



CENTRE OF EXPERTISE FOR GOOD GOVERNANCE

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**Opinion on the draft laws of Ukraine
on Amendments to the Law of Ukraine
“On Capital City of Ukraine, Hero City Kyiv”**

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On 27 September 2019, the Council of Europe produced Opinion CEGG/LEX(2019)4 on the draft law of Ukraine “On Amendments to the Law of Ukraine On Capital City of Ukraine, Hero City Kyiv” (registration No. 2143).

On 23 and 25 September, the Chair of the Parliamentary Committee on State Building, Local Governance, Regional and Urban Development of Ukraine requested an opinion on the alternative texts registered under #2143-1, #2143-2 and #2143-3.

Unfortunately, these texts only became available in Ukrainian on 25 and 27 September, consequently - in English on 30 September, the deadline for the production of the current opinion. In light of the very limited time available (less than one day), the current opinion will only present some general considerations and make extensive reference to the remarks made by Opinion CEGG/LEX(2019)4, which is more detailed. This report is prepared in the framework of the implementation of the Council of Europe Programme “Decentralisation and local government reform in Ukraine”.

The Appendix to this opinion presents a comparative analysis of these four texts, with some technical considerations. The appendix also includes a few remarks concerning arrangements of co-operation between local authorities in the larger Kyiv City metropolitan area, prepared not so much in the light of the draft laws but of the conclusions it reached during the Peer Review¹ organised in the City of Kyiv on this topic. It also presents several considerations concerning more specifically draft law #2143-3.

1. Timing

In respect of the timing of this legislative initiative, the Council of Europe has raised a number of issues in its opinion CEGG/LEX(2019)4; these issues will not be reiterated here but they concern all four draft laws.

2. Separation of the executive bodies of the Kyiv City and Kyiv City State Administration

The Council of Europe is strongly in favour of this measure, which would bring the law in line with Art. 3 (Concept of local self-government) paragraph 2 of the European Charter on Local Self-Government (henceforth “the Charter”), as explained in Opinion CEGG/LEX(2019)4. In fact, the Council of Europe strongly recommended that the Constitutional amendments on

¹ 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

decentralisation, which provide for such separation also at the levels of oblasts and raions, be adopted in order to ensure the respect of obligations under Art. 3 paragraph 2.

Three of the drafts presented (2143, 2143-1 and 2143-3) provide for this separation, which is to be commended.

3. Creating directly elected urban raions inside the City of Kyiv

As mentioned in Opinion CEGG/LEX(2019)4, the creation of urban districts with directly elected councils in capital cities is a very current European practice. It can bring administration closer to citizens, reinforcing democracy and possibly having also positive governance effects by making local government more flexible, more accessible, more responsive and more accountable.

However, for these governance advantages to appear, these districts should not amount to a new autonomous level of local government, splitting Kyiv further and making co-ordination on general planning, urban and development policies even more difficult. A balance between the competences of the City and of the urban districts should be found and a mechanism to resolve disputes and ensure a healthy amount of coordination on major urban issues should exist.

The Charter is not very explicit in this respect. Its Art. 6 “Appropriate administrative structures and resources for the tasks of local authorities” reads, in paragraph 1:

“Without prejudice to more general statutory provisions, local authorities shall be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management.”

However, the reference to “own administrative structures” does not necessarily cover the issue of having or not territorial districts with directly elected councils. In fact, the explanatory report to the Charter reads, in respect of Art. 6 paragraph 1:

“The text of this paragraph deals not with the general constitution of the local authority and its council but rather with the way in which its administrative services are organised. Whilst central or regional laws may lay down certain general principles for this organisation, local authorities must be able to order their own administrative structures to take account of local circumstances and administrative efficiency. Limited specific requirements in central or regional laws concerning, for example, the establishment of certain committees or the creation of certain administrative posts are acceptable but these should not be so widespread as to impose a rigid organisational structure.”

It is however normal and commendable for the City Council to have a voice in the decisions concerning the creation of the urban raions inside the City.

All four versions of the law provide for the creation of such raions. This may be a positive development as leaving such decision to the unique responsibility of the City may not be very effective in practice. However, a reference to Art. 140 fifth paragraph of the Constitution was made in this respect in Opinion CGG/LEX(2019)4.

