



**Centre of Expertise
For Local Government Reform**



Strasbourg, 30 January 2018
CELGR/LEX(2018)1

**OPINION ON THE PROPOSAL TO APPOINT DEPUTY CITY MAYORS
FOLLOWING A COMPETITIVE PROCEDURE**

The present expertise was prepared by the Democratic Governance Department of Directorate General II - Democracy, in co-operation with Prof. Robert Hertzog, Professor emeritus, University of Strasbourg, France

The Verkhovna Rada of Ukraine adopted on 9 February 2017 the draft law *On Service in Local Government Bodies* that has been returned by the President of Ukraine on 22 March 2017 with some proposals for revision. One of these proposals is to extend the competitive procedure to the fulfilment of the position of deputy city mayor.

The Council of Europe answers to a demand of the Chair of the Parliamentary Committee on State Building, Regional Policy and Local Self-Government in relation with this proposal in particular, which is directly related to the provisions of the European Charter of Local Self-Government (ECLSG), ratified by Ukraine in 1997.

The Council of Europe has no specific information about the purposes and justification of this proposal; however it is clear that it aims to fundamentally change the procedure of appointment of the executive deputy of the city mayor, which will have as consequence the change in his/her status, from political and elective into a public servant one. Such a proposal raises serious questions in relation with the ECLSG and the general principles of democratic governance in local self-governments.

I. DEPUTY MAYORS ARE *REPRESENTATIVES*¹, APPOINTED ON POLITICAL BASIS, TO EXERCISE EXECUTIVE RESPONSIBILITIES

1. Deputy mayors' appointment should be a political process

In local self-governments, deputy mayors are members of the “executive” and share the respective functions with the head (mayor) of the local entity. As stated in Article 3 of the ECLSG, “*local self-government*” denotes the right of local authorities “*to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population*”. The head and the deputies, in relation with the council, express the interests of the population. Therefore, they should be chosen, directly or indirectly, by the citizens and bear specific obligations of accountability and responsibility.

The Preamble of the ECLSG provides that “*local authorities are one of the main foundations of any democratic regime*”; this implies that the core principles of democracy are applied to them. And modern democracies are *representative* ones, even when they use some procedures of *direct democracy* (referendum, petitions, etc.). Consequently, public institutions are based on the fundamental distinction between persons who are *representatives* (of the citizens and of the whole population) and those who are *employees* working under the authority of the representatives. The representatives, with legislative (deliberative) or executive functions, fulfil their mission in the best way when they are elected by the citizens.

¹ This concept is primarily applied to elected members of assemblies or councils. It can be applied to the members of the executive, because they act in the interest of the population, on democratic basis, and they are the most visible representatives of a city for the citizens and the media.

The major distinctive feature of representatives lies in the way they are appointed to their position. The discussed proposal would be a major change in this domain and have an important impact on the status of the representatives and the way in which the executive functions in practice.

In most European countries, deputy mayors² are elected or appointed after the election of the head of the executive authority, in a way that guarantees political harmony between all members of the executive authority. At political and legal levels, a deputy mayor has a secondary role as he/she is not the leader and has not full executive power. The main function is to replace the mayor, head executive, when he/she is temporarily unavailable /absent or to provide interim for longer periods (dismissal, death...), and the main powers result from specific delegations given by the mayor. However some own powers may be defined by the law. Deputy mayors are often in charge of specific domains, where they act with full executive power: economic development, culture, budget and finances, human resources management, transportation, schools, etc. Nevertheless, their role remains political and they do not assume functions of “directors” of the respective services.

2. The mayor and the deputy mayor should have a similar status

In light of the above, the deputy mayors are first supposed to have a legal status of the same nature than the head executive, and second to be in a relation of confidence and political proximity with the head executive. These consequences result from the way of appointing the deputy mayors. Article 3 of the Charter, which defines the concept of local self-government, provides that *“Local self-government (...) 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.”* It does not say explicitly that all executive power holders must be elected³. Most often the deputies of the head executive are elected by the council, and belong to the same political majority. But the Charter leaves the possibility to have deputies appointed by the mayor or president, especially when this latter is elected by the citizens themselves, but on the basis of personal and political criteria.

² The law may define a fixed number of deputy mayors, in relation with the size of the local self-government entity, or empower the council to decide on the exact number, on proposition of the mayor.

³ The Charter cannot describe the various ways executives are elected. And in the early 1980s, some European countries had still local self-governments' executives formally appointed by the government (Netherlands...).

For *employees*, the Charter has separate provisions in Article 6 – Appropriate administrative structures and resources for the tasks of local authorities⁴.

The Preamble of the Charter underlines that local self-government aims to create an administration which is *effective*. Bringing together an elected mayor and deputy mayors appointed following a competitive procedure would be a deep political change that would create a major imbalance in the executive authority's organisation, with a probability of serious dysfunction. Members may not be of the same political majority; the head and his/her deputies would not have the same legitimacy. In particular in a large city, the mayor may not be able to provide the necessary political drive for all competences of the local authority. It would therefore be a serious step back in the local authority's capacity to "exercise local self-government" in the words of Art 3 of the Charter, mentioned above.

At this stage, the three main conclusions are:

- Deputy mayors as members of the executive power should be political representatives;
- They should be appointed by a procedure that is coherent with their functions, and
- That guarantees political harmony with the head executive.

