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APPRAISAL
OF THE DRAFT LAW OF UKRAINE
ON THE LOCAL GOVERNMENT SERVICE

The present report was prepared by the Council of Europe Centre of Expertise for Local Government Reform, Directorate General II - Democracy, in co-operation with Prof. Gérard Marcou, University Paris 1 Panthéon-Sorbonne, Director of GRALE (Research Group on Local Administration in Europe), France.

Introduction

The present legal appraisal of the draft Law of Ukraine on the service in local government was requested by the Parliamentary Committee on State Building and Local Self-Government within the framework of the Council of Europe (CoE) Programme to Strengthen Local Democracy in Ukraine (2010-2013, funded by the Swedish International Development Cooperation Agency Sida).

Efficient government is a precondition for a competitive economy and better public services. As a result, the 2010-2014 Programme of economic reform "For a society of well-being, a competitive economy and an efficient State" includes an important section on administrative reforms. The Ukrainian government requested the CoE expertise on the concept of local government reform, the new legislation on the state civil service, and on the local self-government service.

The Law on the State civil service, signed by the President of Ukraine in January 2012 does not take into account most of the CoE recommendations, so there has been no change to the basic concept of the civil service, i.e. it is still a job-based civil service and is still driven by a managerial approach with a weak central authority and strong civil service managers in the state organs. As mentioned in the previous CoE appraisal, no changes have been made to the organisational structure and the civil service personnel remains unstable and fragmented[1].

The present draft refers to the new Law on the State civil service for a number of key issues, so that the shortcomings of this law have repercussions on the local government service. The draft law on the local government service also establishes a job-based system. Another problem is that this draft is not about a local government service but about the organisation of a local government service for each local government body; it sets common rules but there is neither common organisation, nor proper career path for local government service members.

Consequently, the new draft Law on the local government service fails to provide for the recruitment of competent professionals, to ensure the political neutrality of the public service, and to combat corruption.

[1] DPA/LEX 5/2011, sent to the Parliament in October 2011.

An appropriate part of the draft is Article 3, where the basic principles are recited: 1) primacy of the law, 2) priority to rights and freedoms of citizens, 3) patriotism, 4) legality, 5) support local self-government, 6) autonomy in performing the service in the "organs" of the local self-government, 7) equal access of all citizens to the local government civil service, 8) professionalism, 9) integrity, 10) political neutrality, 11) transparency, 12)accountability and personal responsibility.

However, even this Article would need to be revised. What does it mean in practice "to give priority to the rights and freedoms of citizens"? The rights and freedoms are guaranteed by the Constitution of Ukraine, they have to be exercised within the framework of the law and under judicial supervision, and a local government employee could not "give priority" to anything beyond the law. In case of a conflict between the rules, it is disputable that the individual right should have priority as a matter of principle (e.g. in case of compulsory purchase of property to build a new road). This principle is not even mentioned in Article 3 of the Law on State civil service law. **The CoE recommendation is to remove this point.**

Furthermore, it is unlikely that these principles can prevail with the organisation of the local government service as it is provided by the draft law. Unfortunately, these issues are not discussed in the positions adopted on the draft law by various organisations representing local government or institutions (councils or local state administrations).

Due to the link established between the legislation on the State civil service and the legislation on the local government service, and since the law on the State civil service has been published as it is, it is perhaps unlikely that big changes would be brought to this draft law in the light of the present comments. Nevertheless, CoE experts do point out the problems of the draft, taking main CoE recommendations and the European experience into account. This appraisal will also make proposals on how some provisions could still be improved.

This appraisal will review the scope of the draft law, the structure, the recruitment and promotion. Comments on rights and obligations, disciplinary procedures, the labour remuneration, incentives and social guarantees were already provided.[2] In its previous comments the CoE recommended to introduce procedural guarantees for the civil servants in the disciplinary procedures, and to extend the scale of disciplinary

[2] See the CoE appraisal of the draft law on the State civil service - DPA/LEX 5/2011, October 2011.

sanctions. As regards the remuneration system, too much discretion is given to authorities for awards, as is the case with the State civil service.

The scope of the draft Law on the service in local government

There are two issues regarding the scope: 1) the structure of the legal framework applicable to the local government service; 2) the coverage of the draft law, as regards categories of personnel and functions.

In addition, the scope of the draft is too narrow as regards the administrative personnel and too large as far as it applies to the elected officials.

1. The structure of the legal framework applicable to the service in local government

There are many strong arguments for a separate legislation on the local government service, as opposed to a unique legislation for service at both national and local levels:

- it promotes the "identity" of local self-government bodies through their personnel to whom a professional identity is given based on the values of local self-government;
- each local self-government unit is a distinct employer, by contrast with the State;
- the relationships between executives and political leaders are much closer in local government than in the State administration.