Draft law #2143-3 provides for raion councils to adopt their own budgets, which may transform raions into quasi-autonomous entities and may be negative for the coherence of urban policies.

4. Introducing administrative supervision over local authorities' acts

As explained more widely in Opinion CEGG/LEX(2019)4, practically all Council of Europe member States have a mechanism to ensure legality supervision over local authorities' acts. The Ukrainian institutional hiatus is explained by the fact that the Constitutional amendments on justice adopted in June 2016 eliminated this role for the Prokuratura in the context in which such role was supposed to be taken over by the Prefectures. However, the Prefect institution was not created because the Constitutional amendments on decentralisation are still pending.

The Council of Europe helped the Ukrainian partners, in the so-called Strasbourg format, to design a supervision system which would be effective but nimble and would be respectful of local autonomy while being able either to function autonomously or be transferred to the Prefects if such institution is created.

Draft laws #2143 and #2143-3 create a supervision system and put it under the competence of the Head of the Kyiv City State Administration. Draft laws #2143-1 and #2143-2 do not provide for such system.

It is up to Ukrainian authorities to decide whether it is better to create such legality supervision specifically at the level of the Kyiv City or whether the matter can wait until a general law on this topic does this at national level. The Council of Europe advised favourably a draft law on this topic, which was built upon the results of the work in the Strasbourg format.

If a supervision mechanism is created, draft law #2143 violates Art. 8 paragraph 2 and falls short of respecting Art 8 paragraph 3 of the Charter, as explained in detail in Opinion CGG/LEX(2019)4. Draft law #2143-3 is therefore superior in this respect.

However, draft law #2143-3 excludes individual acts from the field of the supervision power. This is understandable from the point of view of impact, but surprising from the point of view of fighting mismanagement of public office and resources; indeed, individual acts are typically very likely to be the source of nepotism and corruption.

The Council of Europe recommends against transferring any supervisory power over local authorities' acts to Heads of State Administration **as long as they also cumulate the function of oblast or raion executive**. The acceptability of the provisions on supervision in draft laws 2143

and 2143-3 is therefore conditioned upon the separation of the functions of state executive and City Mayor created by these drafts.

Conclusions

It is not the Council of Europe's role to recommend to the Parliamentary Committee to examine one or another text to the detriment of the other three. This opinion has simply stated the principles which should guide any text on this issue.

The more detailed analysis of the differences between the four texts included in the appendix and summarised in this opinion shows that, beyond the legal issues raised by the timing of this law and explained in detail in Opinion CGG/LEX(2019)4:

- Draft law #2143-2 does not provide for the separation of the functions of state and city executive, which is the most positive development such law can offer; it is dubitable whether, without this important change, there is a real need for a law on the Kyiv City at this point in time;
- Draft law #2143-1 has its interesting elements; it also does not provide for the creation of an administrative supervision mechanism;
- If Ukrainian authorities prefer to have at this stage a separation of the functions of state and city executive (which is highly recommended) **and** a supervision mechanism, draft law #2143-3 seems to be a more developed version, one which also eliminates most of the conflicts with the Charter that the supervisory mechanism provided for by #2143 creates.
- However, draft law #2143-3 raises a number of technical concerns as it seems to overregulate on some issues, as mentioned in the last section of the Appendix to this Opinion.

Appendix

Comparative analysis of the draft law “On Amendments to the Law of Ukraine “On Capital of Ukraine – City Hero Kyiv” #2143 and alternative draft laws #2143-1, 2143-2 and 2143-3

1. General remarks

The key changes of the Kyiv City legal status and governance arrangements, provided by the draft laws under consideration, are the following:

- separation of local self-governance and state executive power (namely Kyiv City Council executive body and the Kyiv City State Administration) is supported by all but one (#2143-2) draft laws;
- restoration of directly elected city raion councils with their executive bodies is provided for by each draft law;
- a mechanism of administrative supervision of local acts is proposed by #2143 and #2143-3 draft laws only;
- snap elections² of the Kyiv City Mayor and the Kyiv City Council are initiated only by the #2143 draft law.

