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Opinion on the revised draft law "On the city of Kyiv – the Capital of Ukraine" (#2143-3)

The present Opinion was prepared by the Centre of Expertise for Good Governance, Department of Democracy and Governance of Directorate General II – Democracy

Executive summary

This draft law, in its current (second) version, represents a substantially revised and vastly improved text. Most major issues of concern identified in the first version have been eliminated. All Council of Europe recommendations formulated on the previous text have been addressed, albeit some only partially.

Instead of being a self-standing founding law for the Kyiv City, this text is now a draft special law to complement and derogate from the provisions of the other, general, laws. This is a commendable development, in line with Council of Europe recommendations.

However, as a special law, this draft does not include all provisions meant to ensure the respect of the European Charter on Local Self-Government, in particular regarding the administrative supervision mechanism. Such provisions should exist in the general law (future new Law on Local State Administration, on the draft of which the Council of Europe has also formulated an opinion).

It is therefore strongly recommended that the current draft law be adopted either after or as a package with the new Law on Local State Administration.

It is also recommended that the provision giving many representatives and officials of the State Administration the right to take part and express their opinions in meetings of the Kyiv council, district councils and their bodies, be abandoned.

The extent of the subsidiarity principle applied to the relation between the Kyiv City authorities and its districts should be defined in a restrictive manner in order to avoid the excessive fragmentation and lack of cohesion of urban policies at City level.

In respect of the creation of urban districts, any departure of the Cabinet of Ministers from the proposal of the Kyiv City authorities should be duly justified.

As the current draft law does not solve the dilemma of effective metropolitan governance, this issue, which is common to several large urban areas in Ukraine, should be kept in mind for a future law.

I. Introduction

1. The present opinion has been prepared in response to a request by the Chair of the Parliamentary Committee on State Building, Local Governance, Regional and Urban Development of Ukraine, to the Council of Europe received on 8 November 2021. It has been prepared for the Council of Europe by DGII – Centre of Expertise on Good Governance (henceforth "the Centre of Expertise") in the framework of the Programme "Enhancing decentralisation and public administration reform in Ukraine".

2. In view of the limited time available for analysing the new version of the draft law, this opinion will only focus on the most important elements of the draft law. It will not repeat the issues raised in other relevant opinions, in particular:

- the Preliminary comments on the Draft Law of Ukraine "On Amendments of the Constitution of Ukraine" (CEGG/LEX(2020)2);
- the opinion on the first draft of the law under review (CEGG/LEX(2020)4);
- and the Opinion on the draft law "On amendments to the Law of Ukraine "On Local State Administrations" and Other Legislative Acts of Ukraine on Reforming Territorial Organisation of Executive Power in Ukraine" - #4298 (CEGG/LEX(2020)5).

3. In the last ten years, the Council of Europe, through its Centre of Expertise, produced several documents addressing the situation of the City of Kyiv:

- In 2009, a detailed appraisal on a draft law on the same topic; that draft law was finally not adopted (DPA/LEX 7/2009);
- In 2013, a policy advice document, presenting arguments for a reform of the legal status of the Kyiv City (CELGR/PAD1/2013);
- In 2019, a Peer Review report "Democratic governance in metropolitan areas, focusing on Kyiv Region", looking at and making recommendations concerning the governance of the metropolitan area of Kyiv (including surrounding municipalities);
- In 2019, opinions on the draft laws on the same topic submitted to the Ukrainian Parliament (CEGG/LEX(2019)4 and CEGG/LEX(2019)5).

4. The Congress of Local and Regional Authorities of the Council of Europe also prepared:

- An expert Analysis Report on the first draft Law of Ukraine "On the Capital City of Ukraine – hero City Kyiv" on 23 February 2020;
- A second expert Analysis Report on the second draft (i.e. the subject of this opinion) on 8 November 2021. In respect of the current draft of the law, this expert analysis is very relevant, and is generally supported by the Centre of Expertise.

5. All of the above are very useful documents and will occasionally be referred to throughout the current opinion, without necessarily duplicating the arguments and explanation contained therein.

6. This opinion will examine the compliance of the current text with the European Charter on Local Self-Government, in particular, but also with other European standards such as the Recommendations of the Committee of Ministers of the Council of Europe and with the best practice of other Council of Europe member States.

II. General remarks

7. The current draft law is a vastly revised version prepared for the second reading of the Verkhovna Rada in light of the various comments received by the authors.

8. A quick analysis shows that all the comments and recommendations contained in the opinion prepared by the Centre of Expertise (CEGG/LEX(2020)4) on the previous version have been addressed, albeit some of them only partially. As such, this version can be considered as substantially improved and brought more in line with European standards and best practice.

9. The draft law has been simplified, reduced and transformed into a special law, addressing only those issues which are specific to Kyiv as compared to other local authorities. This is a very positive approach as a duplication of regulation does not serve well the requirements for legal simplicity, clarity, and certainty.

