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Opinion on the draft law of Ukraine

"On Amendments to the Law of Ukraine On Capital City of Ukraine, Hero City Kyiv"

The present opinion was prepared in response to the request formulated on 16 September 2019 by the Chair of the Parliamentary Committee on State Building, Local Governance, Regional and Urban Development of Ukraine

The present opinion was prepared in response to the request formulated on 16 September 2019 by the Chair of the Parliamentary Committee on State Building, Local Governance, Regional and Urban Development of Ukraine and refers to the draft law on Ukraine "On Amendments to the Law of Ukraine On Capital City of Ukraine, Hero City Kyiv" (registration No. 2143 of 13 September 2019).

In view of the limited time available to formulate it, the opinion will not include a detailed, article-by-article analysis, but it will look mainly at the most important changes in relation to the current law and will analyse them in the light of the European Charter on Local Self-Government (henceforth "the Charter") and the best of European practice, as identified by the Council of Europe.

The Charter was ratified by Ukraine on 06/11/1996 without declarations or reservations and it entered into force in respect of Ukraine on 11/09/1997. It can therefore be assessed that all obligations of the Charter apply in respect of all levels of Ukrainian sub-national self-government.

The opinion will not make a constitutional analysis, although it will briefly mention a number of issues which seem to appear in respect of some of the articles of the Constitution of Ukraine and which may need to be examined closer in order to ensure that the final text is in line with it. This report is prepared in the framework of the implementation of the Council of Europe Programme "Decentralisation and local government reform in Ukraine".

1. General remarks

The current draft is intended to amend the current law on the status of Kyiv, in force since 1999. The Council of Europe has suggested on numerous occasions to revise this law, in particular in order to eliminate what it considers as a violation of the Charter and of the principle of local self-government itself, i.e. the dual nature of the institution of Mayor, who is directly elected but also appointed as Head of the Local State Administration.

In the last ten years, the Council of Europe, through its Centre of Expertise for Good Governance, produced three different documents referring to the situation of the City of Kyiv:

- In 2009, a detailed appraisal on a draft law on the same topic[1], a draft which shares many similarities with the one under review; that draft was finally not adopted;
- In 2013, a policy advice document, arguing for a reform of the legal status of the Kyiv City[2];

[1] DPA/LEX 7/2009: http://www.slg-coe.org.ua/wp-content/uploads/2012/10/CoE-Appraisal-of-the-Draft-Law-on-the-Capital-City-of-Ukraine-the-Hero-City.pdf

- In 2019, a Peer Review report[3], looking at and making recommendations concerning the governance of the metropolitan area of Kyiv (including surrounding municipalities).

The major changes introduced by the current draft law (separating the executive bodies of the Kyiv City and the Kyiv City State Administration; creating semi-autonomous and directly elected district (raion) councils; and introducing a mechanism of supervision of legality) are to be welcomed. Nevertheless, some elements of the draft law need to be reviewed in order to bring them into line with the European Charter of Local Self-Government.

2. Timing of the reform

While long overdue, the reform of the legal status of the Kyiv City at this particular point in time raises two issues, one to be examined in the light of the experience of other countries which have conducted similar decentralisation reforms and concerning the coherence of the reform itself, and the other one concerning the respect of the Charter.

Normally, a coherent reform should start from the supreme law (Constitution), continue with the general law (Law on Local Self-Government) and only subsequently with the special law (in this case the Law on the Capital City, Kyiv). In Ukraine however, all these three important legal instruments are being discussed at the same time, which raises the danger of lack of coherence and hence legal inconsistency and possibly the need to revise multiple times pieces of legislation just adopted. While the current draft was introduced by a number of MPs and not by the Government, this issue should be kept in mind when examining the content of the text.

In relation to respect of the Charter, its Art 4, paragraph 6– Scope of local self-government - reads:

"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 draft law was registered on 13 September 2019. Part IV "Closing and Transitional Provisions" of the draft law states in its paragraph 3:

"Pursuant to Paragraph 30 of Part One of Article 85 of the Constitution of Ukraine, schedule the snap elections of the Mayor and members of the Kyiv City Council on Sunday, December 08,

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[2] CELGR/PAD1/2013: http://www.slg-coe.org.ua/wp-content/uploads/2013/04/CoE-Policy-Advice-on-the-Status-of-the-Capital-of-Ukraine-%E2%80%93-the-Hero-City-Kyiv_20131.pdf

[3] Peer Review Report "Democratic governance in metropolitan areas, focusing on Kyiv Region: http://www.slg-coe.org.ua/wp-content/uploads/2019/08/CoE-Peer-Review-Report_Democratic-governance-in-metropolitan-areas-focusing-on-Kyiv-Region-1.pdf

2019, and conduct them in accordance with the procedure established by the Law of Ukraine "On Local Elections", taking into account the peculiarities envisioned by this Law".

