

# THE CONGRESS OF LOCAL AND REGIONAL AUTHORITIES

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## Recommendation 228 (2007)<sup>1</sup> Draft additional protocol to the European Charter of Local Self-Government

The Congress, on the proposal of its Chamber of Local Authorities,

1. Having regard to:

a. the European Charter of Local Self-Government (ETS No. 122);

b. the draft additional protocol to the European Charter of Local Self-Government (hereafter “the Charter”) with its explanatory report (Appendices I and II) and the explanatory memorandum (CPL(14)8REP) presented by Christopher Newbury (United Kingdom, EPP/CD) as prepared in collaboration with the Group of Independent Experts to the European Charter of Local Self-Government;

c. the proceedings of the International Conference of 8 July 2005 in Lisbon on the 20th anniversary of the opening of the Charter for signature by the Council of Europe member states and in particular Resolution 195 (2005) on the 20th anniversary of the European Charter of Local Self-Government and its explanatory memorandum CG(12)6 Part II;

d. the body of standards, rules and interpretations of the Charter as adopted by the Committee of Ministers and the Congress of Local and Regional Authorities of the Council of Europe in particular the Recommendations of the Committee of Ministers of the Council of Europe (1998) 12 on supervision and (2000) 14 and (2005) 1 on financial resources; and Recommendations of the Congress of Local and Regional Authorities of Europe Nos. 2 (1994) and 20 (1996) on monitoring the implementation of the Charter, 39 (1998) on the incorporation of the Charter into the legal systems of ratifying countries and on the legal protection of local self-government, 64 (1999) and 79 (2000) on finance, 113 (2002) on relations between the public, the local assembly and the executive, 132 (2003) on municipal property, 151 (2004) on directly elected local executives and 171 (2005) on consultation;

2. Reasserting the importance of the role of local authorities as one of the main foundations of any democratic regime;

3. Convinced that the existence of local authorities with real responsibilities and independence makes the administration

of public affairs more effective and brings it closer to the citizen, in keeping with the subsidiarity principle;

4. Recalling that the Charter remains the only legally binding international treaty that defines the essential characteristics of local self-government and provides local authorities with guarantees in the exercise of their rights and competences in a state where power is shared between the different spheres of government;

5. Noting in this regard that the Charter has been ratified by almost all the member states of the Council of Europe;

6. Considering that the experience derived from monitoring the application of the Charter and the challenges facing the states and local authorities demonstrate the need to reinforce further the international protection of local self-government, in particular in the light of the standard-setting achievements and interpretative experience of the Committee of Ministers and the Congress of Local and Regional Authorities of the Council of Europe;

7. Aware that it is therefore necessary to develop and supplement the Charter, either by inserting new provisions or by clarifying certain rules and principles already considered, in the process of interpreting the Charter, as implicit standards;

8. Noting with satisfaction that the Group of Independent Experts on the Charter has been able to play an important role in the monitoring process with regard to local democracy by assisting the elected representatives of the Congress in the interpretation of the Charter;

9. Taking note of the efforts of the European Committee on Local and Regional Democracy (CDLR) to strengthen the participation of citizens in public life at local level by developing convention-based standards in this area, possibly by way of an additional protocol to the Charter, and stating that it sees no contradiction of these efforts to the present additional protocol or a possible future merger of both drafts;

10. Considering also that, in order to enter into force, a draft additional protocol to the Charter must be adopted by the Committee of Ministers and signed and ratified by at least four states to the Charter;

11. Having regard to the foregoing, the Congress:

a. *recommends that the Committee of Ministers:*

i. examine the appended draft additional protocol to the Charter;

ii. adopt the draft additional protocol to the Charter and take note of the draft explanatory report;

iii. open it for signature by the member states of the Council of Europe;

iv. invite the member states of the Council of Europe to sign and ratify it at the earliest opportunity;

b. invites the Parliamentary Assembly of the Council of Europe to take note of this text.

## Appendix I

### Draft additional protocol to the European Charter of Local Self-Government

The member states of the Council of Europe, signatory to the present protocol to the European Charter of Local Self-Government, opened for signature on 15 October 1985 (hereafter, “the Charter”),

Reasserting the importance of the role of local authorities as one of the main foundations of any democratic regime;

Consequently reasserting their attachment to the standards and principles of local self-government set out in the Charter;

Considering, nonetheless, that the experience derived from monitoring the application of the Charter and the challenges facing the states and local authorities, demonstrate the need to reinforce further the international protection of local self-government, in particular in the light of the standard-setting achievements and interpretative experience of the Committee of Ministers and the Congress of Local and Regional Authorities of the Council of Europe;

Considering that it is therefore necessary to develop and supplement the Charter, either by inserting new provisions or by clarifying certain rules and principles already considered, in the process of interpreting the Charter, as implicit standards,

Have agreed as follows:

#### Article 1

Every state undertakes to consider itself bound by at least 24 of the paragraphs in Part I of this protocol.

### Part I

#### Article 2

##### *Relations with regions or federated states*

The protection awarded by the Charter and this additional protocol to local self-government applies likewise to authorities of regions and federated states as with regard to state authorities.

