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Legal opinion on the complaint made by a Dutch association concerning certain recent legislative changes in the Netherlands, from the perspective of the European Charter of Local Self-Government

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ILDG: Independent Liberal Democrat Group in the Congress

1. Prelimary remarks. Antecedents

2. I have been requested by the Congress of Local and Regional Authorities ("the Congress") to produce a short and concise legal opinion concerning the complaint raised by Lokaal 13, a Dutch association and think tank involved in the promotion of Democracy, local self-government and local authorities, from the perspective of the European Charter of Local Self-Government ("the Charter"). In this letter, addressed to the Congress in January this year and annexed to the present document, the signatories do point out that, in recent years, different legal rules have been approved in the Netherlands and that these new laws have re-allocated competences that, until present, belonged to Local Authorities and, more precisely to the municipalities (*Gemeente*).

3. After these new legal rules (basically, the *Rijkscoördinatieregeling*, or "national coordination regulation"), most of the former responsibilities and competences of municipalities in the approval procedures for wind farms projects, are no longer handed and decided by the municipalities, but by provincial and State bodies: municipalities are now competent only for projects of wind farms with a capacity of less than 5 MW and, in addition, they have lost planning competences in the case of projects over that threshold. Furthermore, municipalities have also been deprived of a real intervention in the domain of noise control and abatement for wind farms, even when that noise hits local communities. Finally, municipalities are no longer entitled to challenge in courts the decisions adopted by provincial or State authorities in the licensing of those projects.

4. In the light of the precedent, they claim that this regulatory amendments amount to a curtailment of local autonomy in the Netherlands, since the realm of local responsibilities has been dramatically reduced in a number of sectors of governmental intervention (namely energy, environment and landscape protection). On the basis of this assumption, they claim that the Charter has been disregarded or infringed.

2. Articles of the Charter applicable to the analysed situation

5. In our view, the raw facts alleged by the complainants (which in general are not contradicted by the Government, see the letter of the Ministry of the Interior of 22 June 2016, also attached to this opinion) would fall under the scope of three provisions of the Charter: art. 3.1, art. 4 and art. 11.

6. Namely, art. 3.1 involves the very definition of local self-government, a concept that "denotes the right and the ability of local authorities...to regulate and manage a substantial share of public affairs under their own responsibility...". Therefore, the issue of competences is inherently connected with the very notion of local autonomy.

7. Art. 4. 1 requires that the competences of local authorities be prescribed by the domestic Constitution "or by statute". It is debatable whether this wording of the Charter may be construed largely, in the sense of including also governmental regulations. This interpretative option should be discarded in the light of the different linguistic versions of the Charter. Thus, the other official version of the Charter, the French ones, uses the word "la loi" (*les competences...sont fixées..par la loi*). Other linguistic non-official versions of the Charter, included in the website of the Council of Europe, also use a wording that refers technically to Acts of Parliament, to statutes or to pieces of legislation having the same nature or hierarchy of statutes (for instance, "delegated" legislation), and do not provide for room to understand that the requirements of art. 4.1 may be satisfied by means of mere governmental regulations in a State that is party to the convention. For instance, the German version states that "*die grundlegenden Zuständigkeiten der kommunalen Gebietskörperschaften werden durch die Verfassung oder durch Gesetz festgelegt*", where „Gestetz" clearly refers to acts of Parliament, that is to Statutes. The Italian version uses the word „legge", and the Spanish one, „Ley", with capital letter.

8. On the other hand, art. 4.4 declares that "powers given to local authorities shall normally be full and exclusive. They may not be undermined or limited by another, central or regional authority, except as provided by the law". Finally art. 4.6 requires that local authorities should 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*.

9. Art. 4 has not been the object of any reservation or declaration by the Kingdom of the Netherland at the time of ratifying the Charter on 20 March 1991 and therefore is fully applicable to the situation here analysed.

10. For its part, art. 11 is an essential provision of the Charter, which "closes the circle" of the protection of local autonomy in the national jurisdictions, by requiring that "local authorities shall have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government...". In our view, this provision is clear and self-executing, for in principle it sets a concrete obligation for the national legislator, to introduce a specific legal procedure, appeal or lawsuit in favour to local authorities, so that they can challenge in courts decisions adopted by other levels or bodies of government, in the course of which local authorities may defend local autonomy, as well as their inherent powers, competences, rights, privileges or legal interests.

