generate emulation between large cities.

14. The methodology issued by the Government will certainly require formal consultation between the Central city and the surrounding communities likely to be integrated in the "zone of influence". This will already give an opportunity to test the opinion of the communities' leaders concerning a future Agglomeration.

15. It is not clear what will happen if the Cabinet of Ministers does not approve the draft document established by a Central city. The latter will have to present a new one taking into consideration the objections of the Cabinet. This formality of approbation should incite the Central City to respect the methodology and to define the zone of influence in an objective and "scientific" manner and not just as a result of political bargaining between the communities and the City.

16. Being included in the zone of influence will not result in a compulsory inclusion in the future Agglomeration. Draft article 14-1 (2) states that communities that are on the map of the zone of influence "may join such an agglomeration" following the decision of each community council. This may facilitate the creation of Agglomerations by avoiding blocking by one or two communities that do not want to become members. However, it may also result in a non-pertinent territory regarding certain competences (transportation, water, waste, etc.). To avoid this there should be an express provision, that could state for example that when 3/4 of the communities, representing at least 75% of the population of an Agglomeration (or any other figures), agree on the creation of an Agglomeration, all communities that are in the zone of influence will become members of the Agglomeration, whatever their decision may be. Though the principle of voluntarism makes perfect sense for the other forms of cooperation mentioned by the law, which by their nature are based on contractual agreements, voluntary participation in an Agglomeration contradicts having an efficient territorial administration.

2.2.2 The Commission preparing the drafts of cooperation agreement and Statute (Article 7)

17. According to Article 7 the Commission shall include representative of all cooperating parties in equal proportions. Members shall be approved by the orders of the village, settlement and city mayors representing the local communities-cooperating parties. This allows concluding that members of the Commission could be any citizen of the given local community. However, it is important that members have a political commitment to speak in the name of the community. This requires that they are rather members of the executive authority or of its council. This may seem evident, but it should be explicit in the law.

18. The provision stating that the Chair of the Commission meetings shall rotate between the representatives of the cooperating parties may cause difficulties. It would be more reasonable to have him/her elected by the Commission for the whole duration of its working session in order to ensure continuity; a deputy chair could be elected at the same time and they could alternate. Another solution could be that the rotation is every month or every two weeks.

19. It is important to have a professional Secretary of the Commission. He/she could be appointed by the Chair of the Centre City among the staff of any member community.

20. Another difficulty could be raised with regard to the provision stating that the executive authorities of the communities shall provide organisational support to the Commission. Communities will assume the costs for their representatives (travel and other mission costs).

One of the communities should also provide a meeting room. It is not however clear regarding the expenditures of the secretariat. A solution could be that all costs are paid by the Central City and the other communities pay compensation in proportion of their population or of their last adopted budget, or following criteria established by the Commission.

21. Article 7 (6) provides that "The Commission shall terminate its activity from the date the cooperation agreement comes into force". This is fully acceptable. Another deadline could be: "when all the communities' councils have adopted the Statute of the Agglomeration"; from there, there is no longer any reason for the Commission to meet, unless it is also meant as a forum where the partners will discuss the practical questions for the commissioning of the Agglomeration. This should then be made explicit.

22. The second phrase of the same provision states: "… or from the moment each village, settlement and city council make the decision to terminate its cooperation efforts". This allows concluding that the Commission will be dissolved when one member stops cooperating. A new Commission must then be created or would the withdrawal of one of the partners be accepted and the activity of the Commission continue further on? The latter solution is preferable as it avoids the possibility of jeopardising the process by announcing withdrawal if one community does not get full satisfaction of certain claims.

2.2.3 Rationalising the creation procedure

23. The democratic process for the creation of an Agglomeration should allow fair consultation of the population which results in a decision of the communities to become members of the Agglomeration by adopting its Statute.

24. Public hearings or referendum should be organised at the beginning of the process for the creation of an Agglomeration. Citizens should be asked, in a manner that could be decided by each community, if they agree that their community joins the proposed Agglomeration and give their advice on the competences that will be transferred to it. Nevertheless, experience shows that large groups of persons cannot discuss complicated issues involving many technical and legal aspects. There is also a risk of misunderstanding and manipulation. A consultation of citizen's opinion must be on clear and simple questions.

