

7 September 2020

## **Analysis Report on the Draft Law of Ukraine “On the City of Kyiv – Capital of Ukraine” (No. 2143-3)**

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This report was prepared as a contribution to the Opinion of the Council of Europe on the Draft Law of Ukraine “On the City of Kyiv – Capital of Ukraine” (No. 2143-3) following a request by the Committee on State Building, Local Governance, Regional and Urban Development of the Parliament of Ukraine.

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The views expressed herein do not necessarily reflect the official position of the Congress of Local and Regional Authorities of the Council of Europe.

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## **Executive summary**

The Draft Law of Ukraine “On the City of Kyiv – Capital of Ukraine” is the more recent of a series of draft laws aiming at addressing some of the pending issues affecting the governance of the capital city.

In several respects, the changes introduced by the draft law are welcome and clearly in line with the Charter and with European standards. This is the case in particular of the innovative provisions aimed at modernizing the administration and of the separation of functions between local and State authorities. The draft also reintroduces the urban districts as institutions of the local self-government. Except for the peculiar appointment of the executive head of the districts, this is also a welcome step.

The proposed draft law also specifies to a much greater detail several aspects that are currently absent or not sufficiently regulated in the present law. This creates more legal certainty, although it might reduce the scope of local self-government and in some case the question arises as to whether the provisions cross the constitutional border between organization of local self-government (which is a prerogative of the State) and the specific aspects of its exercise (which is a local power).

The core of the law is the clear separation between the local self-government and the executive power, and notably between the Mayor and the Head of the State City Administration. While this is as such a positive development, the draft law fails to achieve a balance between the two powers by conferring to the latter overwhelming functions, including heavy supervision and the exercise of powers that normally belong to judicial bodies. This raises severe issues of compatibility with the constitutional principle of the separation of powers and with the proportionality principle laid down in article 8.3. of the Charter.

## 1. Background, process and open issues

The **process** to adopt a new Law on the City of Kyiv as the capital city of Ukraine is in place for quite some time and especially since the summer of 2019, just after the election of incumbent President Zelensky. Earlier drafts have already been assessed by Council of Europe's bodies against the Constitution of Ukraine, the European Charter of Local Self-Government (ECLSG, or the Charter) and general European standards on local self-government. This was in particular the case of the first round of comments in September 2019 and of the assessment of the draft submitted in late December 2019. The latter in particular aimed at introducing significant changes in the governance of the capital city, including the re-establishment of the district councils as local self-governing bodies, and overall suggested a centralization of powers, concentrating overwhelming functions in the hands of the Head of the City State Administration, especially as far as supervision is concerned. Criticism with regard to the last draft focused on one hand on the fact that it intended to anticipate a proposed constitutional reform which was aimed at establishing (strong) prefects as peripheral bodies of the central government, and on the other hand because it designed for the city of Kyiv a remarkably different governance as compared to the other municipalities in the country. As to the compatibility with the Charter, serious concerns were raised in terms of the principle of proportionality, especially in the area of supervision.

The high number of drafts and the long time for the adoption of a new law on the capital city (which was further slowed down by outbreak of the pandemic), is not negative per se, as it allows to take into account more views from different stakeholders as well as from the international community. It is understood that some **consultation** has taken place on earlier drafts of the law, and while this was considered insufficient by some actors, it still represents a (minor) and welcomed step forward in terms of inclusive legislation.

The **new draft law** presents several aspects that are common to previous texts. In particular, its core remains the separation between local self-government and executive power as well as the re-establishment of city districts. As compared to previous drafts, this proposal is more concerned with a number of technical and managerial aspects that aim to make Kyiv a modern, well planned, green, sustainable and digitalized metropolis. The present assessment focuses primarily on the institutional elements, although some comments are made also to the public management and sustainability agenda pursued by the draft legislation. In the end, specific recommendations are made.

## 2. The new draft law in detail

The draft law replaces rather than amending the current law "On the Capital of Ukraine – Hero City Kyiv" from 1999 (and subsequently amended in 2008). Besides political considerations, the main **technical reasons** that call for a new law are essentially two. On one hand, to provide the city with effective instruments for the governance of a complex and growing metropole, which combine efficiency, transparency and protection of the environment. On the other hand, to design a new governance model for its special status as prescribed by the Constitution (Article 133.3), in particular divorcing again the role of the Mayor and that of Head of the State Administration in the city and re-introducing the elected urban district (*raions*) councils in the city as bodies of the local self-government.

