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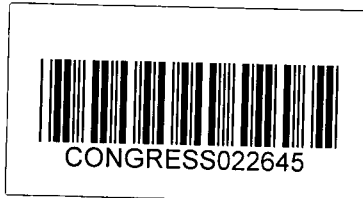


Congress of Local and Regional Authorities of Europe  
Chambre des pouvoirs locaux

Congrès des pouvoirs locaux et régionaux de l'Europe  
Chambre des pouvoirs locaux

For debate in the Standing Committee  
Pour débat à la Commission Permanente  
\*See Rule 12 (4) - Voir article 12 (4) du Règlement\*

Strasbourg, 27 May 1998  
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CPL (5) 5

**FIFTH SESSION**

(Strasbourg, 26-28 May 1998)

**DRAFT OPINION**

**of the Working Group  
on the European Charter of Local Self-Government**

**ON**

**THE DRAFT RECOMMENDATION OF THE COMMITTEE OF MINISTERS  
PREPARED BY THE CDLR  
ON THE CONTROL AND AUDITING OF LOCAL AUTHORITIES' ACTION**

**Rapporteur: Giorgio DE SABBATA (Italy)**

\* Objections to the Standing Committee procedure must reach the Head of the Congress Secretariat a clear week before the meeting of the Standing Committee; if 5 members object, the report will be submitted to the Plenary Session.

Les éventuelles objections à l'examen en Commission Permanente doivent parvenir au Chef du Secrétariat du Congrès une semaine avant la réunion de la Commission Permanente; si 5 membres du Congrès présentent des objections, le rapport sera soumis à la session plénière.

A reading of the CDLR document prompts one first of all to reflect on the importance it represents as a prime example of collaboration and complementarity between the CDLR and the CLRAE in the framework of the European Charter of Local Self-Government. This is a collaboration which must be given every support since it is one which can promote self-government in general, through the updating of the European Charter of Local Self-Government in those countries which have already adopted it and the acceptance of the Charter in the domestic legal systems of those which have not yet done so.

It is not merely the approach itself which is a positive development; there is also the subject matter of the text, which to a large extent reflects the results of the considerable work carried out over the years by the CLRAE both in its present structure as the Congress and before that as the Conference. Accordingly, overall it deserves our support.

Yet, clearly, it is worth taking a closer look in order to assess the differences of opinion and positions which are evident from comparing the CLRAE and CDLR documents in this field.

Paragraphs (a) to (e) set out the principles, each of which, individually, is perfectly acceptable, but placed together as they are, they put an undue emphasis on the importance of supervision and no consideration is given to the principle of subsidiarity. There is no mention whatsoever of this, whereas ideally there should be.

While it is true that authorities "become responsible" when entrusted with tasks as provided for in Article 3 of the Charter, it is also true that such responsibility, rather than being seen as giving rise to the problem of supervision, should first of all be regarded as a positive aspect of the implementation of the principle of subsidiarity set out in Article 4.3. This observation casts some doubt on the validity of the assertion in paragraph (d) that supervision is a precondition for strengthening decentralisation.

On the other hand, paragraphs (h) and (i), which refer to upholding these principles, in particular the principle of proportionality, are very important and positive. Article 8 explicitly establishes this principle by providing for supervision of local authorities' activities; this document extends this to the supervision which may be carried out with regard to elected representatives.

In the third sub-paragraph of para. III.i, it should perhaps be made clear (if indeed this is the case) that it is referring to substitution as regards the carrying out of acts which authorities have omitted to implement. Otherwise substitution could be understood as a means of divesting elected representatives of their role.

**APPENDIX****PRELIMINARY DRAFT RECOMMENDATION  
OF THE COMMITTEE OF MINISTERS TO MEMBER STATES  
ON SUPERVISION OF LOCAL AUTHORITIES' ACTION**

The Committee of Ministers, having regard to Article 15.b of the Statute of the Council of Europe,

- a. Considering that the aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage, and to foster their economic and social progress;
- b. Considering that, when local authorities have, as provided for by Article 3 of the European Charter of Local Self-Government (hereinafter referred to as "the Charter") the right to regulate and manage, within the limits of the law, a share of public affairs, these authorities become responsible towards the citizens – electors and taxpayers – and the State;
- c. Considering that the compliance with the principles of the rule of law and with the defined roles of various public authorities, as well as the protection of citizens' rights and the effective management of public property, justify the existence of appropriate controls;
- d. Considering that the existence of such controls is a consequence of local self-government and a precondition for strengthening decentralisation;
- e. Considering that the nature, scope and methods of these controls must not result in an unjustified restriction of local self-government;
- f. Considering that the nature and scope of controls on local authorities' acts must be differentiated depending on whether they are tasks implemented on behalf of superior authorities or acts within «own» competencies;
- g. Considering that a possibly lack of clarity in local self-government statute, and in particular in definition of competencies, constitute one major threat for this self-government and can result in an exorbitant control on local authorities acts;
- h. Considering that Article 8 of the Charter indicates the framework concerning supervision of local authorities' acts: any administrative supervision of local authorities' acts must be provided for by the constitution or by statute, be normally limited to the legality of acts and be exercised in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect;
- i. Considering that these principles also apply to administrative sanctions concerning local elected representatives;
- j. Considering that, under Article 11 of the Charter, local authorities must have the right of recourse to a judicial remedy in order to secure free exercise of their powers, which implies the possibility of recourse against improper exercise of control functions;

k. Considering that transparency is the best guarantee of conformity of public authorities' acts to the interests of the community, that it is an essential pre-requisite of an effective political control by citizens and that, therefore, strengthening it allows the reduction of other forms of control;

l. Considering that the experience of many member States shows that it is possible to make the systems of control evolve in a favourable way towards local self-government without endanger their effectiveness;

m. Having regard to Recommendation 20 (1996) of the Congress of Local and Regional Authorities of Europe;

n. Having regard to the report of the Steering Committee on Local and Regional Democracy on control and auditing of local authorities action<sup>1</sup>;

