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Financial Autonomy of Local Self-Governments Considering the European Charter of Local Self-Government

ABSTRACT: *The article is devoted to the Council of Europe's European Charter of Local Self-Government as a unique international document serving as a basis on which the systems of local self-government are built all over Europe. The author aims to provide insight into the processes within the Council of Europe, which led to its adoption, to describe its character, to identify its advantages and shortcomings, and to evaluate its overall significance as a vital benchmark for measuring the degree of local self-government across the continent. The focus of this article is on the importance of the Charter from the perspective of local authorities' financial autonomy. The author investigates how the issue of financing is generally perceived by the Charter and the related documents, while most of this study is dedicated to the individual provisions of the Charter concerning the various aspects of financial autonomy, from the general adequacy of funds to more specific issues such as the equalisation mechanisms or the right to borrow from the capital market. Using the documents issued by the Council of Europe bodies, and the opinions of scholars dealing with the topic, the author scrutinises, what kind of obligations arise from the respective provisions, also touching upon how well the ratifying states implement these obligations.*

KEYWORDS: *local self-government, Council of Europe, European Charter of Local Self-Government, local authorities, financial autonomy, The Congress of Local and Regional Authorities.*

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1. Introduction

Administrative relations and structures have always been areas in which states viewed themselves as the only authority to lay down rules.¹ Moreover, the administrative build-up of states can be fairly different, even in countries with similar legal systems. Considering these circumstances, it is not surprising that there are not many international conventions on the principles of local self-government. However, there is one notable exception. The European Charter of Local Self-Government (hereinafter referred to as the 'Charter'), adopted by the Council of Europe in 1985, is the only treaty with binding effects under international law.² This study introduces this unique international document by briefly elaborating on the circumstances and events leading up to its adoption, character, and monitoring mechanism. The main objective is to present the provisions through which the Charter intends to secure financial stability and autonomy for local authorities.

2. The origins of the Charter

It is no coincidence that the Charter was adopted under the auspices of the Council of Europe. The organisation seeking to promote human rights, democracy, and the rule of law in Europe has a long tradition of channelling the opinions and interests of local communities. As early as 1957, the Conference of Local Authorities of Europe was established within its framework as an advisory body to address local government issues.³ This institution, re-established several times under different names⁴ over the decades, has pursued the adoption of a binding treaty on local self-governance since the earliest stages of its existence. There were several such attempts in the 1960s, but all were rejected by the Committee of Ministers for various reasons, including the fact that they designated the European Court of Human Rights (hereinafter also referred to as 'ECHR') as a body endowed with the authority to resolve legal disputes between local authorities and state parties, which turned out to be an overly ambitious idea.⁵

The breakthrough occurred over a decade later. At the beginning of the 1980s, a new draft proposal was formulated under the leadership of Lucien Harmegnies, the

1 Boggero, 2018, p. 287.

2 Himsworth, 2015, p. 5; Congress of Local and Regional Authorities, 2005, p. 2.

3 Boggero, 2018, p. 17.

4 In 1975, the Conference of Local Authorities of Europe was first reorganized into the Conference of Local and Regional Authorities of Europe, later to become the Standing Conference of Local and Regional Authorities of Europe in 1979, and finally, in 1994 the Congress of Local and Regional Authorities (hereinafter referred to as 'Congress'). See Himsworth, 2015, p. 9.

5 Boggero, 2018, p. 20.

former Belgian Minister of the Interior and the Mayor of Charleroi. This time, the proposal used more restrained terminology and excluded any provisions on the involvement of the ECHR. Still, the proposal needed further softening to become acceptable for adoption: after lengthy debates resulting in the weakening of the obligations arising from the text and the significant weakening of its monitoring mechanism, the Charter was finally adopted by the Committee of Ministers in 1985.⁶

The idea of protecting the prerogatives of local authorities at the international level did not emerge out of thin air. It is often argued that the European Charter of Municipalities⁷—a political declaration adopted by the Council of European Municipalities—served as an important source of inspiration for the Charter's preparation. A document characterised by very ardent and ambitious wording, the European Charter of Municipalities consequently uses the term 'freedom', emphasising the inherent character of the rights of local communities to govern themselves and the need to protect this right from any intervention or impediment by superior authorities.⁸ As the basis of rights listed in the document, the drafters expressly referred to 'centuries-old traditions' of municipal liberty in Europe.⁹ Consequently, the rich historical roots of local governance provided a major philosophical basis for the drafters of the European Charter of Local Self-Government, either directly or indirectly, through the European Charter of Municipalities. Some authors argue that the decision to label a document as a 'Charter' can be attributed to this fact.¹⁰

3. The Charter as a constitutional basis of local self-government in Europe

The aim of the Charter is concisely stated in its Explanatory Report: to lay down '*common European standards for measuring and safeguarding the rights of local authorities*'. It contains rules for guaranteeing their '*political, administrative, and financial independence*'. The legally binding nature of the Charter is emphasised in its first Article stating that '*Parties undertake to consider themselves bound by the following article in the manner and to the extent prescribed in Article 12 of this Charter*'. While the ability to impose legal obligations on state parties is indeed the quality

6 Ibid., 2018, p. 22.

7 The whole text of the European Charter of Municipalities can be found at the following address: https://www.ccre.org/img/uploads/piecesjointe/filename/charter_municipal_liberties_en.pdf. Some authors refer to the document as the 'European Charter of Municipal Liberties', see Boggero, 2018, pp. 6, 19, 36.