#### Article 3

##### *Responsibility of the executive organ to the council or assembly representing the local authority*

In so far as the executive organs mentioned in Article 3, paragraph 2, of the Charter are elected on the basis of direct universal suffrage or are appointed by a local authority executive organ elected in that way, the means for engaging their responsibility to the council or assembly representing the local authority shall be guaranteed by law. These guarantees shall, in particular, ensure that the council or assembly has the right of final decision in matters of prime importance to the local authority in question.

#### Article 4

##### *Organisation of local authority services*

Subject to more general provisions laid down by the law, local authorities shall be entitled to determine the institutional structures through which the services they offer shall be provided.

#### Article 5

##### *Principle of concomitant financing*

1. The principle according to which local authorities, within the framework of national economic policy, are entitled to foreseeable resources commensurate with their competences and responsibilities and sufficient for the effective discharge of their competences and responsibilities shall be laid down in the constitution or in the law.

2. Revenue losses incurred by local authorities as a result of decisions by higher-level authorities to reduce or eliminate local taxes or decrease the tax base shall be offset with adequate replacement resources.

3. Where higher-level authorities decide to confer additional responsibilities on them, local authorities shall receive transfers of adequate resources or shall be authorised to raise new resources. In the event of a transfer of responsibilities, the resources shall be at least equivalent to those which the higher-level authority allocated to the discharge of those responsibilities. The obligation to transfer adequate resources or authorise the raising of new resources shall also apply in the case of decisions to set higher minimum quality standards for the discharge of obligatory tasks, decisions to transfer responsibilities, or decisions resulting in changes in general costs such as wages and salaries, social security costs or environmental protection standards.

#### Article 6

##### *Local authorities' property*

1. Local authorities shall be entitled to acquire and utilise property, including the right to transfer ownership or management thereof to intermunicipal co-operation structures, public services or other bodies, in the exercise of their responsibilities in the public interest and within the limits of the law.

2. So far as permitted by the law, compulsory purchase of local government assets shall be carried out solely for the benefit of the public and in exchange for fair compensation.

#### Article 7

##### *Local authorities' own financial resources*

1. A substantial proportion of the financial resources of local authorities shall be derived from charges, whose rate they can freely determine, and from local taxation (whether exclusive or shared), the level of which they are able to decide, where applicable within predetermined legal limits. This proportion shall be sufficiently large to give local authorities an effective margin for manoeuvre in the discharge of their own responsibilities.

2. The local taxation system shall ensure reasonable stability and continuity of public services while guaranteeing a

measure of flexibility such that tax revenues can be adjusted to changing costs.

*Article 8*  
*Financial equalisation*

1. Measures intended to offset the effects of the unequal distribution of local authorities' potential sources of financing and of their responsibilities shall be designed to enable local authorities to provide a comparable average standard of services for comparable levels of taxation and charges. Financial equalisation shall reduce, on the one hand, differences in spending needs due to structural, demographic, geographical, social or economic factors and, on the other hand, differences in local authorities' overall financial capacity.

2. The level of financial equalisation shall be reasonable – so that it does not undermine local autonomy or discourage local authorities from making a fiscal effort or, where applicable, seeking the efficient collection of local taxes.

3. Equalisation criteria shall be objective, clear, transparent, foreseeable and verifiable. They shall be laid down on a non-discriminatory basis by a law which defines their general principles.

*Article 9*  
*General and specific grants*

1. Financial transfers from higher-level authorities to local authorities shall principally take the form of general grants not earmarked for specific purposes.

2. Specific grants intended to finance specific projects shall concern, in particular, investment and the discharge of delegated responsibilities.

3. General and specific grant systems shall guarantee local authorities a degree of economic and financial stability and take account of factors such as economic growth, cost increases, salary increases and changing social and environmental standards.

4. The criteria for allocating general and specific grants shall be objective, clear, transparent, foreseeable and verifiable. If specific grants are conditional on financial contributions by the local authorities in receipt of them, the level of the contributions shall take account of the financial capacity of those authorities.

*Article 10*  
*Financial restrictions of an exceptional nature*

1. The ordinary financial autonomy of local authorities may be restricted only on serious grounds of general economic policy. Any restrictions must be proportionate to the aim to be achieved and devoid of any punitive character. They must not jeopardise the principle of local self-government.

2. Financial restrictions of an exceptional nature must be based on objective, clear, transparent, foreseeable and verifiable criteria and must be applied in an equitable manner.

3. The effectiveness of financial restrictions of an exceptional nature, and the need to maintain them, shall be subject

to regular review, and restrictions must be lifted once they have achieved their purpose.

*Article 11*  
*Involvement of local authorities in decisions concerning them*

1. Any decision by a higher-level authority concerning one or more local authorities must be adopted by means of a procedure comprising, at least, prior notification of the proposed decision to the local authorities concerned, their right of access to the relevant administrative documents, their entitlement to state their own positions within a reasonable time and the obligation to give reasons for the decision, taking account of the positions expressed by the local authorities.

2. Any decision by a higher-level authority concerning the balance to be maintained between the responsibilities of local authorities and the resources at their disposal and the conditions and criteria applicable to financial equalisation and to general and specific grants shall be the subject of negotiations between the higher-level authorities and local authorities. The negotiation procedure shall always be set in motion before a higher-level authority takes any decision whereby local authorities must help to implement policies of interest to both levels.