Nevertheless, both pieces of legislation have to be based on the same principles and provide for the mobility between both branches of the civil service. This is necessary in order to put local government and agencies of the state administration on the same footing and make the local government service attractive for the best professionals.[3]

Two further issues have to be considered:

a) According to Article 4, par.2, the norms of the State civil service legislation and of the labour legislation will apply to the local government service on the issues which are not regulated by the law on the local government service. But, in this case, this provision does not indicate towards which subsidiary norms one should turn at first: the State civil service law or the labour law? Article 6, par.2, of the State civil service law

[3] See DPA/LEX 5/2011 for more details. Also see Position of the Ukrainian Association of District and Region Councils on this draft law, point 1.

declares that the labour legislation will be applicable on issues, which are not regulated by this law. Following this provision, the conclusion of the CoE experts is that the labour legislation should be applicable to the local government service only on those issues which are also supplementary to the State civil service legislation. But such an interpretation could be disputed in practice. Therefore, **paragraph 2 of Article 4 should be reformulated, for example as follows: "The norms of the State civil service legislation are applicable to the local government service on those issues, which are not regulated by the present law. The labour legislation will be applicable on those issues, which are not regulated by the law on the State civil service".**

b) The draft law takes too much advantage of this principle, giving up regulating several important questions, since they are regulated in the law on the State civil service. The CoE experts agree with the position expressed by the Ukrainian Association of District and Region Councils (point 11): such important issues as results of competitive examinations, entry in the local government service, professional training, end of labour relations, disciplinary responsibility, in particular, should be fully regulated in the law on the local government service. There are two main reasons for this: i) the managers and the employees should have to refer to a unique document, in which they will find the full regulation that they have to apply or that is applicable to them – this a matter of clarity of the law and of legal certainty; ii) if such regulations are fully integrated in the local government law, their adequacy to the peculiarities of the local government service can be more easily assessed.

2. The coverage of the draft law, as regards categories of personnel and functions

The CoE recommendation is to distinguish two points: the case of councillors and the case of personnel, who are not considered as members of the local government service.

a) <u>The distinction between personnel and councillors</u>

This distinction is not only necessary due to the difference in status, but it is also required by the European Charter on Local Self-Government. The Charter makes a clear distinction between local government employees and elected officials. Article 7 is specifically devoted to elected officials:

"1. The conditions of office of local elected representatives shall provide for free exercise of their functions.

2. They shall allow for appropriate financial compensation for expenses incurred in the exercise of the office in question as well as, where appropriate, compensation for loss of earnings or remuneration for work done and corresponding social welfare protection".

But, there is an ambiguity for those occupying permanent positions, such as a mayor or a president of an executive committee. They are councillors, since they occupy the said positions through a political election (directly by the people or indirectly by the elected council), but they occupy a permanent position in the structure of a local government body.

Hence the draft law i) is not applicable to council members who do not occupy permanent positions in local self-government organs (Art.2, par.2); ii) distinguishes two kinds of positions in local self-government organs: α) elected positions; β) administrative positions. Both categories of positions are integrated in the classification of positions of the local government civil service (Art.6). The law is then applicable to all those who occupy elected and administrative permanent positions, although usually the law has to provide differences for each category.

This solution is not followed consistently throughout the text, and sometimes it results in provisions that will be difficult to apply or even to justify.

One example of this difficulty is that while group I of the classification of positions includes only political positions, group II includes both political positions (among which are the chairman of the permanent commissions of district and region councils, as well as the Kyiv and Sevastopil city councils) and higher administrative positions. The confusion resides in the source of their legitimacy. Holders of political positions derive their legitimacy from the election: no academic title is required to run for election. Holders of administrative positions derive their legitimacy from their professional qualifications and, in higher posts they have to support policies directed by the political leaders and they also have to cooperate on their formulation and implementation.

Another difficulty is that holders of political (elective) positions have access to a rank, as a professional local government civil servant, but this rank is conferred by decision of the council (Art.22, par.3), and they have a remuneration with the same components as professional local government civil servants (basic salary, bonuses, awards) (Art.28), with the difference that the awards are decided by the council "on the basis of the results of their activity" (Art.29, par.1, last sentence). This means that

the rank and the awards of the mayor are determined by his/her political majority! It would be very difficult to understand and approve such a rule.