These principles are common to previous draft laws on the capital city and seem to represent the consensus-baseline for the reform of the city organization. They are per se fully **compatible** with the Charter and welcome, as they are in line with previous recommendations issued under the monitoring of the implementation of the Charter.

The draft law contains a **preamble** which emphasizes the historical and contemporary role of the city of Kyiv and underlines some principles inspiring the legislation, such as in particular the "balanced, sustainable and comprehensive development". The actual provisions are **structured** in six sections, which will be analyzed in detail, focusing in particular on the articles that raise some issues or, sometimes, are particularly commendable.

## 2.1 General Provisions (Section I, Articles 1-11)

The first session is quite detailed as far as certain underlying **principles** of the city governance are concerned and makes this part much longer as compared to the current legislation. While no standard exists as to the degree of detail, this represents a positive development in two ways. On the one hand, it introduces important principles for modern governance that were not developed when the law from 1999 was adopted, such as environmental criteria, sustainable urban planning, accessibility or digitalization. On the other, it lays down principles and rules that might be taken for granted as the baseline for a functioning urban society (such as safety, cohesiveness, transparency for architectural competitions, protection of vulnerable groups, gender equality, participation)<sup>2</sup>, but are nevertheless very important in the context of the city of Kyiv and of Ukraine more generally, indicating that all actors are expected to strive for the achievement of such goals. In this perspective, the list of such principles has an important integrative effect, even if some of them are already contained in the current legislation.

**Article 1** clarifies that the law is to be considered as *lex specialis*, thus derogating from the general provisions laid down in the two more important laws regulating municipalities in Ukraine, the law “on Local Self-Government in Ukraine” and the “law on Local State Administration”. The reference to the Constitution is appropriate, as the special status of the city of Kyiv is mandated by the Constitution itself, while the reference to international treaties should be made clearer: as there is no international treaty on the status of Kyiv, most likely the reference is to international treaties on local self-government. Therefore, reference could be made to the ECLSG rather than to international treaties in general, or at least to international treaties and other norms on local self-government<sup>3</sup>.

**Article 4** re-introduces the **urban districts** (*raions*) of the city, without indicating their number<sup>4</sup>. This is in principle a welcome measure. In fact, since 2010 the districts only operate as bodies of the state administration<sup>5</sup>, which is problematic in terms of respect of the principle of local democracy laid down in the Charter<sup>6</sup>. This development will bring the situation in Kyiv more in line with established practice in European countries, where it is common for big cities and especially capitals to resort to districts as parts of the city administration, in order to make the administration more effective and to bring it closer to the citizens<sup>7</sup>. It must be recalled that the re-establishment of the city districts has been opposed for long time by the very City Council, so that the law is trying to solve an issue that is open since at least a decade.

It is also positive that the draft law establishes that “a decision to form, name, transform, liquidate, establish and change the boundaries of the urban districts in the city of Kyiv shall be adopted by the Kyiv City Council” (as established by the Constitutional Court back in 2001), and that art. 4.4. lays down the underlying criteria that should inform such changes. This is somehow complemented by art. 12.5, which stipulates that “the extent and scope of the powers held by the Kyiv urban district councils shall be determined by the Kyiv City Council” and reinforced (or duplicated) by art. 30.1, according to which “a Kyiv urban district council shall be established and liquidated by [a] resolution of the Kyiv City Council” (the necessity of such repetition could be double-checked). However, as provided by the Constitution, districts are administrative units, and for this reason any changes in the district division of the city can be made by the Verkhovna Rada (“upon submission of the Cabinet of Minister of Ukraine according to the proposal from the Kyiv City Council”, art. 4.3)<sup>8</sup>. A clearer

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<sup>2</sup> See in particular articles 6 and 7.

<sup>3</sup> For example the non-binding UN General Assembly Resolutions.

<sup>4</sup> Unlike in the previous draft law (December 2019).

<sup>5</sup> See art. 7 of the current law.

