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Special Adviser to the Government of Ukraine on Decentralisation

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Opinion¹

**Of the Special Adviser to the Government of Ukraine on Decentralisation
On the Draft Law of Ukraine “On amendments to the Law of Ukraine “On Civil Service”
in order to resolve certain aspects of serving a civil service”**

¹ This opinion reflects the views of the Special Adviser, based on Council of Europe standards and best European practice. It does not constitute an official position of the Council of Europe on the issue under consideration.

The draft Law of Ukraine “On amendments to the Law of Ukraine “On Civil Service” in order to resolve certain aspects of serving a civil service” was submitted to the Special Adviser to the Government of Ukraine on Decentralisation by the Head of the Committee on State Building, Regional Policy and Local Self-Governance of the Verkhovna Rada.

The draft law is accompanied by an Explanatory note which is very short and formal in respect of the justification of the adoption of the act and its objectives.

The draft law represents however a proposal to significantly increase the attributions of the President of Ukraine in appointing, dismissing and disciplining Heads of Local State Administrations (henceforth Heads of LSA) via a specially created Commission and gives him/her the power to evaluate their performance; links the term of office of Heads of LSA to the one of the President; removes all A-category staff appointed by the President from the competence of the general Commission on Senior Civil Service; to downgrade the status of Heads of LSA to B category; and gives the President the power to assign ranks to all A-category positions.

1. European standards and good practice in the field

This draft law does not concern decentralisation and local government, but rather the way the central government is organised, in particular (but not only) in the territory. It aims to revise the comprehensive and quite modern Law on Civil Service, adopted only six months ago. It also comes after the adoption of the Constitutional amendments in the first reading and before a (long awaited) second reading. As such, the timing of this legislative initiative raises a number of questions which could be better dealt with in the Explanatory note.

Not being a draft law strictly related to decentralisation but rather to deconcentration and organisation of state power, the main European standards relevant to this draft law are not derived from the European Charter on Local Self-Government. The draft rather touches upon constitutional issues, which are within the competence of the Venice Commission.

In case this draft law meets with significant support and interest in the Verkhovna Rada, it is highly recommended that the Venice Commission be consulted on its text.

Examination of the changes to the Law on Civil Service proposed by the draft law

The main changes in the Law on Civil Service are (in the order presented in the text):

- a. *Downgrading of the status of Heads of LSA to B category (the same as their deputies).*

This measure does not raise particular concerns. It is clear that in most countries the status of state representatives in the territory would be seen as slightly inferior to that of State Secretaries in central ministries; however such distinction is not derived from the limited geographical competence of local state representatives (as mentioned in the Explanatory note) but rather from the fact that state representatives are responsible for co-ordinated state policies in the territory, not for designing them.

It has to be stated however that the number of functions to which the category A (and consequently ranks 1 to 3) will remain to be attributed is extremely limited.

- b. *The powers of the Commission on Senior Civil Service concerning organising competitions, dismissing, presenting proposals for transfer to different government agencies, conducting investigations and submitting proposals for disciplinary measures – all in respect of A-category servants “shall not apply to civil servants appointed and dismissed by the President of Ukraine”.*

This provision should normally not be relevant for Heads and Deputy Heads of LSA – as according to the draft law they should be or become B-category staff. However, this provision extracts from the powers of the Commission a relatively large number of very high-level civil servants and subordinates them directly to the President. This measure would not only strengthen the authority of the President but would also likely contribute to the politicisation of the functions in question; a separate discussion is suggested for each of the cases covered by this provision and examining practical implications on a case-by-case basis would be useful; ***accepting a general clause covering all these officials is not recommendable.***

- c. *Ranks linked to the A category (1, 2, 3) should be assigned by the President of Ukraine, while ranks related to categories B and C would be assigned by relevant legal assigning agencies.*

As a reminder, category A staff are, according to Art 6 of the Law on Civil Service (as revised by the current draft) the State Secretary of the Minister of the Cabinet of Ministers and deputies, state secretaries of ministries; heads of central executive bodies and their deputies; heads of

Secretariats of The Constitutional Court, of the Supreme Court, high specialised courts and their deputies.

