SECRETARIAT GENERAL

DIRECTORATE GENERAL II - DEMOCRACY

DIRECTORATE OF DEMOCRATIC GOVERNANCE

Please quote : AT/OK

Strasbourg, 20 May 2014

CELGR/PAD (2014)1

APPRAISAL REPORT

Organic Law of Georgia - Local Self-Government Code

This appraisal was prepared by the Centre of Expertise for Local Government Reform, Directorate General II – Democracy, Council of Europe, in co-operation with Prof Robert Hertzog, Professor emeritus University of Strasbourg, France

Background

In the framework of co-operation between the Council of Europe (CoE) and the Georgian authorities, the CoE provided several expert opinions and recommendations on the draft Organic Law of Georgia, Local Self-Government Code. The most recent document, CELGR/PAD (2013)3 was submitted in December 2013. It provided assessment of the last version of the draft law, and the compatibility of its provisions with established European norms and standards.

Following this appraisal, the draft law was revised and the Code was adopted. In April 2014, the Georgian Ministry of Regional Development requested an appraisal of the adopted Code. This document therefore provides an expert opinion on how the previous CoE recommendations were taken into account in the adopted legislation.

General Remarks

There were three sets of general remarks on this legislation.

The first set concerns the wording. The text of the Code concentrates on the new governmental policy, and less attention is paid to the actual wording, although this could be a translation issue. Nevertheless, the laws should contain only normative provisions that have legal significance, and add new provisions to the existing legislation. For example, the objective of provisions of Article 5, on "Legal basis for implementing local self-government" is not clear: does it mean that *the present law* has to respect the different legal sources (which would not be very consistent)? Or that the *LSG authorities* will have to respect them? Article 13 says that "The decision of the Parliament of Georgia ... shall be appealed according to the rule established by the legislation of Georgia". This is not a normative provision but rather a tautology.

Next, the legal entities are defined in a very complicated way, through a long description of physical, economic or sociological issues, something that is legally speaking not necessary. Public entities, especially the local ones, were seen in the past as being part of the productive system and therefore needed to be described in economic terms in order to receive resources or competences from the competent central planning authorities. This is no longer the case and therefore these explanations seem less necessary or not necessary at all.

The second set of comments is about the pertinence and efficiency of the provisions. The previous appraisal pointed out some provisions that might create difficulties in implementation or have negative effects.

The third set of comments relates to the respect of the European Charter of Local Self-Government (ECLSG). In the draft, there were not many provisions that were seriously in contradiction with the Charter.

Specific Remarks

This is not a full comment on the new Code. This paper provides comments only on the articles which are related to the ECLSG.

Articles 2-4: Concept of Local self-government and new municipality

The CoE fully supported proposals to reshape the structure, size and therefore the number of municipalities, but recommended a better definition of the new LSG entities. While some observations have been taken into account, the adopted text does not contain a major improvement in the definition of the new municipalities. Articles 2-4 are nearly the same as in the draft and the COE comments on them could be reiterated.

Articles 2 states that "The local self-government unit is a municipality" and then Article 3 states that "Local self-government is exercised in municipalities – self governing cities and self-governing communities", the two latter ones being also municipalities. This is really confusing, unless in Georgian there are different words to describe these municipalities.

The issue is therefore about whether or not there is a single concept of "municipality". There could be different sub-divisions or categories, but they must have some specific legal regime, they cannot be simply denominations (cities, communities etc.) without legal consequences. Furthermore, the law makes no difference in the election, statute or competences of the authorities, Gamgebeli or Assembly.

It would be much clearer if there would be a separate article describing criteria for the creation of new municipalities, and explaining that they can include villages, boroughs, settlements, localities and cities, with a precise definition of each one of these terms. The legal provisions could then also be more precise on the definition of the characteristics and the size of new municipalities in order to draw a frame for action of the State Commission for Regional Development (established by the resolution N 297 of September 28, 2010 of the Government of Georgia). See also the remark on Art. 152 below.

Article 4 defines the primary territorial unit of settlement.

The CoE appraisal of the draft law recommended that "the law should not create artificial administrative categories without legal content". The Parliament of Georgia can consider it important to say that all municipalities do not have the same size, the same sociological and economic characters, or the same cultural and political functions. However, it should be clear that these are not *distinct* categories of local self-government.

Articles 10-12 contain much more details on the procedures, which is an improvement compared to the draft.

Article 16 states that "The own powers of the municipality defined by the second part of this article are exclusive authorities". This definition is not clear. Article 4.4 of the ECLSG states that "Powers given to local authorities shall normally be full and exclusive" but this does not refer explicitly to the concept of "own". According to Article 8.2 of the ECLSG, the best

definition of this concept is: "own" powers are the powers the exercise of which – by the municipality – is subject to State supervision on the grounds of legality, i.e. compliance with the law, not on the ground of expediency (whether it is appropriate or not). Misuse of power on ground of expediency can be argued by the State only in case of "delegated" powers. This idea is actually present in the Code under the provisions on supervision.

Article 17.3 - delegation of powers: "The decision on delegation of the State/autonomous republic powers on the basis of an agreement is made by the government of Georgia/autonomous republic. The agreement is concluded between the municipality and the relevant ministry according to Sections 2 and 4 of this Article."