According to the new Constitution of Ukraine, elected officials are accountable to the voters, and not to the professional executives who are on the contrary accountable to the politicians. It is therefore important to organise the material status of councillors elected in permanent executive functions such as mayor or president, or their full time deputies. But this should not be regulated by the local government service law. **Such provisions should be included into a new special chapter of the Law of Ukraine on the Status of the Deputies of Local Councils (2002).** A system suitable to such functions and distinct from the status of professional civil servants should be put in place[4].

b) Local government service and other employees

At present the number of personnel employed under the law on the local government service is about 100,000. The draft law maintains a narrow concept of the local government service, as it is under the existing law of 2001. This means that the majority of the personnel paid from local government budgets is and will remain outside of the regime of the local government service; moreover, there are no precise statistics on the total staff employed by local government bodies and the various agencies depending on them.

The new law will not change this situation. Its scope is determined in two ways: i) by a narrow positive definition of the functions in Article 1 and ii) exclusions recited in Article 2.

The positive definition includes several elements (Art.1, par.1, 7°):

- Occupy a permanent position (of an elective or administrative nature);
- Receive a salary from the local budget of the local government organ for which it exercises the functions attached to the position;

[4] For example, in France, mayors and their deputies may receive a compensation calculated as a percentage of the higher treatment of the numeric salary scale of the State civil service; this percentage varies according to the demographic class of the municipality (17% for a municipality under 500 inhabitants; 145% for a city above 100,000 inhabitants) (CGCT: art. L.2123-23 and L.2123-24) and there is a ceiling in case of holding several mandates; there exists also a special social insurance and pension system.

- This permanent position is in the "organs of the local self-government, the apparatus of the local councils or of their executive organs, the executive apparatus of the district, region and Sevastopil city council"[5];
- The functions performed in such a position are to prepare decision projects and their further implementation; deliver administrative public services; manage the personnel and the municipal properties, and perform other tasks of the organ where the position is assigned.

The exclusions are (Art.2, par.2):

- Workers of the organs of the local self-government employed in support functions;
- Workers of municipal enterprises, budgetary institutions and organisations of the municipal economy of any kind of property regime.

The latter exclusion can be justified for the personnel of municipal enterprises, since they perform functions of an economic nature; by contrast the exclusion is more disputable for the personnel of the social and cultural sphere. Again, this was the concept in force in the former Soviet administrative organisation. The rationale was that all workers have to be under the labour law, and only those vested with authority in command functions were subject to special rules due to their mandates.

Furthermore, the concept of "support functions" is imprecise and difficult to delineate. According to Article 1, par.1, 9°, the workers in charge of support functions are those who are employed in the apparatus of the councils and of their executive organs and whose tasks do not include the performance of the powers of local self-government organs, the preparation of expertise for project decisions, the organisation of the implementation of the said decisions, the delivery of administrative services, the management of the municipal personnel or properties, or other powers of the respective organs. The "experts" are considered to be part of the local government service, whereas this is not clearly the case in the State civil service, for which the recent law is not so detailed.[6]

[5] As mentioned in the previous comments of the CoE on the draft law on the State civil service (DPA/LEX 5/2011), the notions of "organs" and "apparatus" are all but clear and leave wide discretion to the holders of political mandates

[6] There is a comment by the Kyiv Oblast Council, proposing that the definition of the scope of the local government service to be extended to the functions of financial support of local self-government organs: this is an amendment to the definition of 7° completed with an amendment to the list of functions not considered to be support functions for the application of the law (9°). This proposal is interesting: how was it possible to envisage

It is difficult to determine who will be a member of the local government service and who will not: according to paragraph 3 of Article 2 of the draft law, it belongs to the council to establish the list of the positions deemed to perform support functions on the basis of criteria to be established by the Central Agency in charge of the civil service policy. Such list will be difficult to establish for many functions, despite the criteria, and this will be a matter of local arrangements and bargaining. As a consequence, a position will be considered in the local government service in one municipality but not in the other.

Therefore the CoE experts insist that this regulation is not well grounded and not adequate to the building of a modern civil service.

There are 3 major justifications to a larger concept of the civil service:

1) It is logical that all personnel paid on local government budgets are subject to the same legal regime, with a few exceptions (for example, holders of political mandates, since they have authority over administration);

2) For the citizens, this means that the civil service represents not only the authority, but more importantly, the duties and the obligation towards the citizens. This is important for the legitimacy of the local government and of the State;

3) The services performed by local government institutions on budget resources are not submitted to market constraints; they are not of an economic or commercial nature. Therefore, their situation and their legal nature are similar to those of local self-government organs (in the sense of the law). The risk of abuse in recruitments and promotions is exactly the same as in local self-government organs. These services can be subject only to political and judicial oversight, and to financial auditing by specialised public bodies. This is why the reasons that justify the application of the local government service legislation to the personnel of local government organs also justify the application of the same principles, with the adaptations that the functions may require, to other personnel paid from local government budgets.