II. A COMPETITIVE PROCEDURE WOULD CREATE DIFFICULTIES AND SERIOUS NEGATIVE SIDE EFFECTS

1. Deputy mayors as representatives should not have the status of civil servants

The distinction between political representatives (councillors and executives) and civil servants or employees, is commonly accepted in modern States, especially in Europe⁵. It is recognized by the Ukrainian law⁶. The ECLSG has definitely separate provisions for members of assemblies and executives (Art. 3 and 7) on the one side, and employees (Art. 6) on the other. *"It can therefore be concluded that the Charter considers the holders of executive functions - mayors in the first place - as local elected representatives and not as*

⁴ Art. 6-2°- *The conditions of service of local government employees shall be such as to permit the recruitment of high-quality staff on the basis of merit and competence; to this end adequate training opportunities, remuneration and career prospects shall be provided.*

⁵ Cf. the study of professor Gerard Marcou *OVERVIEW OF EUROPEAN EXPERIENCE ON ELECTED AND PROFESSIONAL OFFICIALS IN LOCAL SELF-GOVERNMENT*, CELGR /LEX (2016)2. In Eastern Europe, for historical reasons, there may be more similarity.

⁶ The LAW OF UKRAINE, of May 21, 1997 No. 280/97-BP, *About local self-government in Ukraine*, has separate definitions for « executive bodies of councils » and « officials of local self-governments » (art. 1).

*employees although a financial compensation or remuneration may be paid by the budget of the local authority.*⁷

Some aspects of the status (rules on salary, pensions, legal protection, responsibility, etc) can be partly similar for both categories, particularly when the political officials are full-time dedicated to their functions. But in such case, this shall be applied to both the head executive and to his/her deputies. Nevertheless, executive organs cannot have entirely the same status as civil servants. The latter are part of a hierarchical organisation and have an immediate superior who gives them orders, evaluates their activity, decides regarding their career; they may receive reprimands, can be transferred to another service; they have specific rights for the protection of their position, for joining labour unions, for strike, etc. All this is in contradiction with the position of a representative of the citizens exercising a political function. Article 7 of the ECLSG “on the conditions under which responsibilities at local level are exercised” provides that “*The conditions of office of local elected representatives shall provide for free exercise of their functions*”. The status of civil servant is clearly incompatible with this principle. Therefore, deputy mayors should not be under the same rules than civil service employees.

2. A Competitive procedure would create restrictions and incompatibilities

A competitive procedure would be a serious restriction to the access to political functions as the recruitment would be made on the basis of a competition and no longer decided by a political body. Article 7§3 of the Charter provides that “*Any functions and activities which are deemed incompatible with the holding of local elective office shall be determined by statute or fundamental legal principles.*” The list of these functions must be short and properly justified. Deciding that only civil servants with a precise diploma can apply for political executive functions in a local self-government unit is in contradiction with this article and, more generally, with the fundamental principles of free and equal access to political positions recognized in democracies.

Appointing political leaders who have sufficient knowledge for managing territorial affairs may look as an acceptable idea, if it can fit democratic principles. However the concrete feasibility of this idea depends on many important questions and would require numerous precise provisions in the law, most of them contradicting these principles.

Who will be able to apply for recruitment: any Ukrainian citizen, any resident of the given community? What knowledge, academic degree and personnel capacities are needed to manage local affairs? The culture, the leadership, the capacity of communication may be more important than knowing the budget rules or the code of urban planning. Moreover, for such political position accountability should be towards the citizens, not some administrative body. Basically, the determining characteristic is to be “representative” of the given society -

⁷ Gerard Marcou, op. cit.

elections exist for that purpose. It would be difficult to define the content of the official programme and the kind of exercises for passing a competition for being deputy executives.

These considerations do not mean to imply that local authorities cannot have one or several head(s) of administration which are covered by the Draft Law and who would be selected through a competitive procedure, as the Draft Law provides for. However, two things are clear:

- In particular in large cities, elected mayors do need support from political appointees who can help develop and implement policies in line with the vision of those who best represent the desire of the population, as expressed through elections;
- Civil servants who may be heads of administration may carry different names (Secretary General, Chief Executive, Director General etc.) but they should not carry the name of “Deputy Mayor” as this would stimulate confusion and would be a step back in the decentralisation reform.

Conclusion

Public authorities must make a balance between the benefits and the disadvantages of the rules they propose. In the present case it is difficult to see which could be the benefits of a procedure of competitive selection of executive deputy mayors in cities and the application to them of a status of public servants. Upgrading their level of education and expertise might be a valuable objective, which could apply to all political functions. Considering the concrete problems that have to be solved, there is little guarantee of good result even on this level. Serious negative effects would result from the excessively complicated system of competitive exams and from the political and managerial difficulties generated by a possible status of civil servants of the executive deputy mayors.

The proposed reform could not be a short provision in the law; it would need precise and substantial legal provisions and be thoroughly discussed as it impacts the basic principles of local self-government. These provisions would themselves be in contradiction with higher legal principles. Fundamentally, they would not comply with the principles of democracy and specifically with those of the European Charter of Local Self-Government that is binding for Ukraine.

Additionally, one might consider that aligning the executive deputy mayors of cities on the status of public servants would not be a positive signal of the will of Ukrainian authorities to improve autonomy of local self-governments. In this regard, the situation of rayons and oblasts needs to be pointed out, as it is discussed in many reports of the CoE and of the Congress because of the executive functions being between the hands of the State administration. This is obviously not in compliance with the Charter. The proposed reform could be seen as a step in the same direction for local communities, limiting the executive self-government to a unique person surrounded by civil servants appointed by impersonal commissions.