3. Before any decision by a higher-level authority is taken concerning the balance between local authorities' expenditure and the resources at their disposal, their resources and costs must be evaluated and the results made public. Assessment committees comprising representatives of the higher-level authorities and the local authorities should preferably be responsible for the technical evaluation.

4. The entitlement of local authorities to be represented by representative associations in the various processes foreseen in paragraphs 1 to 3 of this article shall be recognised by law.

*Article 12*  
*External administrative supervision*

1. Administrative supervision by higher-level authorities of local authorities' acts falling within the exercise of their own responsibilities, including in budgetary matters, should imply neither the authority to review the expediency of such acts or perform prior supervision nor the authority to approve the acts concerned with the power to amend them. Except in an emergency, supervision is confined, in principle, to ascertaining the possible unlawfulness of any acts and is subject to the right to apply to a court or other independent authority to have such acts set aside. In exceptional cases, local authorities which have, in accordance with the law, been declared to be in serious financial difficulty may be subject to prior supervision.

2. Administrative supervision by higher-level authorities of the financial management of local authorities shall normally be limited to the implementation and effective functioning of internal controls. Any form of external supervision shall be entrusted to independent authorities. Audits shall aim to verify compliance with the law and rules of sound financial

management, without encroaching upon local authorities' freedom of choice, in accordance with the law.

3. Dissolution of local-authority bodies by a higher-level authority with a view to early elections shall be permissible only where they are unable to function at all or where there has been a serious or repeated breach of the constitution or of the law, duly established by a judicial authority or independent authority.

4. Any supervision by a higher-level authority of the individual conduct of a local elected representative may concern only cases where there has been a breach of the constitution or the law and shall be carried out with due regard for the principle of proportionality.

5. A local elected representative may be suspended or dismissed by a higher authority only where there has been a serious or repeated breach of the constitution or of the law in the exercise of duties pertaining to his or her elected office and punishable by a term of imprisonment, duly established by a judicial authority or independent authority.

6. Any dissolution, suspension or dismissal decision provided for in paragraphs 3 and 5 of this article shall give rise to a right of appeal to a court. The dissolution of a body shall not entail its incapacity, or that of its members, to avail itself or themselves of this right.

#### *Article 13*

##### *Power of substitution*

1. Higher-level authorities shall have power of temporary substitution to act in lieu of local-authority organs only in the cases and under the procedures provided for by the constitution or by the law. This power shall be confined to specific cases where local authorities have failed to exercise their responsibilities and shall be utilised in accordance with the principle of proportionality between limitations on local self-government and the importance of the rights of inhabitants and the public interests at stake. The power of substitution shall not permit the imposition of additional forms of supervision.

2. The decision-making power resulting from a substitution measure shall be entrusted to staff acting solely in the interests of the local authority concerned, except in the case of the exercise of delegated powers.

#### *Article 14*

##### *Right to an effective remedy*

Local authorities shall have the right of recourse to a judicial remedy in order to secure respect for the provisions on local self-government as are enshrined in the Charter and in this additional protocol.

## **Part II**

#### *Article 15*

##### *Relationship to the Charter*

1. The states shall treat Articles 2 to 14 of this protocol as additional to the Charter, and all the provisions of the Charter shall apply accordingly.

2. No Contracting Party to the European Charter of Local Self-Government may exclude from its instrument of ratification, acceptance or approval of the present protocol any categories of local or regional authorities which it has specified in pursuance of Article 13 of the European Charter of Local Self-Government.

#### *Article 16*

##### *Signature and entry into force*

1. This protocol shall be open for signature by the signatories to the Charter. It shall be subject to ratification, acceptance or approval by a state. A state may not ratify, accept or approve this protocol unless it first or simultaneously ratifies, accepts or approves the Charter. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2. This protocol shall enter into force on the first day of the month following the expiry of a period of three months after the date on which five states have expressed their consent to be bound by the protocol in accordance with the provisions of the preceding paragraph.

3. In respect of any state which subsequently expresses its consent to be bound by it, this protocol shall enter into force on the first day of the month following the expiry of a period of three months after the date of deposit of the instrument of ratification, acceptance or approval.

#### *Article 17*

##### *Notification*

The Secretary General of the Council of Europe shall notify all states of:

*a.* any signature;

*b.* the deposit of any instrument of ratification, acceptance or approval;

*c.* any date of entry into force of this protocol in accordance with Article 16;

*d.* any notification received in application of the provisions of Article 1 of this protocol;

*e.* any other act, notification or communication relating to this protocol.

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

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

## Appendix II

### Draft explanatory report to the additional protocol to the European Charter of Local Self-Government

1. The additional protocol to the European Charter of Local Self-Government [hereinafter “the Charter”] was drawn up within the Council of Europe by the Congress of Local and Regional Authorities, then adopted by the Committee of Ministers. It was opened for signature by the states having signed the Charter on \*\*

2. This explanatory report does not constitute an instrument providing an authoritative interpretation of the protocol, although it may facilitate the understanding of its provisions.

#### A. Background to the protocol

3. The process which resulted in the adoption of this additional protocol began in the period leading up to the 20th anniversary of the opening of the Charter for signature by the Council of Europe member states. See in particular the proceedings of the International Conference of 8 July 2005 in Lisbon on the 20th anniversary of the Charter, Resolution 195 (2005) on the 20th anniversary of the European Charter of Local Self-Government and its explanatory memorandum CG(12)6 Part 6.