<sup>6</sup> See the last monitoring report by the Congress on Ukraine, CG(25)8FINAL, 31 October 2013, cit.

<sup>7</sup> This is the widespread practice in European capital cities. In some case the presence of districts has also additional reasons, like in Brussels, where the metropolitan city is in fact divided into 19 municipalities corresponding to districts, also for the sake of safeguarding the difficult linguistic balance in the bilingual capital region. Other examples include Paris, Rome, Vienna, Warsaw, Oslo, and several more cities. Such districts have their own administrative organization and councils elected by the citizens.

<sup>8</sup> As compared to the current legislation, article 4.3 adds one more actor in the process, the Cabinet of Ministers of Ukraine. Boundaries of the City of Kyiv “are established by the Verkhovna Rada upon submission of the Cabinet of Ministers upon submission of the Kyiv City Council”. It must be noted that also in other European countries the power to determine the borders and the organization of the capital city structure is vested with the national Parliament, such as in Belgium. The Charter does not prescribe one single model for dealing with this issue and in fact it is not uncommon that such rules are made by the national parliament, like in the case of Brussels – See C. van Wynesberghe, *Brussels, Belgium*, in E. Slack,

delimitation between the powers of the Verkhovna Rada regarding the boundaries of the City of Kyiv (art. 4.3.) and the powers of the Kyiv City Council regarding the urban districts (art. 4.4.) would be helpful and could avoid future disagreements.

As to less positive aspects, the unique organizational model provided for the urban districts raises concerns. According to article 32 of the draft law, urban districts have a council and an **executive office**, the latter being the executive body of each district. The executive office is managed by a Head, appointed by the district council “under a contract for the duration of powers” of a district council (art. 32.3)<sup>9</sup>. In the other cities of Ukraine the councils set up executive committees, which are collegial executive bodies. However, in the case of Kyiv urban districts, the executive bodies will be one-person management bodies, like the Magistrate is for the city council. This raises issues of compatibility with the Constitution and with the Charter, whose art. 3.2 refers to democratically constituted authorities<sup>10</sup>, meaning that the right to 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” (article 3.2 ECLSG). While this formulation allows for several different arrangements, the configuration of the power structure at district level seems to be beyond the margin of discretion allowed by the Charter.

Furthermore, if read in conjunction with the separation between City and State administration provided for by the draft law and with the strong powers conferred to the latter, the legislative imposition of city districts might cast some doubts upon to their capacity to strengthen local self-government or rather having the opposite effect, as the assessment of the previous draft law already highlighted<sup>11</sup>.

**Articles 6, 7** (and others in other sections<sup>12</sup>) lay down a number of detailed, innovative and commendable provisions. **Reference to the Charter** in article 6.2. is of special importance and it has to be reminded that the Charter has to be read in its entirety, including the recommendations developed in its monitoring. All principles referred to especially in article 6 are of paramount importance. With regard to art, 6.4 no. 2, which prescribes that activities of the local self-government authorities shall pursue, inter alia, the goal of “respect for all people, regardless of race, age, gender, financial, health status or other statues”, the reference to the concept of race is problematic. Unless this comes from an inappropriate translation, it is advisable to replace it with other concepts, such as “ethnic or national affiliation and origin” – so as to include both persons of foreign origin and Ukrainian citizens belonging to minorities.

**Article 8** deals with relations of local self-government authorities in the City of Kyiv with local self-government authorities and executive authorities in the Kyiv Oblast. Such provision is important as it favors cooperation among different bodies with different legitimacies and each dealing with parts of the management of the city. Their smooth interaction is therefore of primary importance.

**Article 9** provides for the mandatory adoption of the Municipal **Charter** in Kyiv<sup>13</sup>, whereas in all other municipalities this charter is optional, as provided by the Law on Local Self-Government. As opposed to the draft bill from December 2019, this provision is simpler and clearer in prescribing that approval and amendment to the municipal Charter be voted by two-thirds of the members of the Kyiv City Council. At the same time, participatory instruments such as the request by a certain number of residents to amend the municipal Charter are no longer included in the draft, despite the fact that citizens’ participation is strongly promoted by means of the instruments listed in article 12.6 of the draft law. Clarification is needed in order to distinguish between the amendment procedures in para 1 and 2 of article 9: as it stands, a possible contradiction could emerge between the amendment procedure regulated by the law (art. 9.2) and the one laid down in the municipal

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R. Chattopadhyay (eds.), *Finance and Governance of Capital Cities in Federal Systems*, Montreal and Kingston 2009, pp. 33 ff.