8 Boggero, 2018, p. 6.

9 See the Preamble of the document.

10 Boggero, 2018, pp. 6–12.

that distinguishes the Charter from other non-binding declarations in the field, the second part of the quoted provision foreshadows that the assurances provided by the Charter might not be categorical. This is confirmed in Article 12, to which Article 1 is referring. Article 12 enables state parties not to commit themselves to certain provisions of the Charter by stating that every ratifying state must be bound by at least 20 provisions of the document, 10 of which must be selected from the 14 core provisions listed in the article. This unique construction creates a situation in which there is no single provision in the Charter that state parties must ratify unconditionally. The rules allowing for extensive reservations regarding the obligations introduced constitute a major weakness of the Charter.

After its adoption, a monitoring procedure was gradually developed within the framework of the Council of Europe to oversee the implementation of Charter obligations. The reason a process is mentioned in this regard is that the text of the Charter itself contains only very weak grounds for establishing a monitoring mechanism. The only provision that can be of some relevance from this perspective is Article 14 requiring state parties to *'forward to the Secretary General of the Council of Europe all relevant information concerning legislative provisions and other measures taken by it for the purposes of complying with the terms of this Charter'*. The Charter thus differs considerably from the European Convention on Human Rights or the European Social Charter, as it does not create an institutional system of control, it does not authorise a specific body to oversee the implementation of the document, and it does not determine any concrete competencies in the field of monitoring.

To fill the gap left by the text of the Charter, the rules and principles articulated in the Statute of the Council of Europe,¹¹ as well as the theory of 'implied powers', had to be used as a legal basis for the creation of a meaningful monitoring mechanism.¹² Already at the beginning of the 1990s, the Standing Conference of Local and Regional Authorities of Europe (the predecessor of the Congress of Local and Regional Authorities, hereafter referred to as the 'Standing Conference') made two efforts to establish a monitoring system for Charter compliance.¹³ Immediately after the creation of the latter, the Committee of Ministers commissioned the Congress of Local and Regional Authorities to *'submit proposals to the Committee of Ministers in order to promote local*

11 See Arts. 3, 8, and Art. 15 para. b of the Statute, which establish the requirement of sincere and effective collaboration in the realization of the aim of the Council (Art. 3), the consequences of the violation of Art. 3 (Art. 8) and the right of the Committee of Ministers to issue recommendations and to request information from the member states on the actions taken by them with regard to such recommendations (Art. 15 para. b).

12 See Boggero, 2018, pp. 52–55.

13 See Resolution no. 223 on the role of local and regional authorities in integration policy between Western and Eastern Europe and Resolution no. 233 on the implementation of the European Charter of Local Self-Government.

and regional self-government'.¹⁴ The authorisation was further elaborated in 2000 by ordering the Congress to 'prepare on a regular basis country-by-country reports on the situation of local and regional democracy in all member states and in states which have applied to join the Council of Europe, and shall ensure, in particular, that the principles of the European Charter of Local Self-Government are implemented'.¹⁵ Thus, the Committee of Ministers solved the issue of Charter monitoring by delegating its supervisory competencies to the Congress in the field of local and regional democracy (which is a broader concept than the Charter itself).¹⁶

The above-mentioned development resulted in the establishment of a thriving system of follow-up activities to the Charter, which intensified and systematised over time.¹⁷ Along with country-by-country reports prepared by rapporteurs assisted by independent experts following their monitoring visit, recommendations suggesting possible ways of improvement were also adopted. The goal is to trigger continuous political dialogue with state parties, through which the quality of local democracy can be improved.¹⁸ As may be evident from the nature of the whole process and the terms used for them, the outputs of the monitoring process are essentially non-binding instruments, meaning that the degree of the dialogue's success ultimately depends on the willingness of the state party under scrutiny.¹⁹ Nevertheless, these outputs have emerged as valuable sources documenting the state and development of local democracy in ratifying countries, including its financial aspects.

A further archetypal feature of the Charter is the vagueness of its provisions, which seriously undermines its binding force.²⁰ Although there is no doubt that the Charter is binding on an international level, the judicial authorities of several state parties have denied (or significantly restricted) the direct effect of the Charter within the domestic legal order, referring precisely to the overly general nature of its provisions. The decisions of the Constitutional Courts of Austria,²¹ Italy,²² or Poland²³ could serve as examples. The linguistic generality used in the Charter makes it difficult to draw definite conclusions during the monitoring process because imprecise provisions render it difficult to justify overly critical verdicts. Contrastingly, the vague wording was not a result of a mistake or negligence but