Recommends to the governments of member States:

1. To establish that, unless the contrary is provided for by the law, it must be considered that local authorities implement their own competencies;

2. To exclude supervision of expediency of the acts that local authorities take in the exercise of their own competencies and, if necessary, to provide for supervision of expediency only for acts of execution of delegated tasks, when the importance of these acts justifies this kind of supervision;

3. To establish that any supervision may only be exercised according to such procedures and in such cases as are provided for by the constitution or the statute;

4. To recognise the essential role of political control by citizens and to foster the implementation of this control, namely through the use of the instruments of direct democracy which are considered appropriate;

5. To strengthen the transparency of local authorities' action and, in particular, to ensure the public nature of all decisions which engender financial costs to be born by the community, as well as the real possibility for local tax-payers to consult them in conformity with the procedures established according to the law;

6. To establish that supervisory authorities must adopt the methods and measures which least damage local self-government while allowing the appropriate results to be achieved;

7. To allow administrative sanctions concerning local authorities' representatives (suspension or dismissal of local elected representatives and dissolution of local bodies) only exceptionally, to accompany their use with the appropriate guarantees, in order to ensure their compatibility with the free exercise of local electoral mandates, and to give preference to substitution of action procedures in order to reduce the cases where the above mentioned measures should be taken;

8. To favour procedures that local authorities can themselves initiate for solving their internal conflicts, in order to avoid the intervention of the supervisory administrative authorities;

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<sup>1</sup> Study series "Local and regional authorities in Europe", N° 66

9. To provide for the local authorities' right to a judicial remedy against the decisions taken by the administrative supervisory authorities, and to establish that, in the case of litigation, is it for the court to decide in the final instance on the legality of local authorities' acts;

10. To undertake, if necessary, the appropriate legislative reforms in order to improve consistency between the systems of control and the principle of subsidiarity, and the effectiveness of these systems, taking into account the guidelines appearing in appendix to this Recommendation.

## Appendix

### *Guidelines*

#### *on the improvement of the systems of control of local authorities' action*

#### **I. Guidelines on the simplification and weakening of forms of administrative supervision**

- To favour the attribution of own tasks more than the delegation of tasks, resulting in a limit on expediency controls.
- To enumerate clearly, in statutory provisions, the acts subject to the control.
- To limit compulsory *ex officio* administrative supervision to acts of a certain significance, as far as this kind of supervision can be effectively replaced in other cases by supervision at the request of interested parties.
- To reduce *a priori* administrative controls (those where the involvement of a government authority is necessary for a local decision to take effect or be valid), this being justified by the fact that citizens have the right to appeal before the court, even when the act in question got through the *a priori* control.
- To change progressively the administrative controls in pre-litigation mechanisms, the effects of controls being limited to contesting the local authority act considered illegal, in the framework of judicial remedy.

#### **II. Guidelines on the development of alternative mechanisms to administrative supervision**

- To strengthen the dialogue between central and local authorities.
- To strengthen the function of advising and assessing, which some bodies (independent from central administration or part of this administration) may have, in particular in the financial and management field.
- To strengthen the role of the independent bodies, as ombudsmen and mediators, in verifying the legality of local councils' decisions.
- To strengthen internal mechanisms of control, in particular in the financial and management field.

### III. Guidelines concerning the supervisory procedures

#### i) Judicial procedures

- To exclude the court replacing the local authority in the evaluation of the expediency of an act: where supervision of expediency is necessary, this should be a task for administrative supervisory authorities.
- To give the courts the power to adopt interim measures, when these measures are justified by the urgency and/or the risks of a damage which could not be remedied: where the supervisory administrative authority can annul the act subject to the control, the court which deals with the case should be given, in general, the power to suspend the annulment decision; in the same way, the court should be able to suspend the local authority act when an appeal is lodged by the supervisory administrative authority for the annulment of such an act.
- To provide for appropriate measures in order to ensure the full and immediate execution of courts' decisions concerning the legality of the act subject to a control, including the procedures for substituting the authorities at fault.
- To provide for appropriate measures in order to reduce the length of examination of cases brought before the court, as the length of judicial procedures runs counter to legal security and may prejudice the usefulness of the control.

#### ii) Supervisory procedures before the administrative authorities

- To provide, if possible, that there is only one first instance supervisory authority; where the intervention of specialised supervisory authorities (depending on the content of the act subject to control) is required, to define precisely the sphere of the respective competencies of these bodies, in order to avoid uncertainty on the authority which actually has to exercise the control.
- To set, in statutory texts, the time limit granted to the supervisory authority in order to take a decision; to establish that the absence of any decision within the given time limit signifies agreement.

#### iii) Financial control and control on management

- To avoid that financial controls and controls on management result in control of the expediency of choices made by local elected representatives.
- To organise these controls in order to: foster good accounting practices and the effectiveness of management, prevent financial imbalances, monitor financial rehabilitation of local authorities which encounter financial difficulties and enlighten citizens with complete and objective information.

### IV. Guidelines on the prevention of the risk of informal control

- To prevent, as a general rule, local authority staff members being dependent on authorities other than the ones that employ them, when taking decisions as part of their duties.

– To avoid relations between local authorities and central government departments working with them leading to the replacement of a reduced level of official supervision by unofficial «technical» control.