<sup>9</sup> The same was provided for in the previous draft, which was even more extreme as it stipulated that the appointment was for two years only, thus increasing the political control over the appointed Head of the executive office. In this regard, the current provision represents an improvement, albeit limited. Art. 32.3 provides that the contract can be terminated earlier for certain reasons, and the more political they are, the stronger is the required majority in the council.

<sup>10</sup> See Explanatory Report, article 3 para. 2.

<sup>11</sup> Congress of Local and Regional Authorities, Analysis Report on the Draft Law of Ukraine “On the Capital City of Ukraine – Hero City Kyiv”, 23 February 2020, cit.

<sup>12</sup> See in particular section IV, below.

<sup>13</sup> Kyiv City Territorial Community Charter.

Charter itself (art. 9.1).

Finally, giving the conflict potential that is innate in **symbols**, it is suggested to specify, in **article 10**, that symbols should in any case not be offensive or divisive and should rather promote the inclusiveness of the city (and of Ukrainian society overall)<sup>14</sup>.

All in all, **Section I** of the draft law represents in many respects a significant **improvement** as compared to the current legislation, but it also introduces some principles in the organization of powers at capital city level that might raise issues of compatibility with the Charter, such as the appointment of the head of the executive office of the urban district councils.

## 2.2 Local Self-Governance in the City of Kyiv (Section II, Articles 12-34)

The draft law re-enforces and clarifies the **separation** between the City (represented by the Mayor) and the Head of the State administration in the City: the former should be tasked with implementing a political strategy, the organisation of the work of the City Council, the implementation of the municipal decisions, while the latter should carry out functions related to the execution of tasks deriving from State decisions and the implementation of State programmes. To date, the elected Mayor also performs the functions of the Head of State Administration, and to return to a separation of the two functions is in principle a welcome development, which might resolve a number of issues deriving from the cumulation of functions, including some constitutional litigation<sup>15</sup>. In fact, the organizational model according to which the Mayor also performs some roles pertaining to the State administration, operating as an officer of the State and not of the local government, is being gradually abandoned in comparative practice. The cumulation of both functions, while not incompatible with article 8 of the Charter<sup>16</sup>, might indeed not be an ideal solution. Following this approach, the draft law separates **local self-government** (Kyiv City Council and Mayor, section II) and **State executive power** (Kyiv City State Administration, section III) and distributes the power between the two, granting to the latter a rather pervasive supervision (see below).

Section II deals with the **local bodies** in charge of local functions, notably the Mayor (art. 13-14), the City Council (art. 15-24), the executive body (Magistrate, art. 25), some other figures (art. 26-29) and the districts (art. 30-32).

**Article 12** is labeled “Exercise of local self-government in the city of Kyiv”, reflecting the terminology of the Constitution. At the same time, it goes quite far in determining its organization, and not only the exercise of the local self-government. As already pointed out in the assessment of the previous draft law<sup>17</sup>, also this draft might cross the constitutional border (art. 140 const.) between **organization** of local self-government (which is a prerogative of the State) and the specific aspects of its **exercise** (which is a local power) for the city of Kyiv, and might therefore face some constitutional challenge if adopted in this form. In this respect, it is advised to undertake a closer examination of the distinction between organization and exercise and to make sure that the law does not operate outside of the constitutional limitations.

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<sup>14</sup> See for a more elaborated comment and for examples the Ljubljana Guidelines on Integration of Diverse Societies, drafted in 2012 by the OSCE High Commissioner on National Minorities (esp. no. 50) – available at <https://www.osce.org/files/f/documents/0/9/96883.pdf>.

<sup>15</sup> As reminded by the 2013 monitoring under the ECLSG, “the separation of administrative functions at the level of the raions/oblasts between the state and the local/regional authorities on the one hand and the combining of these functions at the level of the towns/villages on the other are one of the most problematic issues in the context of sharing administrative responsibilities” (Congress of Local and Regional Authorities, Monitoring Committee, Recommendation 348 (2013), Local and regional democracy in Ukraine CG(25)8FINAL, 31 October 2013, para 187).