14 Committee of Ministers, 1994, Art. 2, para. 1, b).

15 Committee of Ministers, 2000, Art. 2, para. 3.

16 Himsworth, 2015, p. 99.

17 Ibid., p. 119.

18 Ibid., p. 110.

19 Boggero, 2018, p. 65.

20 Congress of Local and Regional Authorities, 2005, p. 3.

21 Verfassungsgerichtshof (VfGH). Case no. B1407/91.

22 Corte costituzionale. Decision no. 325/2010 and Decision no. 50/2015.

23 Trybunał Konstytucyjny. Case no. K 24/02.

a conscious decision during the drafting process, which was intended to ensure that the document received the widest possible support from the Council of Europe member states.²⁴

This intention turned out to be successful, as all member states of the Council of Europe signed and ratified the Charter.²⁵ Notwithstanding the deficiencies touched upon above, the positive development in the field brought about by the monitoring activity demonstrates that the Charter became a document earnestly respected by participating countries.²⁶ It is not by accident that a decade ago, the Council of Europe itself classified the treaty as belonging to the most prominent category of its documents (*'Conventions with numerous ratifications and considered as key'*).²⁷

Although the overly abstract provisions of the Charter could be seen as a weakness from a certain perspective, this feature meant that (instead of being directly applied in concrete cases) it was often used by the judiciary as an interpretative tool or reference standard in cases concerning local self-government.²⁸ However, the Charter played an indispensable role from another perspective in Central and Eastern Europe, where countries were looking to be part of European integration. As there was no (real) system of local or regional self-government during the socialist period, the Charter served as a comprehensive template on which rules concerning local governance could be based in these countries.²⁹ The general nature of the Charter's provisions was an advantage in this case as they made the document sufficiently flexible to adapt to the peculiarities of each country.³⁰

Since its adoption, the Charter has been endorsed by 46 European countries, inspiring and influencing legislation on local self-government throughout the continent. Over time, it became a unique yardstick and established minimal international standards in this field.³¹ Given its success and the fact that it is the only treaty of its kind, no other document comes close to embodying general principles in the sense of European law in the given sphere. It is therefore not an overstatement that the principles encompassed in the Charter act as the nucleus of a common European 'constitutional' basis of local government law.³² Moreover, this basis is consistent and comprehensive, and deals with various aspects of local self-government. The

24 Himsworth, 2015, p. 121.

25 All signature and ratification dates of the Charter can be found at <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatyid=122>

26 Himsworth, 2015, p. 171.; Boggero, 2018, p. 277.

27 Council of Europe. Secretary General, 2012.

28 Boggero, 2018, pp. 77–78

29 Himsworth, 2015, p. 148.

30 Ibid.

31 Boggero, 2018, p. 71.

32 Ibid., 2018, p. 288.

following part of the paper offers a more detailed look at one of the most important dimensions: the financial dimension of local autonomy.

4. Financial autonomy of local self-governments in the Charter

The importance of financial aspects of local self-governance was not underestimated by the responsible bodies of the Council of Europe. Shortly after the adoption of the Charter, the Standing Conference proposed protecting the financial interests of local authorities through another legally binding international convention specifically drafted for this purpose. The result of this effort was the European Charter of Local and Regional Finance, which was meant to supplement the financial guarantees of local authorities in the European Charter of Local Self-Government with more elaborate provisions.³³ However, the project turned out to be unsuccessful. The convention was never opened for signature and was completely called off after the European Charter of Local Self-Government went into effect in 1988.³⁴

With the failure to extend the guarantees of local authorities' financial autonomy through a special treaty, the provisions in the Charter remained the only legally binding international rules on the given matter. While the respective provisions in the Charter are understandably more concise than those meant to constitute a separate convention, it cannot be said that the Charter would turn a blind eye to the financial aspects of local self-government.

The question of financing received substantial attention from charters. This is already apparent in the final paragraph of the preamble, which implies the essential qualities of local self-governance.³⁵ It also stresses the importance of local authorities possessing the resources required to fulfil their responsibilities.³⁶ The appearance of this note in the preamble means that the elementary rule of local government financing; that is, the need to accompany the tasks and responsibilities of local authorities with corresponding funding, is already emphasised in the initial part, explaining the rationale behind the whole treaty.

The Explanatory Report to the Charter follows up on this idea, stating at one point that *'the legal authority to perform certain functions is meaningless if local authorities are deprived of the financial resources to carry them out'*.³⁷ In addition, the Explanatory

33 Maier, 1989, p. 205.

34 Boggero, 2018, pp. 24–27.

35 Himsworth, 2015, pp. 32–33.

36 Preamble of the European Charter of Local Self-Government, para. 1.

37 Explanatory Report, Part C. Commentary on the Charter's provisions, Article 9.

Report mentions financing questions twice in its general remarks. It first clarifies that the principal aim of the document is to commit states to guarantee the political, administrative, and financial independence of local authorities. Further, when introducing a rough sketch of the Charter, it states that a ‘major article’ in the document is meant to ensure that local authorities have adequate financial resources at their disposal.