The most comprehensive reform framework is proposed by the draft laws **#2143-3 and #2143-1**. Both provide for a split of powers between the Mayor of Kyiv and the Head of the Kyiv City State Administration; establish an executive body of the Kyiv City Council headed by the Mayor; restores raion councils in the city as representative bodies of Kyiv raions’ territorial communities; provide for a split of governance arrangements at the city raion level. However, the first provides for a supervision mechanism (except for individual acts) while the latter does not provide for such mechanism and even questions existence of the state authority in the city.

2. Timing of the reform and transition period

Although the reform implies large-scale administrative changes as a result of the split of competences (e.g. reorganization of the Kyiv City State Administration (total more

² The Parliament might decide on snap local elections by its Resolution, not necessarily by the individual Law. It is worth noting, that Mayor and councilors elected by snap elections will serve their office only until the next (regular) local elections, scheduled on October 2020 (Article 141 of the Constitution and the Constitutional Court decision dated of May 29, 2013).

than 2100 employees), and liquidation of 10 rayon state administrations (total approximately 4000 employees), there is no clear schedule of the transition period in any draft law.

Moreover, some of the drafts provide complicated wording in their transitional and final provisions, which may temporarily complicate the availability of public services or even the governance of the City.

In particular the implementation of the reform schedule proposed by draft law #2143-2 may have negative consequences. It orders the Cabinet of Ministers to liquidate Kyiv City raion state administrations within 6 months after the law enters into force, while raion councils will be elected only in October, 2020; and it will take another month to establish their executive bodies and take over the raion state administration functions (first of all in the pre-school and school education sectors, which are current major responsibilities of the Kyiv City raion state administration).

#2143-3 draft law provides for a complicated arrangement of two individual laws in place for the transitional period, which might last until October 2020. Namely, it proposes that the Law On the Capital of Ukraine - Hero City Kyiv (1999) continue to be effective in the parts which do not contradict the new Law until the day the Kyiv Mayor and the Kyiv City councilors, elected at the next local elections, take their oath.

3. Major changes introduced by draft laws

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

Separation of local self-governance and state executive power is not stipulated only by the #2143-2 draft law, which provides for the preservation of the current governance arrangement with elected Mayor as a head of the City State Administration.

The rest of the draft laws initiates the formation of the Kyiv City Council executive bodies.

b. Creating directly elected Kyiv city raion councils and their executive bodies

Each one of the four draft law supports the creation of elected city raions councils.

#2143-1 draft law proposes a definition of the Kyiv City territorial community as all residents living in the city disrespectfully of the duration of their stay in the city, registration and other circumstances. The implementation of such a broad definition might be problematic.

There is a debatable initiative in draft law #2143-3 of having the city raion council executive body chaired by an independent manager (not by the council head), who is contracted for 2-year term according to the results of a public contest. In the #2143-3 model with the raion council

deciding on its own raion budget, the raion would become quasi-autonomous, which might disbalance the city governance arrangements.

c. Introducing administrative supervision over local authorities' acts

Draft laws #2143-1 and #2143-2 are silent regarding the issue of administrative supervision.

Unlike the #2143 draft law, which grants enormous power to the head of the Kyiv City State Administration to suspend every act of local self-government, draft law #2143-3 provides for a more balanced model of oversight and suspension. In #2143-3 compliance with the Constitution and (or) the laws of Ukraine is the only matter for supervision by the head of the Kyiv City State Administration of local acts.

Somewhat surprisingly, draft law #2143-3 excludes individual normative acts (even those within the delegated powers of the LSG) from the list of local acts might be inspected (art.37).

4. Kyiv City metropolitan area local authorities arrangements

Limited attention is paid by the four draft laws to the Kyiv metropolitan area development issues, highlighted by the Council of Europe Peer Review Report (2019). Namely the most urgent are:

- completing and gaining approval for the spatial planning process in both the City of Kyiv and Kyiv Oblast to provide an overriding strategic framework through which transport, economic development, infrastructure, waste management, healthcare and housing policy issues can be planned for and coordinated at a metropolitan level (paragraph 10 of the Peer Review Report recommendations);
- address the issue of demarcation of administrative boundaries of the City and neighboring communities (paragraph 12).

Draft law #2143 (art.21) provides for the possibility of a Cabinet of Ministers intervention if local self-governments in the Kyiv City functional area cannot agree on their spatial planning documents (proposal of the abovementioned Peer Review Report). However such a competency and procedure should be elaborated in the relevant Laws (On Regulation of Urban Planning and On Cabinet of Ministers of Ukraine).