<sup>16</sup> Also the Constitutional Court held in its judgment of 25 December 2003 (no. 21-rp/2003) on the specifics of the exercise of executive power and local self-government in the city of Kyiv that the «creation in the city of Kyiv of a single body from the organisational point of view that carries out the functions of the executive body of the Kyiv City Council and at the same time exercises the functions of the local body of the state executive fully complies with the requirements of Article 3, paragraph 1 of the European Charter of Local Self-Government, which defines local self-government as ‘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’».

<sup>17</sup> Congress of Local and Regional Authorities, Analysis Report on the Draft Law of Ukraine “On the Capital City of Ukraine – Hero City Kyiv”, 23 February 2020, cit.

This Section in fact introduces a **detailed regulation** of the role and powers of the respective bodies. It goes as far as to include in the law some roles that, while very important in the city governance – such as the Deputy Mayor for Finances (art. 26) and the Chief Architect (art. 28) –, normally belong to the scope of self-organization of local governments. The degree of details in this Section on one hand adds to legal certainty and is therefore welcome, but on the other hand it fences the scope of action for the Mayor and the City Council. This is not per se problematic under the Charter, nor it is uncommon in comparative practice, which in fact proves that most recent regulations of local government tend to be more detailed and specific. From a systemic perspective, however, some contrast emerges compared to the subsequent Section III, on “Specifics of the exercise<sup>18</sup> of the executive power”, the cardinal part of the draft law, which only consists of three articles but places the most significant powers in the hands of the City State Administration and of its Head. A high degree of detail could in fact fence the scope of local self-government, as opposed to the executive power (City State Administration) which is less constrained.

**Article 12** adds to clarity in providing the list of the bodies in charge of local self-governance in the City of Kyiv as well as the forms of direct citizens participation in addressing local issues. It is also positive that art. 12.5 clarifies that the powers of the urban district are determined by the Kyiv City Council.

**Articles (13 and) 14** specify in greater detail the powers of the Kyiv City **Mayor**. The draft law abandons the current approach according to which the Mayor of Kyiv has the same powers like all other mayors<sup>19</sup> plus some additional powers<sup>20</sup>. However, despite the long list of 34 tasks, the powers and functions of the Mayor are **limited** to a managerial-executive or to a representative role, except for the appointment and dismissal of the Deputy Mayor, the Chief Architect and, above all, the heads of structural subdivisions of the Kyiv Magistrate (the executive) (art. 14.2 no 14). This provision formalizes a sort of spoils system which is per se not contrary to the ECLSG, although it is rather uncommon in the European practice of local self-government. The Mayor is also vested with a suspensive veto power on the decisions of the City Council, which can be overruled by a 2/3 majority of the Council (art. 22.4).

**Articles 15-24** regulate in great detail the functions, the bodies and the work of the **Kyiv City Council**. Article 24 prescribes transparency requirements and restrictions to the City councilors, which are not provided by other legal acts and do not apply to the members of other local councils in Ukraine. While rules on avoiding conflicts of interest (such as art. 24.3 and art. 24.4) on accountability and on granting transparency, including on reimbursements and compensations (art. 24.6) are certainly welcome, such requirements make the status of councillor in Kyiv rather different from all other local governments in the country. Furthermore, it is rather unusual in comparative practice that the head of the assembly’s support administration is elected, as stipulated by art. 16 of the draft law (Secretary of the Kyiv City Council).

**Article 25** establishes the **Kyiv Magistrate** as the executive body of the Kyiv City Council, and, according to art. 14.2 no. 11, is “managed” by the City Mayor. It is not specified what “management” means in this context, in particular whether the expression includes appointment and dismissal of the Chief Executive nor what kind of accountability is prescribed. Further elaboration and clarification would help.

Importantly, **articles 33 and 34** lay down relevant and pervasive rules in order to ensure **transparency** and openness in the administration and by the local government’s authorities, introducing an electronic office (art. 33) and a system of monitoring and audit (art. 34). From the point of view of drafting, art. 33.8 of the draft law, on the inventory of the property belonging to the Kyiv City Territorial Community, could be placed as a separate article or under the functions of the Magistrate.