5. Article 9 as the cornerstone of the local self-governments’ financial autonomy

The ‘major article’ to which the Explanatory Report is referring to is Article 9 of the Charter. The article deals exclusively with questions concerning the financial condition of municipalities and does so in a comprehensive way. With eight paragraphs, it is the most extensive among all the substantive articles of the Charter. It was also the most controversial and problematic article during the adoption of the document. The paragraphs of Article 9 were subject to the lengthiest debates during the drafting process, as states were reluctant to sanction any legal assurances concerning the financial autonomy of local authorities.³⁸

To secure the eventual approval of the States, tough compromises had to be made, causing a significant softening of the wording of the article. Most paragraphs could remain part of the Charter only after the removal of certain lines or the insertion of phrases that relativised the obligations arising from them, such as ‘*within the limits of statute*’, ‘*within national economic policy*’, ‘*in an appropriate manner*’, or ‘*as far as practically possible*’.³⁹ The following parts of the paper will provide a more detailed look at all eight paragraphs of Charter 9, presenting their final wording and outlining their interpretation, scrutinising the obligations stemming from them, and evaluating their overall significance.

5.1. Paragraph 1

Local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers’.

³⁸ Boggero, 2018, p. 202.; Himsworth, 2015, p. 60.

³⁹ Himsworth, 2015, pp. 61-62.

This paragraph is a broad provision that practically imposes recognition of the principles of fiscal decentralisation⁴⁰ and fiscal equivalence⁴¹ on state parties.⁴² This requires that state parties enable local authorities to acquire their own financial revenue and spend it according to their own preferences.⁴³

As is evident from its wording, the paragraph contains dual authorisation. While the Explanatory Report to the Charter reflects only one of them, stating that the *‘paragraph seeks to ensure that local authorities shall not be deprived of their freedom to determine expenditure priorities’*, the contemporary commentary to the Explanatory Report⁴⁴ (hereinafter referred to as ‘Commentary’)—a document issued recently by the Congress reflecting the experiences from the normative and monitoring work done so far—clarifies that paragraph 1 establishes the entitlement of local authorities to own resources,⁴⁵ and also the freedom to dispose of (at least) these own resources.⁴⁶

Here, the question arises: what should be understood by the term *‘financial resources of their own’*? In the context of the Charter, those resources fall into this category, which are either raised upon the independent decision of the local authority, without any possible intervention of higher authorities in the process, or resources of a local nature that are not immediately levied by local authorities; however, the revenue stemming from them cannot be discretionally altered by the state.⁴⁷ By this logic, central transfers and shared taxes assigned to local authorities cannot be categorised as ‘own resources’, and an overly high dependence of local self-governments on these resources to the detriment of their own resources is a potential breach of Article 9, paragraph 1.⁴⁸ This distinction seems to be supported by the Council of Europe’s Steering Committee on Local and Regional Democracy (hereinafter referred to as the ‘Steering Committee’), which, in one of its studies on local finances and

40 The World Bank understands the principle of fiscal decentralization as the transfer of (certain) expenditure responsibilities and revenue assignments to lower levels of government. http://web.worldbank.org/archive/website01061/WEB/0__CO-11.HTM

41 The principle of fiscal equivalence requires that the territorial incidence of the benefits of a public policy coincide with the geographical boundaries of the government operating and financing the program. See: von Hagen, 2002. The Committee of Ministers perceives fiscal equivalence at the local authority level as a requirement according to which a given local authority should be able to finance the expenditures it decides on from its own resources to the greatest possible extent. See Committee of Ministers, 2005, Appendix, Part I, Art. 2, para. 6. For a more detailed look at the principle of fiscal equivalence, see Olson Jr., 1969.

42 Boggero, 2018, p. 204.

43 Akkermans, 1990, p. 296.

44 Congress of Local and Regional Authorities, 2020.

45 Commentary, para. 142.

46 Commentary, para. 147.

47 Schaffarzik, 2002, p. 512.

48 Commentary, para. 148.

taxation, contrasted 'own resources' with 'transferred resources'. The latter category included, inter alia, shared taxes and central transfers.⁴⁹

The second dimension of paragraph 1, the freedom of local authorities to freely dispose of their own resources, means that states must refrain from influencing decisions on how to use these funds. This rule renders the earmarking of resources contradictory to the Charter. Article 9, paragraph 1, has a strong connection to Article 8, paragraph 2 at this point, as the latter prohibits expediency controls in the sphere of competencies.⁵⁰

The contracting parties must ensure that local authorities have the capability to use the rights assigned to them under Article 9, paragraph 1. This means not only legal and budgetary capacity but also the fiscal capacity to finance their own activities. At this point, the third aspect of paragraph 1 enters the picture: adequacy of resources.