A general provision on possible formation of 'an agglomeration' according to the relevant Law, which is to be adopted, is included in #2143-1 draft law (art. 21).

5. Specificities of draft law #2143-3

Draft law #2143-3 seems to be a more elaborated version of draft law # 2143. It provides a number of interesting developments:

- It splits the functions of Mayor of Kyiv and Head of the Kyiv City State Administration (like #2143 and #2143-1);
- It establishes an executive body of the Kyiv City Council ‘Kyiv Magistrate’ headed by the Mayor;
- It empowers the Head of the Kyiv City State Administration with administrative supervision of local normative acts, but such supervision is lighter and more in line with the Charter than the one proposed by draft law #2143;
- It (re)creates elected raion councils in the city as representative bodies of Kyiv raions’ territorial communities (like all the other three versions);
- it provides for a split of governance arrangements at the city raion level, where raion council executive body is chaired by an independent manager.

It is questionable whether there is a need for the law to make detailed provisions on a number of issues, which could be better left at the discretion of the City Council (e.g. as a part of the City Charter):

- nominations of ‘Honorary citizen of the Kyiv City’, ‘Ambassador of the Kyiv City’ (art.11) could be dealt with autonomously in the City Charter;
- procedure of initiation of changes to the City Charter (art.9) could also be included in the Charter itself;
- the draft law (art.13) provides for three mandatory deputies of the Kyiv Mayor: a) deputy in charge of fiscal issues, b) deputy in charge of the Kyiv city Magistrate management and c) deputy of Kyiv mayor - Chief architect of the City. Other deputies might be appointed by the Mayor decision;
- control, audit and monitoring procedures in the city (art.45-48) are described in detail, which may limit local authority autonomy;
- Municipal E-Gov IT system (art.43-44) should normally not be part of the Law;
- the draft law provides for the establishment in every raion of a Town Hall as a single place for the provision of public services and raion authorities office (art.42). As of today there is a network of recently launched Administrative Service Centers in each city raion. Therefore, the need for a separate Town Hall in a raion is a question of expediency.

Also #2143-3 draft law introduces a number of changes to the basic sectoral laws (Land Code, Water Code, Law On National Police), which can hardly be considered as *specificities* of

execution of local self-governance or state executive power. The explanatory note to the draft law does not elaborate on the problems which are to be solved with the proposed changes. Namely:

1. The draft law proposes an amendment of the Land Code with a new article (art.20-1), establishing special procedure of change of purpose of a land plot individually for the Kyiv City: in case the Kyiv City council decided to change the functional purpose of a territory in the General Plan, the owner of a land plot within the relevant territory can apply for a relevant change of the land plot purpose to the Kyiv Magistrate (administrative service procedure) without the need to take an individual decision by the Kyiv City Council (as requested by Law On Local Self-Governance).

On one hand, this progressive legislative initiative (if supported by land experts) should be applicable for all municipalities, not only the Kyiv City.

On the other, as noted during the Peer Review of the Kyiv metropolitan area organised by the Council of Europe, as of today Kyiv City has no adequate General Plan and its update is blocked by surrounding local authorities, which do not agree on the city boundaries. In the current conditions, this problem may need to be solved at the national level through legislation.

Also the Law On Regulation of Urban Planning (art.18) provides that the functional purpose of a territory is to be set by the Zoning Plan, which might be an integral part of the General Plan or might be adopted as a separate spatial planning document by a City council. Considering the provisions of the above-mentioned Law (art.17), which limits the frequency of changes to the General Plan (not more often than once every 5 years), the draft law should probably mention the Zoning Plan instead of the General Plan.

2. Another sectoral initiative of the draft law is the amendment of the **Water Code with a new individual article for the Kyiv City** (art.80-1), which seems superfluous in the light of Art. 8 and Art 67 of the Water Code.
3. The draft law provision on **amendment to the Law On National Police** (art.23) seems to be out of place. It provides for the competence of the Police to terminate construction works upon court order by prohibiting the continuation of the construction. Such provision should be in line with the relevant sector policy and does not seem to represent a specificity for the City of Kyiv so.