25. Therefore, the provision of Article 8 (3) that detail the consultation process needs to be reconsidered in view of several considerations.

26. A consultation on the cooperation agreement and on the Statute proposed by the Commission could generate confusion and negative effects. It is not clear at what extent the public will read the documents and might be rather susceptible to influence by opinions given by activists of all sides. Seemingly, it is not clear what will happen with the expressed opinions. There could be several outcomes. Either the council of the community will not take them into account and approve the Statute, resulting in frustration of the population and the risk of a recurring opposition against the Agglomeration. Or, several community councils, following the demand of associations or citizens, propose amendments to the Statute that have been accepted by their representatives in the Commission; this may even result in objections to join the Agglomeration. Such questions must be decided at the beginning of the process and not at the end. The withdrawal of a given community may destabilise the whole project.

27. Another issue is the 60 days' timeframe for the consultation (draft Article 8 (3)). It will follow another up to 60 days period during which the Commission prepares the draft cooperation agreement and the Statute (draft Article 7 (5)). It is not clear if a new session of the Commission will be convened to amend its draft in order to take into account the proposals of the population expressed during different public hearings.

28. The provisions of the cooperation agreement and the Statute are discussed by the Commission with the representatives of each community who are mandated to express the will of their community. These representatives may, of course have consultations and discussions with the authorities of their community (council and executive) and even organise freely public hearings. But once the Commission has adopted the draft documents these ones should be directly presented for adoption to the given councils; otherwise this would create an endless procedure. Those who vote against this proposal will not participate. As the meeting aims at taking a decision, representatives of adjacent cities should not participate in it.

2.3 Cooperation agreement and Statute of the Agglomeration: is there a need for two legal documents? (Article 9)

29. Following Article 8 of the existing law, the cooperation agreement is the founding document of cooperation. This article describes the procedure for adopting such an agreement and the content of this document.

30. According to the draft law when creating a legal entity like an Agglomeration there will be two legal documents, a cooperation agreement which is a kind of contract and the Statute of the Agglomeration, annexed to this agreement. The Statute will be the "constitution" of the Agglomeration governing various important aspects of its institutions and functioning and containing compulsory provisions of regulatory nature and force that can be invoked in Courts. An annexed document to a political agreement does not seem to be an adequate legal act. These two different documents may become a matter of various and contradictory interpretations, especially if they refer to the same questions. In practice this has no great utility and creates a risk of future difficulties.

31. A way forward could be having two different procedures and corresponding legal documents depending on the model of cooperation, one being the "contractual cooperation" and the other one the "institutional cooperation".

32. In the first case, the cooperation agreement is the legal document for intermunicipal forms of "contractual cooperation" that will not create a public legal entity. The agreement defines the object of cooperation, methods of cooperation and other pertinent provisions; it establishes, in fact, the "statute" of the cooperation activity. Courts may even sometimes view certain articles of this kind of "contract" as having a regulatory nature. Thus, a cooperation agreement is specific to these forms of intermunicipal cooperation.

33. In the second case, where a legal entity is established, the constituent legal document is the statute of that public organisation. It is prepared by the commission, adopted by the community councils and will be the "charter", or the "constitution", of the Agglomeration. It may contain a short preamble that explains the reasons for the creation of the new institution and the expected benefits for citizens and more efficient management of public service. Annexed to that, a second document, without legal force, might be a kind of an impact

assessment study that presents the "zone of influence", explains the data of the Agglomeration, the reasons to choose this form of cooperation, its general objectives, why certain options have been adopted in the statute, etc.

2.4 Formal Decision for Creating the Agglomeration

34. The formal creation of such an important institution as an Agglomeration should result in a solemn act. We suggest that the "birth certificate" of the Agglomeration is a decree from a minister or from the Prime Minister with following provisions: quote of the deliberations of the communities' councils adopting the Statute; date of starting of the Agglomeration; name and seat as in the Statute; date of the first meeting of the Agglomeration council.