But according to Article 15 of the Law on Local Elections, the decision on early local elections shall be made no later than 60 days before the election day; therefore, the Verkhovna Rada should vote for such decision in the light of an adopted new Law on the status of Kyiv no later than on 8 October 2019. Considering the current parliamentary session calendar and absent an exceptional session, such a decision should in fact be taken on 2-4 October.

In any case, it is debatable whether the right to free elections as enshrined in Art. 3.2 of the Charter as a core element of local autonomy enables the national legislator to shorten elected mandates. At any rate, the conformity of this shortening with the Constitution and in particular its Article 141.1 needs closer examination.

The explanatory report of the Charter reads in respect of Art 4.6 (quoted above):

"Whilst paragraphs 1 to 5 deal with matters which come within the scope of local authorities, paragraph 6 is concerned both with matters coming within the scope of such authorities and with matters which are outside their scope but by which they are particularly affected. The text provides that the manner and timing of consultation should be such that the local authorities have a real possibility to exercise influence, whilst conceding that exceptional circumstances may override the consultation requirement particularly in cases of urgency. Such consultation should take place directly with the authority or authorities concerned or indirectly through the medium of their associations where several authorities are concerned."

Unless substantial consultations have already been conducted with the local authority concerned (the City of Kyiv), it is unlikely that meaningful consultations can be conducted in such a short time. ***If no serious proof of the exceptional circumstances which "may override the consultation requirement" exists, their absence or their conduct in a manner and timing which do not offer the local authority concerned the real possibility to exercise influence would represent a significant violation of the obligation derived from Art 4.6 of the Charter.***

3. Major changes introduced by the draft Law

As already mentioned, the draft law introduces three major changes to the current system, each of them being, in principle, very welcome.

a. Separating the executive bodies of the Kyiv City and the Kyiv City State Administration

This may be the most important and useful initiative in the current law. The cumulation of executive functions on behalf of the central government and on behalf of the local population in the City of Kyiv (just like at the level of raions and oblasts) has often been criticised and

extensively covered in previous documents of the Council of Europe as being inefficient, anti-democratic and against the Charter.

Indeed, Art. 2 ("Concept of local self-government") reads, in its paragraph 2:

"This right shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them."

Putting an end to a situation which is a legacy of a previous époque and represents both a confusion of functions and a conflict of interest is to be particularly welcomed.

b. Creating semi-autonomous and directly elected urban district (raion) councils

First, it needs to be noted that there is nothing in the Charter which may create obligations on the Ukrainian authorities in this respect. From the point of view of Ukraine's international obligations, the Ukrainian authorities can choose any model of urban raion that they may deem fit.

However, most European capitals with a size comparable to Kyiv do have elected urban district councils. The relations between the city council and district councils differ across Europe: in some case the city council clearly prevails (e.g. in Berlin or Paris), in other it is the district councils which are more powerful and have the final say in case of disagreement (e.g. London) and yet in others city and district councils are on a relatively equal footing (e.g. Budapest).

It is generally considered that, in the right conditions of administrative architecture, the creation of elected district councils brings democratic advantages (decision making is brought closer to citizens) and it can also bring governance advantages (flexibility and adaptation of the level of services to the needs of the local population; greater responsiveness and accountability etc.).

There are however also risks of fragmentation and creating a new layer of authority may not contribute to the coherence of major city planning policies. In Kyiv oblast, the Council of Europe Peer Review Report shows that there is minimal to no co-operation between the City of Kyiv and the other local authorities which constitute the functional area of the Kyiv metropolitan zone, a situation which has important disadvantages. Creating too independent urban districts inside the Kyiv City itself would add confusion to this already complex and un-coordinated situation and make the formulation of a common planning and development policy for the whole functional area even more difficult. It is therefore necessary to achieve a good balance of power between the City and the district councils in order to not bring more entropy to the system.

Under the current legislation, the Kyiv City Council has the power to decide independently on the list of and boundaries of raions and to organise their activity, including concerning the decision to equip them or not with an elected council. The Law on Local Self Government (Art. 5) stipulates that in cities with raion division the city's community or council may decide to

establish raion councils. In 2001 the Constitutional Court confirmed that the establishment and liquidation of raions in Kyiv may be decided by the Kyiv City Council. Consequently, the Kyiv Council reduced the number of raions from 14 to 10. They do not currently have elected councils. It can therefore be assessed that currently in Kyiv the City Council predominates very strongly, raions being little more than its antennae.