In sum, while detailed and well structured, the section on the local self-government in the City of Kyiv design a **weak self-government**, whose bodies have primarily the task to manage the administration, with a relatively limited role as to key decisions for the city.

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<sup>18</sup> See the comment above on the use of terminology following the constitutional distinction between organization and exercise of local self-government.

<sup>19</sup> As provided in the Law on Local Self-Government (art. 13.1 current law).

<sup>20</sup> Article 17 of the current law.

### 2.3 Specifics of the Exercise of the Executive Power (Section III, Articles 35-37)

By contrast, the section on the State executive power (Kyiv City State Administration and its Head) is far shorter and less detailed, but clearly confers to these bodies a wide range of extremely **significant powers**.

**Article 35** shortly prescribes that there cannot be State urban district administrations (art. 35.3), this way concentrating the executive power as opposed to the local self-governance which is divided among several authorities (City Council, Mayor and urban districts in particular). Above all, it stipulates that the Kyiv City State Administration cannot be headed by the Mayor (art. 35.2), thus explicitly overcoming the current situation. It is striking, however, that article 35 fails to provide **how and under which procedure the Head of the Kyiv City State Administration is appointed** (and dismissed). Having regard to previous drafts, it may be inferred that the Head is appointed (and dismissed?) by the President of Ukraine. However, such link has been criticized in the assessment of the previous draft<sup>21</sup> and, should it remain, it would raise the same issues of compatibility with the Charter and with its principles of local democracy. In any case, the **rules on appointment, accountability and dismissal of the Head of the Kyiv City State Administration** need to be clarified and **included** in the text of the law.

**Article 36** lists the **powers** of the Kyiv City State Administration (and its Head). The list of reserved powers is long and includes not only those powers that are commonly reserved to the State in its supervision functions (such as emergency powers, control of the respect of the constitution and of the laws, ensuring order, etc.), but it also contains general clauses that have the potential to disproportionally extend the power of the (Head of the) State City Administration, such as the prerogative to “take any other measure as may be required to perform the tasks assigned to the Kyiv City State Administration” (art. 36.3 no. 8). The Head of the State City Administration also has the power to bring the acts of the local self-government in compliance with the Constitution and with the laws in delegated matter (art. 36.3 no. 4), which confers an un-checked power to reverse acts. It also serves as controller of the constitutionality of acts of local self-government authorities, as (the Head) “considers appeals [...] that concern non-conformity of acts by the local self-government authorities with the Constitution or laws of Ukraine” (art. 36.3 no. 3), which seems **disproportionate in terms of the very separation of powers**.

This attitude is further confirmed by **Article 37**, in which the “procedure for ensuring compliance with the Constitution and laws of Ukraine in the City of Kyiv” is laid down. The powers contained in this provision normally (and also in the current legislation) belong to the judicial authorities, such as the “review of the acts taken by the local self-government authorities in the City of Kyiv on the matters related to the powers delegated to them for compliance with the Constitution of Ukraine and/or the laws of Ukraine” (art. 37.1). The Head of the City State Administration also has the power to issue acts (precepts) to redress non-compliance of acts of the local self-government in delegated matters with the Constitution or the laws (art. 37.2), which means that the Head is at the same time the body (the person) that decides on compliance and the one that issues an order to comply with the decision. While the previous draft (December 2019) provided for similar powers, it included some reference to judicial proceedings, which are absent in this case.

Such powers **transcend the constitutional division of functions** between the state powers<sup>22</sup>, and **disproportionately** limit local self-government. In this context it should be recalled that the Charter adopts a rather broad understanding of supervision, whereby a wide number of control activities can be legitimately carried out, from reporting to authorization, from accounting controls to the power to suspend or annul local authorities’ acts. Such supervision, however, undergoes two limitations established by the Charter: it can be carried out only according to procedures established by law, and the means must be proportionate to the goal. It follows that supervision should be limited to acts of a certain importance, limited in time and not result in a disproportionate curtail of the right of local self-government. Supervision can therefore be pervasive, including for example the power to overturn or cancel any act of the local authority that prejudices the functioning of the constitution, but this can happen only while respecting the separation of powers and the local self-government. It is questionable whether the draft law respects these principles, since it empowers the Kyiv City State

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<sup>21</sup> Congress of Local and Regional Authorities, Analysis Report on the Draft Law of Ukraine “On the Capital City of Ukraine – Hero City Kyiv”, 23 February 2020, cit.