10. However, this approach, although generally welcome, raises particular issues of concern in the case of Ukraine where the general laws are also being revised in parallel to the preparation of the present draft law, as will be explained in the substantial part of this opinion. The general laws in question here would be the (future) Laws on State Administration (most importantly), but also on Local Self Government and possibly On Procedure for Administrative-Territorial Organisation Issues, drafts of which have been registered in the Parliament and one of them has already been the subject of a first reading.

III. Substantial comments

11. The comments on the substance of the draft law will not repeat comments already formulated in other documents mentioned in the introduction to this opinion. They will be formulated not in the order they appear in the draft law but in the order of decreasing importance.

a. Mechanism for supervision over Kyiv authorities' acts

12. One of the fundamental elements of change introduced by this draft law is the separation of the executive bodies of the Kyiv City and Kyiv State Administration. As mentioned in opinion CEGG/LEX(2020)4, this major reform would finally bring in line the legislation on Kyiv with the Charter and should be commended.

13. One of the most important parts of this separation, and of the relation between state and city administrations in general, is the mechanism for supervision of the legality of local acts which the draft law introduces. The mechanism for this supervision is fundamental to ensure both the respect for local self-government and protection of the rule of law in Kyiv.

14. The position of the Council of Europe in respect of such a mechanism for supervision was made clear in CEGG/LEX(2020)2. Such a mechanism is not a violation of the Charter and similar mechanisms have been created in all European countries. However, in view of its sensitivity, and in order to ensure the respect for local self-government, the Charter establishes a number of conditions for it, as Art 8 provides for:

1. *"Any administrative supervision of local authorities may only be exercised according to such procedures and in such cases as are provided for by the constitution or by statute.*
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.*
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."*

15. Moreover, two other articles of the Charter are of particular importance for the supervisory mechanism:

- Art 4 para 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.*
- *Art. 11: 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 as are enshrined in the constitution or domestic legislation."*

16. In short, supervision should be:

a. fully based in law;

b. only on legality for own competencies;

c. respectful of functional autonomy for delegated competencies;

d. proportional to the interests it protects;

e. open to judicial remedy.

17. The importance of the proportionality principle cannot be overstated. This principle implies that not all acts should be supervised; the frequency and intensity of supervision should be adapted to the importance and potential impact of various acts; there should be no room for excessive requests for information, reports and data from the supervisory authority etc.

18. All these principles are not specific to Kyiv but common to all local authorities. As such, they have been (at least partially) addressed in the draft Law on Local State Administration (#4298) and sufficiently commented on in the opinion CEGG/LEX(2020)5. However, this draft law has not yet been adopted by the Verkhovna Rada.

19. If anything, the strict respect of these principles in the case of the administrative supervision mechanism is even more important for Kyiv, in view of the political, social, and economic importance of the Ukrainian capital city. Moreover, the ratio between the number of supervising and supervised authorities here is 1 to 1, which makes excessive supervision a greater risk for local self-government than elsewhere (as an example, such ratio in France is on average 1 to 365).

20. **Therefore, the current draft law could be acceptable as a *lex specialis* (special law), but only insofar as the *lex generalis* (general law) ensures the full respect of the above-mentioned principles set out in the Charter. As a stand-alone law however, the current text would represent a flagrant violation of the Charter.**

21. **It is therefore recommended that the current draft law only be adopted after adoption of the general law concerning the mechanism of administrative supervision (which is currently the draft law on Local State Administration) or as a package with this general law, and only if this general law ensures the full respect of the above-mentioned principles included in the Charter.**

22. **A second option would be that this draft law, in its Final and transitional provisions, suspends the implementation of the provisions concerning administrative supervision until the entering into force of the *lex generalis*, the one on Local State Administration.**

23. A third option, far less advisable, would be to replicate all provisions concerning safeguards as to the administrative supervision mechanism in this draft law.

b. Creation of urban rayons

24. As explained in opinion CEGG/LEX(2020)4, the Charter does not apply to municipal subdivision. Such subdivisions are not covered by the protections offered in the Charter, such as the subsidiarity principle, own competences and budget, right of judicial appeal or limitations to administrative supervision etc.

25. There is also no systematic use of urban districts in Europe. Although many large municipalities have created them, in some cases these subdivisions are very powerful with the municipality itself looking more like a federation of districts, while in other cases they are not much more than municipal antennae offering certain services to citizens and input into municipal decision making.

26. As Kyiv has a population of 3 million inhabitants, without including the inhabitants of other smaller municipalities in the larger Kyiv metropolitan area, it is probably useful to create urban rayons in Kyiv in order to ensure better knowledge of the local situation and ensure better proximity of services. **However, as mentioned in the 2019 Peer Review report, it is already difficult to ensure coordination of policies between the local authorities which constitute the metropolitan area; the problem should not be compounded by the atomisation of the Kyiv municipality into quasi-independent smaller ones.** The Congress also advised in its Recommendation 219(2007) on the status of capital cities to refrain from splitting the capital's territory into a number of municipalities.

27. Art 2 of the current draft law provides for the list and limits of districts to be established and changed by the Cabinet of Ministers upon proposals by Kyiv city council and taking into account the proposals of the district councils themselves (after their creation) and the results of public discussions.