4. The main basis for the drafting work on this protocol was the body of standards, rules and interpretations adopted by the Committee of Ministers and the Congress of Local and Regional Authorities of the Council of Europe. The protocol draws in particular on the following recommendations: i. Recommendations of the Committee of Ministers of the Council of Europe (1998) 12 on supervision and (2000) 14 and (2005) 1 on financial resources; and ii. Recommendations of the Congress of Local and Regional Authorities of Europe Nos. 2 (1994) and 20 (1996) on monitoring the implementation of the Charter, 39 (1998) on the incorporation of the Charter into the legal systems of ratifying countries and on the legal protection of local self-government, 64 (1999) and 79 (2000) on finance, 113 (2002) on relations between the public, the local assembly and the executive, 132 (2003) on municipal property, 151 (2004) on directly elected local executives and 171 (2005) on consultation.

#### B. General comments

5. Some paragraphs of this explanatory report contain explicit references to the Charter and the protocol. However, even where there are no such references, each of the provisions of this protocol must be interpreted in the light of the complete text of the provisions of the Charter and the protocol. In addition, the fifth paragraph of the preamble in itself stresses that the formalisation of certain standards and principles in the additional protocol does not necessarily mean that similar standards and principles cannot stem from the interpretation of the Charter itself.

### C. Commentary on the provisions of the additional protocol

#### *Preamble*

6. The preamble to the additional protocol refers mainly to the preamble to the Charter itself, reaffirming the particular importance of the autonomy of local authorities as one of the main foundations of any democratic regime.

7. It also refers to the process which resulted in the preparation of the protocol (see paragraphs 3-4 above), focusing in particular on the past standard-setting and interpretative work of the Committee of Ministers and the Congress of Local and Regional Authorities of the Council of Europe. Considering that the standards set by this protocol are similar to those advocated in the relevant recommendations of the Committee of Ministers and the Congress, they should be interpreted in the light of these recommendations.

#### *Article 1*

8. Bearing in mind the great diversity of legal systems and local authority structures in member states, this provision, which constitutes a simplified version of the model used for the Charter itself (see Article 12), permits the adoption of an additional protocol oriented towards the future while making it possible for the states not to commit themselves to some of the paragraphs included in Part I of the additional protocol, or to commit themselves to them in a differentiated and progressive manner.

9. Article 12 of the Charter was an original text in treaty law at the time it was designed, as it provides that states must be bound by at least two thirds of the paragraphs contained in Part I of the treaty, while it limits their choice by virtue of a list of provisions (binding core provisions) considered as the most important. The present protocol provides that states must be bound by at least three quarters of the paragraphs contained in Part I of the protocol. On the other hand, it does not further limit their choice with a list of core provisions by which the countries could not object to be bound.

10. As the ultimate objective is compliance with all the provisions of the protocol, it is however important to stress that, pursuant to Article 12.3 of the Charter, any state may, at any later time, notify the Secretary General that it considers itself bound by any paragraphs of this protocol which it has not already accepted under the terms of Article 1 of the protocol.

#### *Article 2*

11. Generally speaking, the Charter deals with the protection of local self-government vis-à-vis the states to this international treaty, in other words, for the most part, vis-à-vis states. At the same time, it is frequently the case that regions or federated states possess decision-making powers in relation to local authorities. It therefore needs to be made clear that the safeguards provided by the Charter itself and by the protocol also apply in respect of them. In other words, the rules set out in Articles 12 of the Charter and 1 of the protocol apply irrespective of each country’s constitutional arrangements (centralised, decentralised or federal state).

*Article 3*

12. Article 3.2 of the Charter establishes the principle that the executive organs of local authorities are responsible to councils or assemblies whose members are freely elected by the citizens of the local authority on the basis of direct, equal, universal suffrage by secret ballot.

13. In general, applying this principle does not pose any problem as long as the members of the executive are elected or appointed by the council or the assembly concerned. The situation may differ where a single executive officer or the members of the executive (the mayor, etc.) are directly elected by the voters. The use of such forms of direct citizens' participation is expressly allowed by Article 3.2 of the Charter. Yet, it may sometimes prove difficult to reconcile these with the fundamental principle that the executive must be responsible to the representative council or assembly.

14. Article 3 of the protocol therefore sets the minimum requirement of an "effective" guarantee of the responsibility of executive organs not appointed by the representative council or assembly. In such cases the law must provide the council or assembly with a minimum number of control mechanisms. Furthermore, the council or assembly must have the deciding say in matters of prime importance to the local authority, which should include the budget.

15. If it is assumed that the system for the allocation of responsibility is effective, the definition of "matters of prime importance" and the choice of methods to ensure that the council or the assembly have the deciding say in the event of disagreement can be left to the discretion of the law.

*Article 4*

16. Article 6.1 of the Charter grants local authorities the power to adapt their administrative structures to specific needs and, in so doing, to organise themselves as they see fit. In view of the current tendency in Community law, economic development and administrative science to opt for new forms of organisation or ones borrowed from private law to make public services more "efficient", Article 4 of the protocol strengthens the right of local authorities to choose the means by which public services are delivered to the population. This right may only be restricted by statutory provisions of a more general scope, that is, governing certain activities which may be engaged in not only by a local authority but also by other economic operators (rules on competition, food standards, etc.).