Giving the President the power to assign ranks to such a large range of civil servants seems to be excessive and would considerably weaken the role of the Cabinet of Ministers and of the Prime Minister; ***this provision is therefore not recommended for adoption.***

d. The heads of LSA would be appointed for the term of office of the President of Ukraine. The Cabinet of Ministers would be responsible for establishing their terms of remuneration and bonuses.

Linking the term of office of Heads of LSA to the term of office of the President would contribute to politicise the position of Head of LSA and does not reflect the constitutional distribution of powers between the President and the Cabinet of Ministers; ***therefore it is not recommended.***

e. A Commission on the civil service of Heads of LSA would be established by the President to hold competitions and discipline Heads of LSA. Proposal on one third of members shall be made by the Cabinet of Ministers; however regulations of the Commission and its final composition are to be decided by the President.

This provision seems to contradict Art. 118 of the Ukrainian Constitution, which stipulates that Heads of LSA shall be appointed and dismissed by the President of Ukraine upon representation of the Cabinet of Ministers. When exercising their powers, Heads of LSA shall be responsible to the President and the Cabinet of Ministers for different aspects of their work (see the Opinion of the Venice Commission, CDL-AD(2015)028, para. 15).

Transferring such powers to a Commission controlled by the President (both in terms of its composition and its regulations) means depriving the Cabinet of Ministers of its constitutional right to contribute to decisions on appointing, dismissing and holding accountable the Heads of LSA.

Moreover, such measure would also not be in line with European practice. Representatives of central government in the territory are typically nominated by the Government, not the President. Giving the Ukrainian President a right of “co-decision” is already quite exceptional in the light of European practice. Giving him/her the right to appoint and control (even via an interposed Commission) these representatives may be considered as excessive presidential powers.

In the two countries which have inspired the most the Ukrainian decentralisation reform, France and Poland, the state representatives in the territory (Prefect and respectively

Vojevoda) are appointed by the Government. In France the President formally signs the nomination decree; however this is derived from his/her formal duties as Chair of the Council of Ministers. In practice, the nomination of prefects is decided jointly by the Minister of the Interior and the Prime Minister and there are no known cases where the French President has refused to sign the decree as resulted from such decision.

While a Commission to manage the Heads of LSA (no longer covered by the Commission on Senior Civil Service if their status is downgraded to B category) may be a good idea, ***it is necessary to maintain the constitutional role of the Cabinet of Ministers in appointing and dismissing the Heads of LSA.***

*f. Evaluation of the performance of Heads of LSA should be performed by the President; their “recognition” should be done by the President **and** the Cabinet of Ministers and recalling them from legal holidays could be done by the President **or** the Cabinet of Ministers.*

Submitting Heads of LSA to evaluation performed by the President establishes a clear line of command between them. The “recognition” done jointly by the President and the Cabinet seems to strive to restore the Constitutional principle of co-decision President – Cabinet of Ministers concerning the appointment and dismissal of Heads of LSA. However, as the right of proposal is taken from the hands of the Cabinet and given to a specialised Commission controlled by the President the two procedures are not identical or even legally similar.

Conclusions

This draft law affects in a significant manner the organisation of the central (and deconcentrated) executive power. More explanations concerning the justification and objectives of the law should ideally be offered.

Some parts (in particular concerning the appointing and dismissing of Heads of LSA) raise particular constitutional concerns.

The timing of presenting this legislative initiative, only six months after the adoption of the comprehensive Law on Civil Service and before the expected constitutional amendments concerning decentralisation also raises some questions.

In any case, account taken of the importance and potential impact of this draft law, it is recommended that the Venice Commission be requested an official opinion before its adoption.