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that those in charge of the financial management of the local self-government organs would not be civil servants?

Therefore, the CoE recommendation is to extend the scope of the law on the local government service to all personnel of the local self-government organs and to the personnel of institutions financed by the local budget, with any adaptation made being justified by the nature of the functions and the level of responsibilities and qualifications.[7]

The structure of the local government service

Two issues need to be considered on this subject: the management structure and the legal structure of the local government service.

1. The management structure

The management structure of the local government is based on the notion of "local self-government organ"; unfortunately, this notion is unclear and will split up the local government service.

Positions (posts) are assigned to local self-government organs. According to Article 1, par.1, 1°, the "administrative position (*адміністративна посада*) in local self-government organs" is the "primary structural unit of the apparatus" of the local councils, departments, administrations and other executive organs established by these councils".

The local self-government organ is the basic management unit of the local government service. The funding of local government service positions is organised within the framework of the local self-government organs (art.5), and a personnel management service is established in each local self-government organ (art.8). It is in charge of the file management for entry in the local government service, promotion and cessation of activity of local government civil servants, the selection of the people for administrative positions, the training of employees as well as councillors. Furthermore, the recruitment procedures based on competitive examinations are initiated by each local self-government organ, and hence by its personnel management office, since Article 16, par.5, refers to the provisions of the law on the State civil service, in which Articles 20 and 21 regulates the formation of the commission and the advertisement of vacancies by the head of the personnel management office of the State organ.

[7] This would not rule out the possibility of hiring specialists from outside of the civil service for very specific or temporary tasks, in accordance with conditions to be defined by the law.

Unfortunately there is **no clear definition of the local self-government organ;** one can only guess that the "local self-government organ" is functionally equivalent to the "State organ".

This is the matter of concern as regards the management of the local government service, and in particular the recruitment.

The local government law of 1997 distinguishes representative and executive organs of the territorial communities or for their common interests at the district (*rayon*) and region (*oblast*) levels (Art.1, 10 and 11). The head of the territorial community or the heads of the district and region councils are not qualified as "organs". Article 15 says that several organs may join for common purposes. But, Article 16 gives a definition of local self-government organs and, since it is the only legal one, this definition has to be considered as binding for the interpretation of the legislation on the local government service. According to paragraphs 1 and 2 of this Article, "local self-government organs are legal persons vested by the law with own powers within the framework of which they handle autonomously and bear the responsibility for their acts according to the law". Specific powers of the organs of the executive power may be delegated upon them and are exercised under the control of the organs of the executive power.[8] In this context, organs of the executive power mean central organs of the State executive power.

This provision casts doubt on the scope of the notion of local self-government organ: although funded by the budget of the territorial community (or of the regional or district council), the local self-government organ is rather a structure subordinated to the executive organ of the territorial community, or the apparatus of the secretariat of the district or regional council – since, at present, these councils have no executive organs of their own. As a consequence, according to the definitions of the local government law, the council and the executive organ of the council might not be local self-government organs in the sense of the law, and this notion would be applicable only to administrative divisions of the apparatus vested with legal personality and treated as budgetary units.

[8] « *1. Органи місцевого самоврядування є юридичними особами і наділяються цим та іншими законами власними повноваженнями, в межах яких діють самостійно і несуть відповідальність за свою діяльність відповідно до закону.*

2. Органам місцевого самоврядування законом можуть надаватися окремі повноваження органів виконавчої влади, у здійсненні яких вони є підконтрольними відповідним органам виконавчої влади.»

This means that, in practice, members of the local government service are not directly employed by the territorial community, or by the district or region council, but by a local self-government organ, and there are several of them in a territorial community. This means also that the number and size of local self-government organs may depend on the decision of the heads of executive organs, or on the council, or on a determination of the law concerning the organisational structure of local governments. **This should be revised: the territorial community, the district or region council should be the employer, not units of their administrative organisation.**

Such organisation will make difficult to have a personnel policy at the level of the whole territorial community, since most significant powers of the personnel will be assigned at the level of the local self-government organ. However, there are some elements of unity: the selection commission for each competitive examination is appointed by the mayor (art.19, par.1), and the programmes of the tests or examinations are determined every two years by the mayor (art.19, par.4) (see below). In spite of this, the wide management powers of personnel management offices of local self-government organs will make even more difficult to implement a national policy, despite the contrary affirmation in several provisions of the draft referring to the central agency of the civil service (art.7 in particular): because of the number of such organs, because the head of the territorial community will stay in between and because central organs of the executive power will control their activity on delegated tasks and this will probably include the personnel questions.