28. It would be better to leave responsibility for the establishment of, and amendments to, the list and limits of districts to the Kyiv city council. This solution would be more in line with Art 6 ("Appropriate administrative structures and resources for the tasks of local authorities") of the Charter: "*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*".

29. It is understood that the Kyiv authorities have had the power to establish such districts for a long time but have not chosen to exercise these powers. If indeed the existence of such districts is considered of high importance and the districts are indeed, as mentioned by para 3 of the same Art 2 of the draft law "administrative and territorial units which are part of the system of administrative and territorial organisation of Ukraine", and account taken of the first part of Art 6 of the Charter, it could be considered that the provision is not a violation of the Charter.

30. It could however be made clear that any decision of the Cabinet of Ministers should be **based upon** (not only triggered by) a proposal of the City council (and following consultations with other stakeholders). **Any differences between the decision of the Cabinet of Ministers and the proposal of the Kyiv authorities should be fully justified.**

31. As mentioned above, the principle of subsidiarity is usually not applied to urban districts. The legal interpretation of the principle varies, from a very light understanding like "bringing administration closer to citizens" to a very restrictive one like "Competences should belong to the lowest level authorities unless they **cannot** exercise them". Without specifically naming it, in Art 4 para 3, the Charter gives what can be considered a balanced definition of this principle: "*Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy*".

32. **As the creation of these districts is one of the important specificities of this draft law, it would be better to explain the exact scope of the subsidiarity principle applied to relations between the City and district authorities in order to give it legal certainty.**

c. Other issues

33. Art 14 para 4 of the draft law stipulates that "the Head of the Kyiv State administration, and/or his authorised deputy heads, heads of structural subdivisions if its administration, may participate in meetings of the Kyiv City Council and their bodies (…) to express their comments and suggestions".

34. Having state representatives who exercise an advisory function for the benefit of City authorities and those of its districts is commendable. **However, the very broad scope of this article would appear to create a sort of *a priori* supervision, which would not be in compliance with the Charter. Indeed, giving such a legal right of participation and expression in meetings not only of councils (usually public) but also of bodies of these councils down to the level of heads of structural subdivisions of the state administration seems excessive.**

35. The draft law does not really address the problem of the metropolitan area governance arrangements and of the current urban planning deadlock. The relevant article provides only declarative obligations for local self-government bodies of Kyiv 'suburban zone' to take into account the Kyiv City Council bodies' proposals to their 'planning documentation'. In case of disagreement between the parties, the issue may be submitted to the Cabinet of Ministers for consideration.

However, it is not clear whether the Cabinet will be empowered to take final decision or will only serve as a conflict moderator. The Cabinet of Ministers also has no time limit for its policy response.

36. Of course, issues of metropolitan governance may be common to all metropolitan areas in Ukraine and, if the solving of institutional arrangements in the City of Kyiv itself is not considered of utmost urgency and/or not specific enough, a special law covering all metropolitan areas on a uniform basis could be prepared in parallel /subsequently.

IV. Conclusions and recommendations

37. The current draft law is vastly improved when compared to the previous one. Most major issues of concern identified in that document have been addressed. Instead of being a founding law for the Kyiv City, this draft law is a special law to complement and derogate from the provisions of the other, general, laws covering local government, in particular the (future) laws on local state administration, on local self-government, and on the territorial organisation of power in Ukraine.

38. As already mentioned in Opinion CEGG/LEX(2020)4, a coherent legislative succession should normally follow the sequence Constitution – general laws – special laws. It is however acceptable that, in a case such as Ukraine, where the legislative reform efforts are massive and intensive, several laws can be discussed and possibly adopted in parallel. A good degree of legislative coherence must nevertheless be ensured.

39. In the case of the current draft law, at the very minimum the new and sensitive mechanism of administrative supervision should be established on a sound basis, in full compliance with the Charter.

i. It is therefore strongly recommended **that this law be adopted either after or as a package with the *new* Law on Local State Administration, which should set the basis for this mechanism and establish the limitations and conditions which should bring it in line with the Charter**. Alternatively, the Final and Transitory provisions in this draft law should postpone the implementation of provisions concerning administrative supervision until the entry into force of the **new** Law on Local State Administration.

ii. **It is also recommended that Art 14 para 4**, which gives the right to a large number of representatives and officials of the State Administration to take part and express their opinions in meetings of the Kyiv council, district councils and their bodies, **be abandoned** as its provisions may amount to excessive interference in and a sort of a priori supervision over local government acts.

iii. In order to ensure legal certainty and eliminate expectations for an excessive decentralisation of the city competencies towards its districts, **the principle of subsidiarity regulating the relations between the city and the districts should receive a legal definition**.

iv. Ideally, **the City Council should decide on the creation and borders of its districts**. If this is considered to be impractical, **any departure by the Cabinet of Ministers from the proposal of the City authorities should be based on clear and convincing arguments**.

v. In case further **elaboration of provisions concerning metropolitan governance** in the current draft law is not advisable view that such issues may be common to all metropolitan areas, the Verkhovna Rada should **keep the issue of preparing such a future law in mind for the near future**.