*Article 5*

*Paragraph 1*

17. Under Article 9.2 of the Charter, "local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the law". The protocol upholds the principle of concomitant financing, calling for it to be laid down in law or in the constitution, with a preference for the latter. It also defines its scope, adding that resources must be "foreseeable" and sufficient for the "effective" discharge of local authorities' "own responsibilities" and those delegated to them, without nevertheless

abolishing the authority of the states to readjust the resources of local authorities in accordance with general measures entailed by state economic policies. The foreseeability requirement is intended to enable local authorities to plan changes to their budget over a given period. A certain degree of foreseeability may also be engendered by the consultation and assessment methods provided for in Article 11 of the protocol.

*Paragraph 2*

18. The principle of concomitant financing also applies to decisions by higher level authorities to reduce or do away with local taxes or to decrease the local authority tax base, including cases where this occurs for general economic or competition-related reasons. The required compensation may be achieved through new tax resources or transfers or the allocation of new staff or equipment. In some cases, it may also consist of a transfer of property. In no case shall the compensatory measures affect adversely the right of local authorities to "own" resources according to Article 9 of the Charter and Article 7 of the present protocol.

*Paragraph 3*

19. Additional burdens for local authorities may be created by decisions to assign them new "own" or delegated powers, the setting of higher standards for the discharge of obligatory tasks (particularly in the social, health and environmental fields) or the impact on local authority finances of decisions taken by higher level authorities resulting in changes in general cost factors such as wages, salaries and social security costs.

20. One of the bases for assessing concomitant financing may be the resources which the higher level authority has allocated for the discharge of delegated or decentralised tasks. However, even if the minimum level is respected, additional financial transfers may nevertheless be made if the resources in question are manifestly inadequate for the tasks in question to be carried out properly.

21. Once the balance between responsibilities and transferred resources has been struck, each local authority may draw on its own resources to provide services of a higher standard than the obligatory minimum.

*Article 6*

*Paragraph 1*

22. Despite their considerable importance for local self-government, local authorities' property rights are not dealt with expressly by the Charter. Paragraph 1 rectifies this situation.

23. "Property" is interpreted very broadly, encompassing both physical property and intangible, intellectual and industrial property as well as other pecuniary and financial assets. This interpretation is based on Article 1 of Protocol No. 1 to the European Convention on Human Rights as well as the case law of the European Court of Human Rights.

24. The right to property also includes the possibility of acquiring and developing property by means of procedures

prescribed by national legislation. It may be exercised by an individual authority or transferred to intermunicipal organisations or other bodies in the public interest. As a rule, local authorities with property rights may exercise fully the rights that the law confers on property owners. Exceptions to the rule must be prescribed by law, pursue a legitimate aim, be necessary and be compatible with the principles of local self-government.

25. The article does not specify any particular form of property (such as ordinary property, private property or public property). The choice of the applicable rules is left to national legislation in the light of the traditions and distinctive characteristics of each country.

26. The right to property must be interpreted in the light of other provisions of this Protocol, such as Article 5 on the principle of concomitant financing and Article 12 on external administrative supervision.

#### *Paragraph 2*

27. Even if the property rights of local authorities are recognised, the fact that local authorities form part of the public sector justifies specifying the protection afforded to them in relation to compulsory acquisition measures, which may be carried out only to the extent permitted by law and solely for the public benefit. The generally accepted right to fair compensation also applies in respect of local authorities.

28. This right to “fair compensation” does not exclude recourse to exceptional measures with the same effect for local authorities as for other possible addressees, nor the need to assess the values at stake, an operation which may lead to very low or even close to zero valuations.

#### *Article 7*

29. This article adds to the provisions of Article 9.1, 9.3 and 9.4 of the Charter. It concerns “financial” resources, a category of resources which is not fully distinguishable from those referred to in Article 5 on concomitant financing and Article 6 on “property”. At any rate, these provisions contribute jointly to the implementation of the principle of local self-government and to the definition of the “own resources” of local authorities and those allocated to them. Moreover, the present article should be interpreted in connection with Articles 8 (equalisation) and 9 (allocations and subsidies) of the present protocol.

#### *Paragraph 1*

30. The purpose of this paragraph is to define more clearly the concept of “own resources” under Article 9 of the Charter and afford greater protection to local authorities in this respect.

31. The power to set the rate of local taxation being a crucial element of local self-government and of the responsibility of local elected representatives towards their electorate, this paragraph makes it clear that shared taxes, if levied entirely by other authorities which also determine their rate, cannot be regarded as “own resources” of local authorities.

32. Paragraph 1 recognises the following as falling within the category of own resources: charges set freely by local authorities and local taxes whose level local authorities are able to decide, be they exclusive local taxes or taxes common to several levels of government where local authorities are able to decide the additional tax accruing to them.

33. The requirement that a “substantial” proportion of financial resources should be derived from “own taxation” should significantly strengthen Article 9.3 of the Charter. At any rate, this proportion should be sufficiently large to give local authorities a “real margin for manoeuvre” in the discharge of their own powers, which should also strengthen Article 9.2 of the Charter (see also Article 5 of this protocol).