3. Analysis of the several claims raised by Lokaal 13

3.1. The alleged reduction of municipal competences

11. It is clear, in our view, that the changes occurred in the legal order of the Netherlands in the specific fields of governmental action to which the allegations by Lokaal 13 refer, do perform a reduction in the competences enjoyed by the municipalities before those amendments.

12. However, it is hard to support the view that these legal changes amount to a violation of art. 3.1 of the Charter, in combination with art. 4.1/4.4 of the said Charter. To begin with, art. 3.1 is written down in a rather loose manner: the wording "an important part of the public affairs" is certainly vague, in the sense that the "importance" of that share can be analysed under different perspectives and may be subject to different interpretations: *importance* in the terms of actual number of competences, or in terms of relevance of the said competences, or *importance* in terms of the social and political impact of the said competences, etc. On the other hand, it seems clear that art. 3.1. of the Charter deals with the group or set of competences enjoyed by local authorities in a given country as a whole, and does not specify precise or concrete competences. That is, the Charter does not incorporate a clear table or percentage of competences that should be enjoyed by municipalities. What is more, it should be pointed out that there is no comprehensive or codified set of competences for municipalities in the legal system of the Netherlands. The Municipalities Act of 2002 (as amended) does not contain such enumeration. The actual competences of municipalities in the different sectors of governmental action are identified by the applicable laws and regulations in each of those sectors. Therefore, there is no "hard core" of essential or "inherent" competences for municipalities whatsoever. Accordingly, the competences granted to local authorities in the different sectors of governmental activity may be widened or reduced by the State legislature

13. The assessment of the respect or disregard of art. 3.1 of the Charter in a given country requires that this analysis be conducted at a "macro" or global context. Therefore, art. 3.1 is a suitable legal tool when one desires to perform an assessment of the whole domain of competences enjoyed by local authorities (or specifically by municipalities) in a given country, but it may be an unsuitable interpretative tool to assess the pertinence or fairness of a concrete re-allocation of powers in a given sector or field. Thus, in our view individual, ad hoc or punctual withdrawal of competences do not fall under the requirements of the Charter.

14. Furthermore, the deprivation of powers of local authorities in a given field, performed to certain legal amendments, may be "compensated" or "balanced" by other legal arrangements, which might grant new competences and responsibilities to municipalities in another sector of governmental action. For instance, new responsibilities could have been awarded to the Dutch

local authorities, therefore compensating this withdrawal, by means of other pieces of sectoral legislation.

15. On the other hand, the MS do enjoy a certain margin of discretion in deciding which is the most proper level of government to handle certain governmental tasks and responsibilities, according to their legal traditions, economic considerations and political considerations of expediency and pertinence, with due respect to the guidelines clearly enshrined in art. 4.3 of the Charter, which clearly embodies the well-know and accepted principle of subsidiarity.

16. Only in clear and extreme cases it is possible to determine a violation or disregard of the Charter. For instance, if there is an across-the-board or overall withdrawal of all or most relevant local competences. One could argue that, by way of a gradual, incremental approach, the legislature could step-by-step dismantle or dramatically reduce the realm of local competences in different sectors of governmental intervention, up to a point where the "essential" core of local responsibilities could not be recognizable anymore. In our view, this possibility has not crystallised yet in the Netherlands.

17. As the 2014 Congress Report on the situation of local and regional democracy in the Netherlands has pointed out[2], Dutch local authorities still do keep at present a reasonable and fair share of responsibilities and spheres of intervention in the handling of public affairs. In this sense, mention should be made to several policy papers approved by the Central Government in the last years, such as the 2004/05 Inter-governmental Relations Code, and that of 2013.
This policy orientation, which is favourable to local decentralisation, has produced tangible (albeit controversial) results in the field of local authorities empowerment, such as the recent transfer of competences in favour of local authorities in the domain of social services.

18. On the other hand, it seems undisputed that municipalities are consulted in the decision-making process for licensing of wind farms projects and that they are indeed involved in the policy and decision making for such projects (see, letter of the Ministry, page 4-5), something which has not been contradicted by the local authorities association. Therefore, the requirements of art. 4.6 of the Charter have been respected.