The draft Law under review changes this situation completely:

- It creates (Art. 2) mandatorily raion councils with their own executives; raion councils will have legal personality (in Ukraine and a limited number of other countries such as several former members of the Soviet Union and the United Kingdom the legal personality belongs to the councils) and will have their own budget;
- It stipulates (Art 2) that the list of Kyiv raions is to be introduced by the Verkhovna Rada upon submission by the Cabinet of Ministers at the proposal of the Kyiv City Council;
- It established in Art 12 a detailed list of competences which are attributed to raion councils (absent any opposite provision, these are to be understood as own competences); it states that raion councils shall "approve acts of individual action" ;
- Art 12 also provides that raion councils are in charge of the management of Kyiv **City territorial community** communal property at the Kyiv City Council decision;
- It creates (Art 17) the position of Chairperson of the Kyiv raion council, the executive committee of the raion council with its own Chairperson (Art. 18) and stipules rather extensively their attributions;
- Conversely (Art. 23), the decisions about the budgets of the raion councils are essentially taken by the Kyiv City council; however, these decisions should be done based on the principle of subsidiarity (which is theoretically a strong legal principle although its precise limits may be in practice subject to various interpretations).

It could therefore be assessed that the proposed local government architecture is relatively balanced: while the list of district raions' own competences may be seen as too long and the subsidiarity principle as too strong, in the end the City council keeps very important financial leverage over the activity of district raions and this should hopefully contribute to achieving an acceptable degree of coherence in the activity of the two levels of local authorities.

However, attention needs to be drawn to two articles of the Constitution, namely Art 85, which establishes the list of powers of the Verkhovna Rada (and which does not include the power to decide the list of raions in the Kyiv City) and Art 140, which stipulates, in its fifth paragraph:

"*The issues of organisation of the administration of city districts shall fall within the competence of the city radas*" (i.e. councils).

While this opinion does not ambition to make a constitutional analysis of the text, it draws the attention to the need to examine closer the implication of these articles on the proposed change in the authority who has the power to decide the list and boundaries of city district (urban raions).

c. Introducing a mechanism of administrative supervision over local authorities' acts

Unlike any other member State of the Council of Europe, Ukraine has currently no mechanism to ensure supervision of the legality of local acts. This legal and institutional hiatus is due to the fact that the role of the Prokuratura in this respect was abolished in the Constitutional amendments on justice adopted on 2 June 2016 (and this was warmly welcomed by the Venice Commission) but the Constitutional amendments on decentralisation, which were supposed to transfer this competence to the newly created Prefect institution, were not adopted.

The Council of Europe (Centre of Expertise for Good Governance) conducted on 26 April 2017 a "Strasbourg format" meeting (confidential moderated negotiation among all stakeholders) on the principles of the establishment of a supervision system in Ukraine and obtained interesting results: it proposed the creation of a system which is efficient but respectful of local self-government, which can function autonomously but can also be easily transferred to the Prefects if such an institution is created.

Moreover, the Centre of Expertise issued an opinion (CELGR/LEX (2018)8 of 22 October 2018) on the draft law prepared by the Ministry of Regional Development in the light of the conclusions of this Strasbourg format meeting.

Establishing such a mechanism at the level of the Kyiv City is therefore an interesting development. As a general rule, during the discussions held in "Strasbourg format" it was widely considered that Heads of State Administration, who already have an excessively powerful role as executives of both state and oblast (or raion) administration, should not be in charge of such supervision. However, the Kyiv City State Administration could be an exception. Following the separation between the Head and the Mayor proposed in the draft law under review, its new role would be completely revised and would be closer to that of a Prefecture.

The draft law however raises three important issues, one of conformity with the Charter; a second related both to respect of the Charter and expediency; and a third of expediency.

i. Respect of the Charter – the question of "public interest"

In its Art 4 ("Scope of local self-government"), the Charter establishes a clear distinction between own competences (paragraph 4) and delegated ones (paragraph 5):

"4. 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 for by the law.

5. Where powers are delegated to them by a central or regional authority, local authorities shall, insofar as possible, be allowed discretion in adapting their exercise to local conditions."

Moreover, Art. 8 ("Administrative supervision of local authorities' activities") establishes in its paragraph 2 a distinction between the type of supervision that can be exercised over own competences (normally limited to legality) and delegated competences (which may also include supervision of expediency):

"2. Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities."

The Explanatory Report to the Charter in respect of Art. 8 paragraph 2 reads:

"Administrative supervision should normally be confined to the question of the legality of local authority action and not its expediency. One particular but not the sole exception is made in the case of delegated tasks, where the authority delegating its powers may wish to exercise some supervision over the way in which the task is carried out. This should not, however, result in preventing the local authority from exercising a certain discretion as provided for in Article 4, paragraph 5."