Like other powers of LSG units, delegated powers should be decided by the law, be permanent, as long as the law is not changed, and general for all municipalities or at least all similar municipalities (e.g. similar size of population, containing forest territory, mountains, particular economic situation, etc.). The delegation should not benefit a given municipality by virtue of contractual procedure, as the article seemingly stipulates. This may create inequalities between municipalities and allow the ministries to choose the "good" ones who will get additional powers. Delegation is not meant to be for limited tasks or limited duration. The law might allow the ministers, under conditions and following the procedures provided by the law, to decide to delegate certain State powers to LSG, in general. This must then be done by a normative act and not a contract.

Articles 20-22 take CoE recommendations into consideration and are now much clearer and more pertinent than in the draft version.

Article 51 creates a procedure of non-confidence rather than impeachment, which is a positive step. This procedure is very complicated so much so that it should not be abused every time when there is a conflict between the executive and the assembly.

However, the risk of strong or persisting disagreement between Gamgebeli and Sacrebulo is embedded in the system. There are only two possible solutions to overcome the problem: either to leave the final decision to the government, which can decide to call new elections either of the council or of the mayor, or to create a procedure that will oblige the two sides to compromise.

Articles 61-90: this is the new Chapter VI on Administrative-legal acts of municipality and its officials. It represents another improvement of the Code, and a good solution of the issues raised by the previous CoE appraisal.

The previous CoE appraisal did not contain any specific observations on the **Government of Tbilisi**. Yet, these provisions in the adopted law are not very clear on how this government, which mimics the central government, will work exactly. It is not easy to understand how the powers will be shared between this body with a long list of functions and the mayor, directly elected by the citizens and holder of the general executive authority in the city. The main question is: who is the genuine executive authority, the mayor or the government?

There is nothing in the law on the procedures of decision in the government. Is it by majority? Who has the final word? Will all the members of the government need to sign mayor's decisions? It would be preferable to say that these matters must be discussed during government sessions and that a public abstract of its meeting should be available, and that the final decision is taken and signed by the mayor, on proposal of the government.

The **budget provisions** of the law are mostly of organic or procedural nature. But they don't provide a workable solution to the fundamental financial weakness of Georgian municipalities which is due to lack of fiscal resources and the disputable way in which State grants are calculated. Hence the need for a new law that would deal specifically with these issues.

Article 90 - independence of municipal budget. The law states that "the budget of municipality is independent from ... the State budget of Georgia". This technically true since the municipal budget is *distinct* from the State budget but on substance municipal budgets are heavily *dependent* on State subsidies. This statement could therefore have been omitted. "The independence of the budget of municipality is guaranteed by its own revenues" is also a not very credible statement, since the municipal budgets in Georgia do not have much of own revenues; they are mostly dependent on the State grants.

As the previous CoE appraisal pointed out, the system of local finance, and in particular the local taxation, is still under-specified both in this draft Code and in the Budgetary Code. There is currently no legislation in Georgia with a good description of the system of local taxation, and this should be subject to further reforms. The CoE provided a number of recommendations in this area in the past.

The previous appraisal made also remarks on the insufficient clarity of certain provisions on property. It is still unclear if the word "property" means only land and real estate or also other types of property. Are there different categories of "properties"? There is still a need for precise delimitation of land and other real estate which would fully belong to municipalities.

Article 140 - Audit of the activities of the Municipal entities. It would be recommended to say more on the status of internal auditor. How independent is he/she? Is the auditor under the supervision of Sakrebulo or Mayor, or none of them? This is not so much a matter of more legal provisions but of professional capacity of the person in charge of the audit.

Art. 146 - Status and Authority of Regional advisory council. This is not a local self-government administration, with obligation to comply with the ECLSG. It is in fact a State procedure of consultation of LSG entities and it is logic that the initiative is given to the governor to call and run the meetings. Then, it is up to the delegates of municipalities to be more or less influential and efficient.

Article 152 - territorial optimisation of municipalities. This article gives full authority to the State Commission for Regional Development established in 2010 by the resolution N° 297 of the Government of Georgia "On approval of the provision of State Commission for Regional Development of Georgia" to develop the criteria of territorial optimisation of municipalities within one month after adoption of the Code.

This delay seems very short and, more importantly, as it was recommended by the previous CoE Appraisal, some guidelines for these criteria should be fixed by the law. The law should also identify priority criteria such as the minimum size of population, distance to the centre of the locality, existence of facilities and public services, etc.

Article 159 - Ensuring the development of infrastructure. The provisions of this article can be read as compliant or non-compliant with the ECLSG depending on how they will be implemented. There must be an initiative of the municipality, which allows State administration to intervene in a matter that is normally "own competence". The demand will be introduced by the Mayor, but does he need approval of the Sakrebulo? The new municipalities will not be fully operational in short term to manage infrastructure projects of greater importance and it could be in their interest that certain tasks are fulfilled by line ministries who have the expertise and human resources. However, two issues will need to be solved, i.e. who will cover the costs, and who will be supervising these operation.