While the term 'adequate' in paragraph 1 should be understood in a quantitative sense, as it solely relates to the amount of funds available to local authorities,⁵¹ one would look in vain for a precise guide in the Explanatory Report or the Commentary to determine what exactly is to be understood by this term. The reason for this ambiguity can be found in the activities of some countries during the drafting process of the Charter, which sought to remove the phrase 'adequate' from the wording of the paragraph. Although they failed in its complete removal, they managed to render the formulation of the paragraph so fluid and open to the interpretation that it is practically impossible to establish an objective quantitative rule for the assessment of whether funding is adequate under Article 9, paragraph 1.⁵²

However, comments regarding what can almost certainly be deemed satisfactory from the perspective of adequacy do exist. The above-mentioned study of the Steering Committee on local finances and taxation states that '*when own resources are not less than grants (general and specific grants) it may be considered that financial autonomy has a solid base*'.⁵³ While it would be hard to dispute this affirmation, the problem is that a situation in which the municipalities' own resources account for most total financial resources is rare across European countries. As the Congress noted in its recommendation from 2000, '*local authorities can boast a proportion of own resources equal to or greater than 50% of their total financial resources in only 8 Council of Europe member states*'.⁵⁴

Some conclusions can be drawn from the monitoring activities of the Congress. In one of its previous recommendations connected to a monitoring report, it concluded

49 Steering Committee on Local and Regional Democracy, 1999, p. 5.

50 Boggero, 2018, p. 205.

51 Boggero, 2018, pp. 208–209.

52 Himsworth, 2015, p. 63.

53 Steering Committee on Local and Regional Democracy, 1999, p. 55.

54 The Congress of Local and Regional Authorities, 2000, Appendix 1, Art. 2, a, para. i.

that the situation, in which the own resources of municipalities amount to 15% of all revenue is not in conform to Article 9 of the Charter.⁵⁵ Still, the Congress does not seem to be particularly consequent in following the previously mentioned benchmarks, and it (along with other Council of Europe bodies) completely refrains from establishing a general formula for evaluating the adequacy of municipal own resources.⁵⁶

According to the Commentary, the right to adequate resources is not absolute. Adequacy under Art. 9 para. 1 must be interpreted 'within national economic policy'. In accordance with this, the Committee of Ministers stated that in times of economic hardship, the amount or the ratio of resources at the local authorities' disposal could be shortened, provided that it does not impede the very essence of the principle of local self-government, and the criteria for such limitations remain '*clear, objective, and quantifiable*'. The Committee added that the limitations must above all be '*proportionate to the desired aim*' and '*lifted once they have achieved their aim*'.⁵⁷

5.2. Paragraph 2

'Local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the law'

The second paragraph of Article 9 contains the principle of concomitant financing⁵⁸ (also known as the principle of commensurability⁵⁹), which prescribes a proportionate relationship between the tasks executed by local authorities and the financial resources available for their proper fulfilment. The basic purpose of this provision is to prevent countries from diverting the costs of providing certain services from the state to local authorities.⁶⁰ However, there have been long-standing debates about what kind of obligation is precisely imposed on state parties by this provision.

A restrictive interpretation of this provision is supported by certain authors⁶¹ and naturally by contracting parties. According to this view, Article 9, paragraph 2 does not mean that any increase in the administrative expenses of local authorities

55 The Congress of Local and Regional Authorities, 1999, para. 47.

56 Boggero, 2018, p. 209.

57 For more details see Committee of Ministers, 2004, Appendix, Part 1, paras. 8–16.

58 Boggero, 2018, p. 210.

59 Commentary, para. 149.

60 Boggero, 2018, p. 213.

61 Akkermans, 1990, p. 295.

must automatically be accompanied by an increase in revenue. It only requires that the resources of these authorities be proportionate to the mandatory, delegated, and voluntary tasks they perform. If the resources of municipalities can be deemed proportionate, a change in funding will not have to occur even after acquiring an additional task.⁶² This approach is also reflected in the Explanatory Report to the Charter, which—rather cautiously—only states that *‘there should be an adequate relationship between the financial resources available to a local authority and the tasks it performs’*.⁶³

In contrast, a more progressive approach to this provision strictly suggests that any new task assigned to a local authority must come with appropriate financial compensation from the state. This interpretation is generally favoured by the Congress, which is also apparent from the text of the Commentary on this provision declaring that *‘any new task assigned or transferred to local authorities must be accompanied by the corresponding funding or source of income to cover the extra expenditure’*.⁶⁴

In 2011, the Committee of Ministers issued a recommendation dedicated to funding new competencies for local authorities through higher-level authorities.⁶⁵ Surprisingly, despite being the more reserved body in the Council of Europe that usually voices the opinion of member states, the Committee inclined towards the more progressive interpretation of paragraph 2 in this document, by articulating a rule according to which *‘when higher-level authorities take decisions which impose or could result in additional net costs for local authorities, compensation should be given by the higher-level authorities to local authorities’*.⁶⁶ The recommendation also contains rules on the amount of compensation, stating that when a new competency is assigned to local authorities, the amount of compensation must be based on the estimated net costs connected to their fulfilment.⁶⁷

Within the framework of its monitoring activity, the Council uncovered shortcomings related to Article 9, paragraph 2 in numerous countries. Difficulties in compliance with this provision are particularly widespread in Central and Eastern European countries, which could indicate insufficient funding from the local self-government sector.⁶⁸

62 Boggero, 2018, p. 213.

63 Explanatory Report, Art. 9. para. 2.

64 Commentary, para. 150.

65 Committee of Ministers, 2011.

66 Ibid. Part A, Art. 1, para. i.

67 Ibid. Part A, Art. 3, para. i.

68 Boggero, 2018, p. 214.

5.3. Paragraph 3

'Part at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate'.