2.5 Provisions of the Statute

35. The Statute of the Agglomeration will be a very important legal and political document. As the law cannot deal with all the questions that have to be solved for making an Agglomeration work, it should refer to the Statute to provide the needed rules. Therefore, the legal provision on statutes should be strengthened.

36. The Statute should decide on the precise name of the Agglomeration. It could be Agglomeration of - * with just the name of the central city. It could also add the name of the second largest city or it could be a new name related to the region of which the Agglomeration is the economic and historical capital. The draft law mentions "the name and location of statutory agglomeration bodies": what will this be in fact?

37. It should also define the official seat of the Agglomeration, which should be the central city or, by exception, it could be in another one; this will also be the official seat for all executive and deliberative authorities of the Agglomeration. Certainly, these authorities may have meeting rooms (parliament) or offices (administration) located in different places that do not have to be listed in the Statute itself.

38. The Statute or the draft law itself should state that, in principle, an Agglomeration is established for an indefinite period and cannot be created for a fixed duration. The Statute may provide for a procedure of dissolution, but this may only be in very exceptional circumstances.

39. According to the draft law the Statute shall contain provisions on "the responsibility for violation of the Statute". This matter should only be defined by the law and sanctions should only be imposed by Courts.

2.5.1 Competences of the Agglomeration

40. According to the draft law the competences transferred to the Agglomeration from communities are no longer competences of the communities but become own and definitive powers of the Agglomeration. The communities cannot decide on these matters, which distinguishes this form of cooperation from contractual forms.

41. However, draft Article 14-3 lacks clarity. The title of the article says, "Competence and powers that may be transferred to the Agglomeration Council", meaning that the subsequent list is optional and that not all domains need to be transferred to the Agglomeration. Nevertheless, the draft Article 14-3 (1) provides that "The competence of an agglomeration shall cover the settlement of the following issues", meaning that these are compulsory. Another problem is that this article provides for both competences of the Agglomeration as an institution and competences of the Agglomeration Council, which is only an organ of this legal person. There should be two different paragraphs or articles on these two subject matters.

42. Following the experience from other countries, the list of competences transferred to the Agglomeration could include a rather short list of competences that must be transferred and a list of optional competences which could be much longer. Many public tasks that belong to the communities could become intermunicipal by the logic of subsidiarity. The compulsory ones include generally economic development, infrastructures, transportations and other matters where the upper level of the local self-government is more pertinent.

43. The following competences could be provided either as compulsory or optional:
    - Commercial and industrial districts;
    - Social housing;
    - Establishment of economic development programmes;
    - Tourism;
    - Urban planning.

44. There could even be a provision stating that by agreement of the founding communities the Statute may decide on any other transfer of competences that are of common interest.

45. The draft Article 14-1 (3) provides that the Agglomeration Council is established "To coordinate the activities of the territorial communities". It is not the task of the Agglomeration Council to coordinate the actions of the communities in general. Its function is to decide on matters which were transferred to the Agglomeration from the communities.

46. Coordinating the communities would mean, for example, a competence to issue an "orientation scheme" that expresses guidelines or directives for policies which stay under the operational responsibility of the communities (culture, environment protection, economic development, etc.). This is something totally different and may exist in other forms of cooperation. Of course, if this is the will of the Government and Parliament of Ukraine it could be added in the law for certain matters that are of "agglomeration interest" but will still be managed by the communities. It would require explicit provisions in the law on these special procedures.

2.6 Zone of good neighbourliness

47. The draft mentions another form of cooperation named the "zone of good neighbourliness" (draft Article 4 (7)). The draft Article 14-4 defines the regime of this zone which should be included in the cooperation agreement of the Agglomeration. But this is, in fact, another form of cooperation between the Agglomeration and the communities outside of its borders and not members of it. So, there must be a specific cooperation agreement discussed between all

these partners, in a separate procedure. This might become a very complex system that might need great energy and time to work and create a lot of difficulties for modest benefits.