<sup>22</sup> Probably also the very wording of the Constitution: article 144 const. in fact establishes that local government acts that are not in compliance with the constitution or with the laws, are suspended and appealed to a court.

Administration (and its Head) with some functions that typically **belong to judicial or law enforcement** bodies rather than to executive (and not even specialized) authorities, including the interpretation of the laws and of the Constitution.

The provisions of the draft law in this regard raise **severe concerns** as to the compatibility with article 8.3 of the Charter, which establishes the principle of proportionality in exercising supervision and control<sup>23</sup>. The width and depth of the supervision established by the draft law might in fact result **disproportionate** in terms of limiting the autonomy of local self-government and of pushing the limits of the separation between the executive and the judicial power. The powers of the Head of the State Administration should be revised following the principle of proportionality enshrined in the Charter, as articles 36 and 37 contradict, inter alia, the goal to respect the Charter laid down in articles 1 and 6.2 of the draft law.

#### **2.4 Strategic Planning in the City of Kyiv: Strategic Urban Development Documents and City Information Systems (Section IV, articles 38-40) and City as a Service (section V, articles 41-42)**

The last two sections of the draft law are sectoral, clearly remain within the constitutional mandate to organize the exercise of local self-government and are quite innovative and commendable. Important and modern planning instruments are provided for the strategic planning, including of digital nature (see art. 40).

Regulations in these areas are quite detailed, in a way that is (still) unusual in legislation. In most cases, such instruments are provided for in administrative acts rather than in legislation. Especially in the context of Ukraine, however, it is certainly appropriate to include such a level of details in the law.

As to the final and transitional provisions, an evaluation of their completeness and effectiveness would go beyond the scope of the assessment of compatibility with the Charter and with international standards. It must be noted, however, that the Association of Ukrainian Cities, in its comments made available to the Congress, is of the view that “the draft law does not in any way regulate the formation of new bodies (the Kyiv Magistrate [...]), liquidation of the existing bodies, implementation of powers by such bodies, legal succession of these bodies, conducting competitions, appointments, etc.”. A further check on these aspects should be encouraged.

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<sup>23</sup> According to the Explanatory Report to the ECLSG (art. 8 paragraph 3) states that “the controlling authority (...) is obliged to use the method which affects local autonomy the least”.

## Conclusions and Recommendations

The draft law “On the City of Kyiv – Capital of Ukraine” is the most recent of a series of legislative proposals aiming at resolving the lasting problems of the governance in the capital city. Successive drafts have increased the degree of detail in regulating key aspects for the strategic planning, the modern management, the inclusive organization of a complex metropole, and this draft is **very commendable** as far as these parts are concerned.

As to the governance and the division of powers, the draft law continues the trend common to previous proposals and divorces, in a clearer way, the functions and the authorities of the local self-government and of the executive power. In particular, the functions and roles of the Mayor on one hand and of the Head of the Kyiv City State Administration on the other are divided up to the explicit prohibition for the Mayor to head the City State Administration. While such rupture with the present situation is perfectly in line with the Charter and even welcome, the distribution of the powers between the two is questionable and the control functions attributed to the Head of the City State Administration are **disproportionate and incompatible** with Article 8 of the Charter.

Based on the above analysis and with the aim of ensuring that the draft law will be in line with the Charter and with established European practice, following recommendations should be considered:

1. **Eliminate** from articles 36 and 37 the powers of the Head of the City State Administration that should belong to the judiciary, such as the interpretation of the Constitution and the clause that provides him/her with the power to adopt “any other measure” required to perform the tasks (art. 36.3 no. 8).
2. **Include** rules on appointment and dismissal, as well as on accountability, with regard to the Head of the City State Administration.
3. Refer to the principle of **proportionality** as criterion for the exercise of the control powers of the Head of the City State Administration.
4. **Reconsider** the procedure for appointment of the head of the executive office of urban district councils.
5. Undertake a closer examination as to whether the draft law respects the constitutional distinction between **organization** and **exercise** of local self-government.