34. The concept of “responsibility” incumbent on local authorities in respect of their taxpaying citizens is wider than the reference merely to “responsibilities” and constitutes a supplementary obligation of transparency and democracy.

#### *Paragraph 2*

35. By extending the obligation under Article 9.4 of the Charter to put in place financial systems of a sufficiently diversified and buoyant nature to enable local authorities to keep pace as far as practically possible with the real evolution of the cost of carrying out their tasks, paragraph 2 introduces a new requirement in relation to the Charter, namely the stability and continuity of “own resources”, which does not prevent the necessary degree of flexibility in relation to changing budgetary costs (see also Article 5.1 on the foreseeability of resources).

#### *Article 8*

36. If horizontal equalisation measures are introduced in situations where, for specific reasons, the desired results cannot be achieved through vertical equalisation, the article applies to both forms of equalisation.

#### *Paragraph 1*

37. Article 9.5 of the Charter concerns financial equalisation procedures or equivalent measures which are designed to correct the effects of the unequal distribution of resources between local authorities. Paragraph 1 defines this obligation in greater detail. It stresses the dual role of equalisation, which is not only to offset the inequality between local authorities’ financial capacities and financial needs, but also to ensure that the system adopted does also take account of local authorities’ fiscal effort.

38. The equalisation criteria should include as far as possible demographic, geographical, social and economic factors leading to disparities in costs. In addition, they should include an estimation of all of a local authority’s sources of income (overall financial capacity).

39. Equalisation should not offset differences in administrative efficiency, in costs arising from the tailoring of levels of service to local preferences, or in rates of taxation actually applied. The aim should be to achieve broadly comparable levels of service for comparable levels of taxation and charges.

40. Regarding the requirement to “negotiate” before any change in the criteria, reference should also be made to Article 11.2 of the protocol.

*Paragraph 2*

41. The level of financial equalisation should not discourage local authorities from making a fiscal effort or from seeking the efficient collection of taxes where this is their responsibility. It is important that the part of the transfers attached to equalisation is not such as to discourage richer local authorities from making an additional fiscal effort or to demotivate poorer local authorities from exhausting their fiscal capacity. This may happen in particular if the equalisation of the imbalance between the richest and the poorest local authorities is taken too far.

*Paragraph 3*

42. The obligation to establish and apply objective, clear, transparent and verifiable equalisation criteria is designed to rule out discretionary practices, discrimination on political grounds and other discriminations of a similar nature which would not be based on objective criteria. If laid down by law, these objectives would be further strengthened.

*Article 9*

*Paragraph 1*

43. Under Article 9.7 of the Charter, grants to local authorities should in principle not be earmarked for the financing of specific projects or remove the basic freedom of local authorities to exercise policy discretion within their own jurisdiction. To the extent that “special funds” are merely specific grants in disguise, they should also be avoided.

44. In order to make this principle more operational, a clearer distinction needs to be drawn between “general grants” and “specific grants”. The principle is strengthened by the requirement that financial transfers should “principally” take the form of general grants not earmarked for specific purposes.

45. In general, specific grants should be confined to co-financing capital expenditure, ensuring that certain local public services are delivered everywhere to a minimum standard, offsetting “centrality costs”, financing certain public services that local authorities provide on behalf of the state or when discharging delegated responsibilities, or covering variations in costs caused by decisions at national level relating to the standard quality of local services.

*Paragraph 2*

46. In order to limit the scope of specific grants more precisely, it is specified that the earmarking of grants for specific purposes is accepted only where this does not place excessive limits on local authorities’ financial autonomy.

*Paragraph 3*

47. The requirement of stability ties in with that applying to financial resources in general (see in particular Articles 5.1 and 7.2 of the protocol). It is designed to rule out any possibility of discriminatory practices in this area. The use of

general criteria relating to economic growth, etc. will have the same effect.

*Paragraph 4*

48. The purpose of setting objective criteria for the calculation of grants is to make it possible for any interested party to verify the manner in which they are used. The last sentence requires that, where grants are conditional on financial contributions by the local authorities in receipt of them, the criteria applied should take account of the financial capacity of those local authorities in order to ensure that this type of grant does not, in practice, favour the more prosperous authorities and widen the gap between them and those which are financially weaker. It is to be noted that this provision would also apply to subsidies of the European Community if the latter is party to the Charter or the additional protocol.

*Article 10*

*Paragraph 1*

49. Adding to the more general protection afforded by Article 9 of the Charter, Article 10 of the protocol is designed to provide an improved framework for the general financial restrictions that may be imposed on local authorities in exceptional circumstances.

50. Paragraph 1 specifies that such restrictions may be imposed only on “serious grounds of general economic policy”. Even in cases falling within this category, the restrictions must be in keeping with the aims to be achieved and must not take the form of sanctions or other punitive measures. Neither the principle of local self-government nor its implementation in the longer term should be jeopardised by measures of this kind. These restrictions should certainly not be such as to exclude recourse to legal remedies for violation of the law, etc.

*Paragraph 2*

51. The measures in question may not be general or of a virtually permanent nature, but must remain “exceptional” and be based on objective and verifiable criteria. They must be applied as equitably as possible.

*Paragraph 3*

52. The temporary nature of such measures should be guaranteed through regular reviews of the need for them. They should be restricted to the period for which they are actually necessary and be lifted as soon as possible.