At first glance, the third paragraph of Article 9 seems to be more specific than the first two paragraphs because it only concerns local taxation. This provision is closely connected to the first paragraph: it is specifying and complementing it. It specifies the line '*financial resources of their own*' by clarifying that part of these own resources should stem from local taxes. Consequently, under Article 9, para. 3, state parties must grant local authorities the possibility of introducing local taxation on their administrative territories. It also complements paragraph 1 in the sense that while it grants local self-governments the right to decide on their expenditures, paragraph 3 secures them the freedom to decide on at least a certain part of their revenues.⁶⁹

However, to have a genuine influence on such revenues, it is not enough for local authorities to decide merely on the introduction of the local tax. Under Article 9, para. 3, only those taxes can be regarded as local, for which they can determine the rate.⁷⁰ This requirement is also reflected in para. 157 of the Council's Commentary to the Charter. The reason behind this condition is that by these means, local representatives obtain a tool for making crucial political decisions; in this case, the setting of the local tax burden paves the way for political accountability⁷¹ and creates the possibility of tax competition between different municipalities.⁷² In addition, the Commentary mentions that local authorities should also have the opportunity to decide on other aspects of local taxes, such as tax relief or deductions.⁷³

Notwithstanding, the right of local authorities to influence revenue from local taxes is not absolute under the Charter. Governments can impose statutory restrictions on the freedom of local authorities to determine the rates. In practice, such restrictions can be realised in the form of minimum or maximum permissible tax rates, a requirement for approval by higher authorities, or a decision stemming from a procedure involving consultations between local authorities and the central government.⁷⁴

However, the restrictions introduced by the central government should be limited as well. The Explanatory Report provides; for example, that '*such restrictions must not*

69 Boggero, 2018, pp. 218–219.

70 Schaffarzik, 2002, p. 515; Weiss, 1996, pp. 197–198.

71 Commentary, para. 159.

72 Boggero, 2018, p. 219.

73 Commentary, para. 157.

74 Boggero, 2018, p. 221.

prevent the effective functioning of the process of local accountability, meaning that the restrictive rules cannot narrow the local representatives' freedom of decision to an extent that would practically prevent them from having a meaningful influence on the local tax burden. Another limitation is that such restrictions cannot render the local authorities' own financial resources inadequate, as this would result in a breach of Article 9, paragraph 1.⁷⁵

Unfortunately, para. 3 of Article 9 is characterised by feeble wording using the formulation of *'part at least'*, which results in a weak obligation placed on state parties.⁷⁶ Neither the Charter, nor the Explanatory Report does contain any information on what is to be understood by the phrase *'part'* appearing in the paragraph. A more concrete share is not offered even by the Commentary to the Charter, indicating that the Council may have been either unable or unwilling to formulate a specific benchmark within the framework of its monitoring activity. Sadly, the weak obligation contained in Article 9, para. 3 contributes (or at least does not help to improve) to the situation in which, in most state parties, local authorities either do not have the opportunity to introduce local taxes, which would fulfil the conditions laid down by the Charter, or these kinds of taxes have a marginal impact on their budgets.⁷⁷

Nevertheless, the amount of resources stemming from local taxes in a given country serves as a valuable source of information for the Congress during its monitoring activities, as it expressly states that the ratio of local tax income compared to overall revenues or overall tax income is a critical indicator of the quality of local self-governments' financial autonomy.⁷⁸

5.4. Paragraph 4

'The financial systems on which resources available to local authorities are based shall be of a sufficiently diversified and buoyant nature to enable them to keep pace as far as practically possible with the real evolution of the cost of carrying out their tasks'

The fourth paragraph of Article 9 aims to prevent local authorities from being excessively dependent on a single or very few types of resources, which would limit their ability to respond to various economic challenges. Therefore, resources responsive to inflation play an important role in the local revenue system.⁷⁹ As indicated in the

75 M. W. Schneider, 2004, p. 324.

76 Himsworth, 2015, pp. 61–62.

77 Boggero, 2018, pp. 223–224.

78 Commentary, para. 154.

79 Explanatory Report, Art. 9 para. 4.

text, responsiveness to challenges can be enhanced by offering local authorities a diverse scale of revenues. An exemplary list of such revenues is contained in the Commentary, which enumerates transfers, local taxes, charges, profits under private law, interest in bank accounts and deposits, penalties and fines, sales of properties and goods, and the provision of services.⁸⁰

The other key term in paragraph 4 is buoyancy. By this, the Charter means that the resources available to local authorities should be adaptable to the increasing expenditures resulting from the fulfilment of their responsibilities. For example, this can mean that the transfers provided by higher authorities should be revised periodically to keep up with increasing costs, or that local authorities should be able to increase the tax rates of various local taxes if necessary owing to inflation.⁸¹

5.5. Paragraph 5

'The protection of financially weaker local authorities calls for the institution of financial equalisation procedures or equivalent measures which are designed to correct the effects of the unequal distribution of potential sources of finance and of the financial burden they must support. Such procedures or measures shall not diminish the discretion local authorities may exercise within their own sphere of responsibility.'