48. A more operational and flexible solution would be to provide that the Agglomeration can contract with neighbour communities on any matter of common interest. If there is need of intense cooperation, these partners could use one of the other legal models proposed by this law.

2.7 Financial Provisions

49. The Agglomeration will have important investment responsibilities and will manage costly public services. This entails high expenditures, various resources (fees paid by the users, grants, loans, taxes, etc.) and thus requires a solid financial system. The draft law does not elaborate on the matter and mentions "estimates of expenditures and of revenues" without using the word budget.

50. The Budget Code does not refer to an "Agglomeration budget", but to the budgets of State and of local governments that are administrative-territorial entities. An Agglomeration is also a territorial entity in fact. This draft law can modify the Budget Code by providing that the budget of an Agglomeration is subject to the general rules that apply to municipalities or more precisely to communes of a size of over 200 000 inhabitants. This matter cannot be implicit. An Agglomeration cannot start working without precise provisions for its financial system (budgeting, accounting). An article must deal with this matter, at least by making references to the provisions of the Budget Code or other relevant laws.

51. The financial resources of the Agglomeration as provided by the draft law are not up to the missions it will have to implement such as infrastructures and costly public utilities that need important amounts of money for investment and current operating. If the Agglomeration is not provided with adequate resources and if it cannot demonstrate that it will deliver better services to the population the process of Agglomerations will be delegitimised in public opinion and in the mind of city councillors. Article 15 enlists several means through which the State supports cooperation actions, but these are mostly earmarked grants for specific objects and not resources that are needed for the services managed by the Agglomerations.

52. There is no precise method on how the grants of the member communes will be calculated and paid to the Agglomeration, when this is a highly sensitive question. One should not expect that easy consensus will be built by the founding members of the Agglomeration. The member communities will be reluctant to pay it money and it will be in continuous financial stress with under-financing of its competences.

53. The law should define a methodological frame for the calculation of the contributions paid by each community to the budget of the Agglomeration and refer to the statutes for precise rules. If the participation of each community is to be decided at each budget deliberation this would bring a "genetic" weakness to the Agglomeration, with a risk of unbalanced budgets and difficulties of treasury for paying its expenditures.

54. The law should have a "prospective" provision saying that the Agglomeration may receive general grants (as mentioned in Article 15) from the national budget. Not all grants from State should be earmarked.

55. Considering the investments related to the competences listed in Art. 14-3, the Agglomeration should have, in principle, the capacity to take out loans. The right to borrow belongs today to territorial hromadas. The Agglomeration that will receive competences transferred from the latter may have the same possibility.

2.8 Administration and Personnel of the Agglomeration

56. The draft law has no provisions on the staff and employees of the Agglomeration. The model that appears in it is that executive tasks are performed by the personnel of the Central city. This model may exist elsewhere, but it raises a lot of questions that have no answer in the draft law both on the managerial and on the financial side.

57. Establishing an administrative apparatus for the Agglomeration separate from the one of the Central city (and all other communities) can have various advantages. It allows a human resource management system which is adapted to the competences specific to the Agglomeration. It is financially transparent. It allows choosing the mayor of the capital city to be also the chair of the Agglomeration or to have a different person for this function. It reduces the risk of conflicts of interest. The Agglomeration can have its own offices, in a different building than the municipality, to show its "independency" from the communities, etc.

58. Having all the executive tasks of the Agglomeration executed by the employees of the Central city may allow some economies of scale, give access to staff with good professional qualification and avoid bureaucratic rivalries between two administrations working on common matters. It is especially appropriate when the executive authority of the city and of the Agglomeration is the same person. Otherwise the employees are under two functional and hierarchical authorities. Though not the most optimal, such an organisation exists in other countries and may have its advantages.

59. Looking at the draft Article 14-2, the cost of the executive authority of the Agglomeration seems to be paid by the Centre city and would be an expenditure of its budget. Such an approach is not financially correct. A public entity cannot have financial expenses for activities that are the responsibility of another public entity. This is against the budget principle of universality that requires that all the expenditures of a public person are included in its budget law or document. It is also against the principle of sincerity of the accounts following the general accounting rules: here, in one accounting one does not see the real expenses (costs) of this person, and the other accounts describe undue expenses. To make this legally and financially correct, a convention between the city and the Agglomeration must define the reciprocal obligations in a rather precise way; this convention should be periodically revised.