However, the draft law under review includes two very problematic provisions under Art. 21 (emphasis added):

"1. Acts of local government bodies or officials of the city of Kyiv, except for the those related to the sphere of state oversight (control) by other state authorities, shall be subject to inspection by the Head of the Kyiv City State Administration ***for their conformity with the public interests of the territorial community****, the Constitution and/or laws of Ukraine.*

3. Revealing deficiencies based on the inspection ***of the relevant acts that do not correspond to the public interests of the territorial community****, the Constitution of Ukraine and/or laws of Ukraine, shall represent the reason for the Head of the Kyiv City State Administration to appeal to the relevant local government body or official with a demand to immediately eliminate such deficiencies."*

As these provisions do not refer to delegated powers (which should represent the exception anyway), they seem to be seriously at odds with the provisions of the Charter. Indeed, the local authorities are the ones which are elected to act in the interest of the local population, as stated in Art. 3 ("Concept of local self-government") paragraph 1 of the Charter:

"1. Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population."

Public interest is a broad concept which could be used for political reasons, for addressing not only the constitutionality/legality of an act (already mentioned in Article 21.1) but also its

expediency. Including it in the criteria for administrative supervision is in any case against Art. 8 paragraph 2 mentioned above... **It is therefore strongly recommended to delete these references to the public interest in the draft law in order to bring it in line with the obligations under the Charter.**

ii. The legality and effectiveness of systematic supervision of all local acts

Art. 8 ("Administrative supervision of local authorities' activities") in paragraph 3 reads:

"3. Administrative supervision of local authorities shall 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."

The Explanatory Report to the Charter in respect of this paragraph reads:

"The text draws its inspiration from the principle of "proportionality", whereby the controlling authority, in exercising its prerogatives, is obliged to use the method which affects local autonomy the least whilst at the same time achieving the desired result."

The draft law under review provides for the systematic supervision of all acts issued by the local authorities (of both City and district levels). It is questionable whether such a heavy procedure is in line with the principle of proportionality aimed at under this paragraph.

Moreover, while the Charter does not require the exclusion of certain types of acts **insofar as the supervision concerns only their legality**, it would be highly inefficient (and very difficult technically) to exercise such heavy procedure compulsorily on each and every act; a far better solution would be to leave to the supervisory authority the capacity to adapt the frequency and type of supervision to ensure proportionality with "the importance of the interests it is intended to protect". Only here, a legal possibility for the supervisor to evaluate and adapt its own working methods in line with "public interest" would make legal, institutional and management sense.

iii. The suspension procedure

The Council of Europe does not recommend giving to the supervising authority the right to suspend acts of local authorities or to make such suspension automatic when the act is legally contested by the supervisory authority in Court.

A far better solution is to leave suspension of contested acts to the Court, if necessary, in an emergency procedure only when the coming into force of the act is likely to have effects which are difficult or very costly to reverse.

However, in light of the inexperience of local governments with the new tasks to be transferred to them and the desire of Ukrainian authorities to fight mismanagement of public funds and

corruption, the Council of Europe's Venice Commission has accepted the principle of systematic suspension by Prefects in its Opinion on the Constitutional amendments on decentralisation.

Subsequently, in the "Strasbourg format" negotiations on administrative supervision and the Opinion of the Council of Europe (formulated by the Centre of Expertise) on the draft law on administrative supervision, the principle of systematic suspension was also accepted.

However, the addition of a delay of 7 to 30 days (depending on the type of act) from the adoption and transmission in order may be excessive and a big hinderance to the celerity of local government activity and possibly even a violation of the proportionality principle mentioned in Art. 8 paragraph 3 of the Charter (see above).

4. Conclusions and recommendations

The Council of Europe welcomes in general the current draft law "On Amendments to the Law of Ukraine On Capital City of Ukraine, Hero City Kyiv" (#2143 of 13 September 2019) and considers that most of reforms which it includes go in the right direction.

It welcomes in particular:

- The separation of the executive functions of the Kyiv City State Administration and of the Kyiv City;
- The creation of elected urban district councils;
- The creation of a mechanism to supervise legality of local authorities' acts in the City of Kyiv and its districts.

However, the Council of Europe:

- Invites the Verkhovna Rada and the Cabinet of Ministers to ensure the respect of Art. 4 paragraph 6 of the Charter and to ensure that meaningful consultations are conducted in a manner and timing which offers the local authority concerned the real possibility to exercise influence;
- Urges the Verkhovna Rada to eliminate the reference to the "public interest" as one of the grounds upon which suspension of a local act adopted in the sphere of its own competences may be justified;
- Recommends to the Verkhovna Rada to simplify and make lighter the administrative supervision mechanism by making supervision elective and adapted to needs rather than compulsory and systematic for each and every act, and by eliminating the period where acts are unenforceable pending a possible "protestation" by the supervisory authority.