*Article 11*

53. Several provisions in the Charter assert a right of participation by local authorities in processes which may lead to decisions concerning them, such as Article 4.6 on the general right to be consulted, Article 5 on consultation in the event of changes in boundaries and Article 9.6 on consultation relating to the allocation of redistributed resources. In addition, the right of local authorities to associate under Article 10 no doubt implies the right to be represented by a representative association in all forms of participation.



54. Requiring higher level authorities to involve local authorities more closely in the decision-making process makes it possible to strengthen the position of the latter without restricting the substantive decision-making power which the applicable law confers on the higher level authorities. This means recognising the equal status of different tiers of government which is inherent in the concept of local self-government without denying the unilateral power of the higher level authorities under the constitution and other applicable law.

55. Article 11 introduces a general requirement of minimum consultation and defines its substance. It strengthens and widens the scope of certain forms of consultation already provided for in the Charter and adds new ones. The hierarchical organisation of the paragraphs enables states to accede to them in a differentiated and progressive manner (see Articles 15 and 16 of the protocol).

#### *Paragraph 1*

56. This paragraph introduces a general requirement of consultation supplementing the stricter obligations arising from other provisions. It also defines the substance of this obligation in relation to the general principles of good administrative procedure. In principle, this obligation applies to individual acts as well as to the adoption of general rules of a particular interest for local authorities. The aim is to ensure a reasonable minimum degree of “adversariality” adapted to non-contentious administrative procedure.

57. Its application in respect of the procedure for preparing decisions to be adopted by the representative assembly in question, with or without the involvement of the executive, must fit in with the applicable constitutional procedure. Similarly, the administrative procedure relating to regulatory action might be less strict than that relating to individual decisions. Such weakening of each local authority’s procedural position should however be offset through the participation of the association representing the authorities in question (see Article 10 of the Charter and paragraph 4 of this article).

#### *Paragraph 2*

58. The obligation to negotiate applies mainly to certain decisions relating to financial autonomy, but also, more generally, to decisions concerning the local authorities’ involvement in measures to implement policies of common interest.

59. The concept of “negotiation” broadly encompasses the prior consultation measures covered by paragraph 1. The additional element is an obligation on the higher level authority to seek agreement with the authorities concerned on the substance of the decision to be taken.

60. The parties are free to determine the means to be employed to achieve this aim. If no agreement is reached at the end of the negotiations, the higher level authority recovers its power to take the necessary decisions unilaterally.

#### *Paragraph 3*

61. The crucial role of the principle of concomitant financing as enshrined in Article 9.1 and 9.2 of the Charter and further developed in Article 5 of the protocol calls for the establishment of procedures to facilitate mutual understanding, resolve any conflicts and ensure fuller compliance with the principle.

62. The key features of the system must be technical assessment of the resources and costs relevant to decisions on the balancing of resources and expenditure and the obligation to make the results public.

63. Joint committees with a general or sectoral remit will preferably be responsible for the technical assessment of resources and costs, so as to facilitate efforts to achieve mutual understanding. The requirement that opinions should be made public is intended to have the same effect, even in cases where opinions within the committee are not unanimous. In particular, recourse should be had to the services of a joint assessment committee in cases where the process could lead to major changes to the existing system.

#### *Paragraph 4*

64. This provision adds to local authorities’ right to associate under Article 10 of the Charter by specifying that national law must recognise the right of local authorities to be represented by a representative association in the various processes for participation by local authorities in decisions concerning them. This right should apply in the first instance to processes involving the participation of a group of local authorities acting together.

#### *Article 12*

65. The purpose of the provisions of this article is to elaborate and strengthen those of Article 8 of the Charter while avoiding in principle any political subordination of local authorities and local elected representatives. The protocol retains the distinction between “own” and delegated responsibilities. As used here, the term “acts” also covers local authority budgets. The words “other independent authority” mean an independent administrative authority or, depending on the domestic legal order of the parties, any other equivalent state authority, exercising its functions in complete independence, which is called upon to decide, by virtue of the law, on one of the issues raised by Article 12.

#### *Paragraph 1*

66. The main aim of administrative supervision by higher level authorities in the area of the “own powers” of local authorities should be to ensure transparency of local action vis-à-vis the citizens and the observance of legality.

67. No supervision implying any hierarchical subordination of local authorities to higher level authorities is therefore acceptable. Consequently, paragraph 1 rules out any administrative supervision by higher level authorities relating to the expediency of decisions. When a power of approval is conferred on higher level authorities, it entails no power to amend the decision in question.

68. Prior administrative supervision is allowed only where local authorities have been declared to be in serious financial difficulty, in accordance with the law. On the other hand, prior supervision exercised by an independent body (court, court of auditors or other) is not excluded.

69. Except in emergencies, supervision of local authorities' final decisions must be confined to their lawfulness. They may be set aside only by a court or an independent administrative authority.

#### *Paragraph 2*

70. Paragraph 2 is designed to strengthen local authorities' internal supervision mechanisms in the financial and management spheres by minimising the effects of external administrative supervision insofar as it questions the expediency of choices made by local elected representatives.