The fifth paragraph aims to mitigate naturally occurring financial inequality among different local authorities. For various reasons, some municipalities inevitably have more limited possibilities of raising revenue than others. While these authorities have fewer financial resources, they are often required to fulfil the same tasks as their better-positioned counterparts, which could lead to serious financial difficulties or an inability to fulfil certain tasks properly. At this point, higher authorities should intervene and redistribute funds to offset imbalances.⁸² This is exactly what is imposed by the paragraph below.

There are two basic types of equalisation mechanisms: vertical and horizontal. Horizontal equalisation refers to the redistribution of the local revenues of certain (wealthier) municipalities to financially weaker ones, whereas vertical equalisation involves grants and transfers from central or regional authorities. While the Congress does not seem to clearly prefer any of the two types, mentioning the advantages of both solutions in the Commentary,⁸³ the Committee of Ministers favours vertical

80 Commentary, para. 161.

81 Commentary, para. 164.

82 Committee of Ministers, 2005, paras. 37–39.

83 Commentary, para. 167.

equalisation since horizontal redistribution could trigger a sense of resentment from the side of richer municipalities. The Committee holds that horizontal equalisation should only be used if *'local fiscal capacity varies so greatly that the decided level of equalization of resources cannot be achieved solely by means of government grants'*.⁸⁴

Apart from choosing the right type of equalisation mechanism, a further crucial task of the state parties is to strike an ideal balance in the functioning of the equalisation mechanism: the amount of aid should effectively help financially vulnerable local authorities but must not be over-dimensioned. Equalisation cannot supplement the revenue sources of local authorities, which otherwise should have been levied by them, for example, in the form of local taxes.⁸⁵ The second sentence in para. 5 clarifies that equalisation mechanisms must not be used to even out financial differences between local authorities.⁸⁶ Excessive equalisation will dissuade wealthier local authorities from exploiting their possibilities to raise their own revenue,⁸⁷ resulting in an economically suboptimal situation.⁸⁸ Finally, financial equalisation mechanisms must not be used to interfere with local authorities' freedom to act autonomously in the sphere of their own responsibilities.⁸⁹

5.6. Paragraph 6

'Local authorities shall be consulted, in an appropriate manner, on the way in which redistributed resources are to be allocated to them'.

At first glance, this paragraph may seem superfluous, as para. 6 of Article 4 ensures the right of municipalities to be consulted on any matter concerning them.⁹⁰ However, Article 9, para. 6 is meant to ensure a higher standard of the right to be consulted than para. 6 of Article 4. While according to the latter the general right to be consulted should be granted *'insofar as possible'*, Art. 9 para. 6 does not contain such a limitation. This means that under the sixth paragraph of Article 9, state parties are always obliged to consult local authorities whenever they decide on the redistribution of resources between them.

84 Committee of Ministers, 2000, Appendix, Part 2 Art. b).

85 Boggero, 2018, p. 227.

86 Schaffarzik, 2002, p. 523; Schneider, 2004, p. 327.

87 Congress of Local and Regional Authorities, 2000, Appendix 1, Art. 2, b, para. viii.

88 Steering Committee on Local and Regional Democracy, 1999, p. 51.

89 Boggero, 2018, p. 233.

90 The exact wording of the paragraph goes: *'Local authorities shall be consulted, insofar as possible, in due time and in an appropriate way in the planning and decision-making processes for all matters which concern them directly'.*

The Commentary makes it clear that the duty to consult applies not only to situations in which the legislature is implementing the redistribution of funds but also to all decisions on the question.⁹¹ The requirement that the consultation must be conducted ‘*in an appropriate manner*’ means that local authorities must be informed adequately in advance on the topic to be consulted, and state parties must ensure that they have sufficient time to express their views and formulate their observations during the process.⁹² The Commentary adds that regional or statewide associations of local self-governments are suitable partners for these consultations.⁹³

5.7. Paragraph 7

‘As far as possible, grants to local authorities shall not be earmarked for the financing of specific projects. The provision of grants shall not remove the basic freedom of local authorities to exercise policy discretion within their own jurisdiction.’

The penultimate paragraph of Article 9 prescribes a preference for non-earmarked grants over earmarked grants. The reason behind this provision is the presumption that earmarked grants enable higher authorities to acquire influence over the decisions of local authorities as they restrict their freedom of action, which contradicts the basic idea of the Charter.⁹⁴ Still, the Charter does not rule out the possibility of using earmarked grants. Both the Explanatory Report and the Commentary acknowledge that it would be unreasonable to expect state parties to completely discontinue the funding of local authorities via earmarked grants; for example, they may be justified in the case of major capital investment projects or as a way of implementing austerity measures.⁹⁵ However, the Commentary expressly states that using earmarked grants to cover operating costs (such as salary payments) is worrisome from the perspective of local autonomy.⁹⁶

Neither the Charter nor the Explanatory Report offers a specific ratio of earmarked to non-earmarked grants that would be deemed acceptable from the perspective of the provision, and such a ratio was not generally articulated by the Congress during its monitoring activity either. However, some authors argue that