60. An article of the draft law should regulate the status of the employees, their organisation, the relations between the Agglomeration and the Central city.

2.9 Authorities and Organs of the Agglomeration (Article 14-2)

61. The draft law provides that the executive authority of the Agglomeration is the person who is the executive of the Centre city. This is coherent if the employees working for the Agglomeration are the ones of the municipality of the centre city. Such a model exists exceptionally in other countries. But then the Agglomeration budget should pay compensation

to the Central city. This compensation can be calculated by an analytical accounting giving the exact cost of the services or can be defined with a flat rate in a global manner.

62. It is difficult to propose a perfect solution. One is having the mayor of the city becoming automatically the Chair executive of the Agglomeration and managing all matters with employees of the city, with compensation paid by the Agglomeration. Another one is to have the Chair of the Agglomeration freely elected by the council and having an own administration organised for the Agglomeration; this model can work even when the mayor of the central city is elected Chair of the Agglomeration. Other combinations may be more problematic.

63. The model of governance where executive and administrative functions of the Agglomeration are strongly mixed with those of the Centre city may have dissuasive effects on certain municipalities to join the Agglomeration. There is often the fear of "imperialism" of the bigger city; there may also be political rivalries or other reasons for not trusting the central city leaders. The Parliament of Ukraine should have a thorough discussion of the cost/benefit balance of this model.

64. Lastly, the proposed model of governance should take into account the compatibility with the current Article 12 (4) of the Law on Self-Government, which also needs to be examined and appropriate harmonisation ensured.

3. Main recommendations of the draft Law

65. The draft law creates a new form of cooperation of local self-government entities by introducing specific provisions on Agglomeration to the Law of Ukraine on co-operation of local communities. According to the new provisions the Agglomeration (or rather its council) will be an institution, a legal person, separate from those of its members. It will become an important part of the local self-government system of Ukraine. Thus, it must have a solid legal, institutional and financial basis according to the principles of local self-government and the standards of the ECLSG.

66. The current draft creates a system where the authorities of the Central city have great importance, but few means at their disposal: there would be no separate staff (and likely no budget) and most (if not all) resources would be derived from earmarked government grants. Agglomerations would therefore function more in line with central governments' priorities (who would foot the bill) than the real local interests in order to ensure some synergies and cooperation between municipalities of the Agglomeration. This would be an improvement as compared to the current situation, but it would be far from perfect both in democratic and governance terms.

67. Improvement is needed or recommended in a number of fields, as explained in the current opinion:

- There should be a distinction made between the Agglomeration and other forms of cooperation provided by the law, the latter results purely from the adoption of an agreement considered as a contractual act.
- It is recommended to reconsider the fully voluntary inclusion of communities included in the zone of influence in the future Agglomeration and provide for a mechanism that will avoid absurd shaping of the area of an Agglomeration, "holes" in the territory and

irrational frontiers. The communities that voted against the adoption of the Statute may nevertheless become members if a special majority decides so.

- Procedure for the creation of an Agglomeration should be streamlined and clarified including with regard to public consultation process.
- Establishing a legal entity like an Agglomeration could be based only on one constituent document *i.e.* the Statute, governing various important aspects of its institutions and functioning and containing compulsory provisions of regulatory nature and force that can be invoked in Courts. The draft legal provision related to statutes require strengthening.
- Consider introducing a block of competences that would be transferred to the Agglomeration as compulsory and one as optional.
- Revise the resources and financing procedure of an Agglomeration, a bigger financial autonomy needs to be ensured.
- The provisions on the staff and employees of the Agglomeration needs to be strengthened both on the managerial and on the financial side.
- The governance system of the Agglomerations seems to be imbalanced with the executive authority and the chair of the council cumulating these functions with the ones in the centre city. It is recommended that the chair of the council (if it is not also the Chair of the executive authority) is elected by the council and among its members.