71. Administrative supervision by higher level authorities in these areas must therefore concern mainly the effectiveness of internal controls, in order to promote transparency of local authority action and political accountability to the citizens, and to enable local authorities themselves to make adjustments in the event of shortcomings in the supervision system or of a financial imbalance.

72. If the law provides for external supervision of financial management itself, such supervision should be assigned only to independent bodies (judicial or administrative). In any event, supervision must not encroach upon local authorities' freedom of choice in accordance with the law.

#### *Paragraph 3*

73. Articles 7 and 8 of the Charter do not deal with the supervision of local authority bodies or elected representatives. Paragraphs 3 to 5 therefore supplement the protection afforded by the Charter in these two areas which are very important for the autonomy of local authorities and the principle of "free exercise" of the functions of local elected representatives. They take into account that the supervision of local authorities is first and foremost confined to the voters and for the local assemblies.

74. A local authority body may be dissolved by a higher level authority only on an exceptional basis, that is to say, where it is unable to function at all or where there have been serious or repeated breaches of the Constitution or the law. In any event, it is for a judicial authority or an independent administrative authority to establish first that these requirements are met.

#### *Paragraph 4*

75. In accordance with the principle of the free exercise of their functions under Article 7.1 of the Charter, this paragraph rules out any form of administrative supervision of the individual action of local elected representatives which is not motivated by the possibility of a breach of the constitution or the law. The obligation to respect the principle of proportionality is made explicit. It obviously also extends to any sanctions – see paragraph 5.

#### *Paragraph 5*

76. Administrative decisions to suspend or dismiss a local elected representative on grounds of his or her individual conduct in the exercise of his or her duties are permissible only where there has been a serious or repeated breach of the constitution or the law in the exercise of duties pertaining to his or her elected office and punishable by a term of imprisonment, duly established by a judicial authority or independent authority. As in the case of the dissolution of bodies, it is up to a judicial authority or independent administrative authority to establish first that these conditions are met (see paragraph 4).

77. The provisions of this paragraph do not prevent the Parties from keeping in force their legislation, if any, on the loss of civil rights as a criminal sanction in the event of certain particularly serious forms of illegal conduct.

#### *Paragraph 6*

78. Paragraph 6 grants the bodies and elected representatives affected by a dissolution, suspension or dismissal decision the right to appeal to a court. This right supplements the right of appeal of the local authority itself under Article 14 of the protocol. The dissolution of a body must obviously not have the effect of depriving the body, or (some of) its members, of the right to appeal.

#### *Article 13*

79. The Charter does not deal with that particularly serious form of restriction of local self-government which is "substitution", which may be the result of administrative supervision by higher level authorities (see Article 8 of the Charter and Article 12 of this protocol). The use of such powers should therefore be limited to cases where they are strictly necessary.

#### *Paragraph 1*

80. Substitution decisions may be taken only in the cases and under the procedures provided for by the constitution or the law and may be of only temporary validity. The power to "substitute" must be confined to specific cases enumerated by the law where local authorities have defaulted in the exercise their powers.

81. Each decision to resort to this power must be taken after consideration of the proportionality of the measure, particularly in the light of the conflicting interests mentioned in the text. The decision to activate powers of substitution remains subject to a political assessment of the various conceivable solutions for remedying the failure to exercise the responsibilities in question, including the possibility of partial substitution.

82. Every decision to initiate a substitution procedure shall be taken under the various procedures prescribed in Article 11 of this protocol.

83. Under no circumstances does the existence of a power of substitution permit the setting up of additional forms of external control aimed at discovering cases of possible inaction on the part of the local authorities. The recourse

to measures of substitution must be decided on the basis of circumstances discovered during general control procedures.

*Paragraph 2*

84. To prevent the power of substitution from being used to allow the higher level authority to interfere in decisions reserved for local elected representatives, the protocol asserts the principle of the personal impartiality of staff exercising the powers conferred under the substitution decision. An exception may be made in the case of delegated powers, in view of the higher level authorities' direct responsibility for their exercise.

*Article 14*

85. Unless otherwise provided, it is for the states to choose the means by which the standards and principles of public international law by which they are bound are to be introduced into their own legal systems. Experience shows that the Charter cannot be relied upon in all judicial systems, which unquestionably lessens the effective scope of local self-government.

86. Article 14 of the protocol introduces the obligation to recognise the right to an effective judicial remedy against any alleged violation of the provisions of the Charter and the Protocol. It does so by drawing inspiration from Article 13

of the European Convention on Human Rights, which secures the right to an effective remedy before a national authority, although there is no requirement to introduce the Convention itself into national law, as well as from the wording of Article 11 of the Charter. It will be for a competent court to decide to what extent the provisions relied upon are enforceable.

*Article 15*

87. Article 15 makes it clear that the provisions contained in the additional protocol are additional to those of the Charter. Consequently they do not detract from the validity of the Charter's own provisions as properly interpreted. See also paragraph 5 of the preamble to this protocol.

*Articles 16 and 17*

88. The provisions contained in Part II of the additional protocol are based on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers at the 315th meeting of the Deputies in February 1980.

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1. Debated and approved by the Standing Committee of the Chamber of Local Authorities on 20 November 2007 and adopted by the Standing Committee of the Congress on 21 November 2007 (see Document CPL(14)8RECREV2, draft recommendation presented by C. Newbury (United Kingdom, L, EPP/CD), rapporteur).