91 Commentary, para. 173.

92 Commentary, para. 174.

93 Ibid.

94 Explanatory Report, Art. 9 para. 7.

95 Ibid.; Commentary, paras. 180 and 181.

96 Commentary, para. 180.

more than half of all transfers should be at the free disposal of local authorities.⁹⁷ In opposition to this view, the Explanatory Report states that ‘a higher ratio or project-specific grants to more general grants could be considered reasonable where grants as a whole represent a relatively insignificant proportion of total revenue’. This reasoning has been disputed by certain authors, claiming that Article 9, para. 7 only regulates the relationship between earmarked and non-earmarked grants and should not be linked to the relationship between grants and other types of revenues,⁹⁸ or that it is practically impossible for grants and transfers to represent only an insignificant part of the local authorities’ total revenues.⁹⁹ Nevertheless, the Council considers that a tendency to favour earmarked grants represents a clear threat to local authorities’ policy discretion, and may thus easily be contrary to Article 9, para. 7.¹⁰⁰

5.8. Paragraph 8

‘For the purpose of borrowing for capital investment, local authorities shall have access to the national capital market within the limits of the law’.

The last paragraph of Article 9 concerns the local authorities’ right to borrow freely as a supplementary tool for financing certain expenditures. According to this provision, local self-governments should be able to access the national capital market for this purpose. However, according to the Explanatory Report, this holds true only in relation to financing capital investment; loans from the capital market should not be used to fund current expenditure.¹⁰¹

Local authorities should borrow under their own responsibility; therefore, the central authorities should only offer guarantees for their loans under exceptional circumstances.¹⁰² As implied by the text of the provision, the rights contained in paragraph 8 are not absolute. States can limit the access of local authorities to capital markets to prevent excessive indebtedness.¹⁰³ Accordingly, local authorities should not be allowed to conduct speculative investments and should also be prohibited from using any kind of financing technique that hides the real level of their indebtedness.¹⁰⁴ Although the economic crisis in 2008–2009 triggered many austerity measures,

97 Schaffarzik, 2002, pp. 525–526.

98 Schneider, 2004, p. 328.

99 Schaffarzik, 2002, p. 527.

100 Commentary, para. 180.

101 Committee of Ministers, 2004, Appendix, Part 1, para. 24; Committee of Ministers, 2005, paras. 73–74.

102 Committee of Ministers, 2005, para. 76.

103 Commentary, para. 186.

104 Committee of Ministers, 2004, Appendix, Part 1, paras. 21–22.

causing the enhancement of restraints on local self-government borrowing, it remains applicable that these restraints established by the state must be justified and proportionate, as the arbitrary prohibition of borrowing can be seen as a disguised form of control over local self-government.¹⁰⁵ The fulfilment of the latter requirement seems to be problematic in many countries throughout Europe, where local authorities are either completely banned from borrowing in financial markets or such a possibility is generally subject to governmental approval.¹⁰⁶

6. Conclusion

Although the Council of Europe eventually dropped the project of adopting an international treaty devoted specifically to the question of local self-government financing, its more general relative, the European Charter of Local Self-Government, still contains considerably broad regulations on the topic. Its longest provision, Article 9 regulates a variety of aspects connected to the financial autonomy of local authorities, such as the general adequacy of funds available to them (para. 1), the requirement that these funds are commensurate with their tasks and responsibilities (para. 2), the possibility to introduce local taxes (para. 3), the diversity and buoyancy of resources at the local self-governments' disposal (para. 4), financial equalisation for vulnerable municipalities (para. 5), the right of local authorities to be consulted in the matters of financial redistribution (para. 6), the preference of non-earmarked grants (para. 7), and the right of local authorities to have access to the national capital market (para. 8).

Thanks to the uniqueness and overall importance of the document as well as the nature of its provisions, the system established by the Charter is seen by certain authors as a reference framework for designing the constitutional scheme of local government systems and measuring the degree of local autonomy across Europe.¹⁰⁷ Analogously, the rules and principles set forth in Article 9 of the Charter serve the aforementioned purposes regarding the financial autonomy of local self-government. Unfortunately, as is observable from the monitoring activity of the Council, the level of implementation of the obligations arising from the Charter is far from ideal, which also applies to provisions concerning financial autonomy¹⁰⁸ and is par-

105 Commentary, para. 186.

106 Congress of Local and Regional Authorities. Chamber of Local Authorities, 2014, para. 99.

107 Boggero, 2018, p. 280.

108 See Boggero, 2018, pp. 214, 222–224, 231–232, 238, 244–245.

ticularly true for Central and Eastern European countries.¹⁰⁹ It is thus clear that while the Charter is a suitable tool for creating an environment favourable enough for local self-governments, many ratifying states still have a long way to go in this regard.

109 See Boggero, 2018, pp. 214, 231; Pál & Radvan, 2022, pp. 1164–1165 regarding the countries of the Visegrád Group, Hoffmann, 2021, p. 241 regarding Hungary; Radvan, Mrkývka & Schweigl, 2018, pp. 904–905 regarding the Czech Republic; and Hintea, Moldovan & Țiclău, 2021, pp. 348–350 regarding Romania.

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