19. Having said that, attention should be also paid to the fact that the Kingdom of the Netherlands has already be been subject to three different Congress reports on the situation of local and regional democracy in that Kingdom, in 1999[3], 2005[4] and 2014[5], each one leading to a Congress Recommendation. Namely, the 2014 one recommended the Dutch authorities to reinforce the "autonomous" and "proper" competences of municipalities and provinces and reduce the tasks performed under the *"Medebewind"* procedure, in the light of the Article 4 para. 4". In our view, there is a clear contradiction between the legal changes referred to in the letter of Lokaal 13 and this recommendation, although it should be stressed that the alleged legal changes took place before the approval of Recommendation 352(2014), namely in 2010 (licensing powers of wind farms) and in 2011 (noise control and abatement).

3.2. The lack of judicial remedies at the disposal of municipalities

20. In our view, it is clear that art. 11 of the Charter is applicable in this case, since Dutch municipalities are deprived of the right to file judicial appeals against the decisions of the higher bodies (State or provincial authorities), in cases where their interests, voice or autonomy has been ignored. The government states that local authorities are heard in the process of licensing wind farms, but it seems clear that the State body can still grant such licences in spite of the opposition of the municipality.

21. The requirements of art. 11 of the Charter, as summarily presented *supra*, are not complied with in the Netherlands, a structural pattern that was already underlined in the 2014 Congress

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[2] See: "Local and regional democracy in the Netherlands", CG(26)7FINAL, 28 March 2014. Rapporteurs: Artur TORRES PEREIRA, Portugal (L, EPP/CCE), Jean-Pierre LIOUVILLE, France (R, SOC), especially at pages 17-19.
[3] Recommendation 55 (1999) on local and regional democracy in the Netherlands
[4] Recommendation 180 (2005) on the state of local finances in the Netherlands
[5] Recommendation 352(214) local and regional democracy in the Netherlands.

Report on the situation of local and regional democracy in the Netherlands and in Recommendation 352 (2014) resulting thereof[6]. On that occasion, the Congress Delegation noted that there is no specific remedy for local authorities in the administrative court system, where they could use local autonomy as a legal argument to challenge a measure, decision or regulation approved by the central government. The situation seems to have worsened in recent years, with the enactment of pieces of legislation such as, inter alia, the Crisis and Recovery Act (CRA). In that case, as in the situation claimed by Lokaal 13, the government underlines the necessity of implementing "fast-track" or expedient decision-making procedures. As the letter of Minister Plasterk tries to justify, "since 31 March 2010, lodging an appeal before the administrative courts has been excluded for local and regional authorities, in order to reduce the lead time of the procedure for the construction of wind farms". In our view, this legitimate governmental interest can not be put on a equal footing with the requirements of due process of law, which in our view involve, among other, the capacity for local bodies to sue in courts.

22. However, and since the Netherlands made an improper "reservation" to art. 11 of the Charter, this provision is regrettably not binding on that advanced and democratic kingdom, so progressive in other domains. As a matter of fact, the country is still in the rear wagon of the reduced number of countries which have declared not to be bound by art. 11 of the Charter (concretely, only 3 countries in Europe, according to Congress data of 2016).

4. Conclusions

23. The statutory amendments resulting in a re-arrangement of local competences performed by the pieces of legislation and regulations mentioned at the introduction of this document do not constitute in our view a violation of the core requirements of art. 4 of the Charter. They can be understood as a legitimate exercise of the margin of discretion enjoyed by Dutch authorities in deciding the most suitable manner to allocate the different responsibilities and competences among the several layers of government. Arts. 3.1 and 4 of the Charter can be used in assessing the whole system of local competences in a given country, but are not a valid analytical tool for discussing punctual or specific re-allocation of competences, which might be compensated by the legislature by means of granting additional powers to local authorities in other fields of governmental action. On the other hand, these legal developments go in a sense which is contrary to that of Recommendation 352 (2014), although this document is more recent than the legal changes here discussed.

24. On the other hand, the fact that municipalities have been taken away the possibility to submit a dispute with a higher level of government to judicial review in the domain of wind farms projects goes against the requirements of art. 11 of the Charter. Unfortunately, the Kingdom of the Netherlands is not bound by this provision, following the "improper" reservation made at the time of ratifying the Charter. Consequently, and from a technical legal point of view, no violation of art. 11 of the Charter can be determined in connection with the claim formulated by Lokaal 13.

[6] See Explanatory Memorandum, pages 27-28