Overall, there is very little change on these points compared to the current local government service law of 2001. The future situation might even become worse if there is no compensation to the legal fragmentation of powers regarding the personnel policy, and because of the shift to a job-based model.

2. The legal structure

The legal structure is based on the same principles as the State civil service, and the structure in groups, subgroups and ranks is parallel to the structure of the State civil service in order to facilitate comparability and mobility. Groups correspond to a hierarchy of functions, the subgroups to a hierarchy of importance of local councils (Art.6). For each subgroup, minimum education level is required, whereas it belongs to the councils to

determine the professional competences they need (Art.15). The rank makes it possible for a civil servant to benefit from advancement (in principle every two years) without being appointed to a higher position, and protects the salary if he/she is transferred in a lower position due to the needs of the personnel management (Art.22).

Recruitment and promotion

This is the most questionable part of the draft law, which could worsen even the present situation.

The draft law provides for: the direct entry at all levels, the absence of in-service promotion procedure and of organised mobility, and the selection of appointees on the basis of competitive examinations by independent commissions, except for positions corresponding to political mandates. This means that the competitive examination becomes the rule for all recruitments: there is an examination or a test based on a programme, followed by an interview, and the result of the competition is binding for the appointing authority. This is a significant improvement compared to Article 10 of the 2001 law, which gives more discretion to local authorities regarding the choice of the selection procedure.

Unfortunately, the conditions of the recruitment through competitive examinations are unlikely to improve recruitment, ensure the equal access to local government service positions, and enforce impartiality in the selection process. The draft law establishes a system of competitive examinations which are too fragmented. It belongs to each local self-government organ (not each territorial community, see above) to organise a recruitment procedure according to the law to fill a vacancy. In other words, the draft law seems to comply with recruitment procedures based on competitive examinations with independent commissions, but there will be too many local competitive examinations. This will also hinder mobility.

The first issue is the publicity of vacancies. Article 20 provides for such publicity, as well as for the organisation of a competitive examination, but it requires only publicity in compliance with legal requirements and a model regulation on the organisation of such competitive procedures. This is not enough. The law should be much more precise. Referring to the narrow scope of the local government service, **the publicity should be ensured at the national level**, in order to make it possible for all those having the qualifications and an interest to apply. The equality in the

access to the civil service positions requires a system of national advertisement. **The CoE recommendation is to complete this point.**

The second issue is the **lack of an in-service promotion procedure**. All competitions are open to both external and internal candidates. The access to any new position is the result of a new recruitment procedure. This is reflected in Article 21, par.4, and in Article 25.[9] These provisions are a step back compared to the present legislation, in which Article 16 organises the "reserve of executives" (*кадровий резерв*), based, in principle, on an assessment of the capacities, a preparation to future functions and a selection procedure for the vacancies. This institution permits to organise a continuity of the professional development of the members of the local government service, it has various equivalents in other countries. **Provided that the procedures are refined and include guarantees of equal treatment, this institution should be resumed in the new law**.

The last issue is the organisation of the competitive examinations. For any recruitment a commission of at least 5 members has to be appointed by the head of the local council: it includes members of the local self-government organ that has to recruit, a representative of the personnel management service of this organ and experts of the speciality of the position to be filled by the recruitment (art.19, par.2). The commission may decide when at least the majority of its members are present (par.3). A model regulation has to be adopted by the national civil service agency on the selection commissions (par.5).

These provisions necessitate the organisation of thousands of procedures for occasional recruitments in thousands of local self-government organs. It is very complicated for potential candidates to apply to so many procedures. Then, it will be difficult to find competent and reliable experts for all commissions for so many procedures, especially in small towns. This will undermine the authority of the selection procedure. There is also a risk that members of the commission do not attend, or are not expected to attend, leaving the decision to local people. As a result, there is a serious risk that local competitive examinations can be easily biased.

Therefore the CoE recommendation is to avoid this system and to establish a system of national competitive examinations, based on

[9] Art 25 refers to an Article of the law on the State civil service that has a completely different subject: art.32 on changes in service conditions – this is a mistake which has to be corrected.

personnel planning, with national juries and a transparent procedure.

The organisation of such competitive examinations can be de-concentrated in several regional capital cities in order to minimise the costs for the applicants. Then administrative positions can be proposed to the selected candidates according to the needs in different places, with the commitment to stay there four years before having the opportunity to have a transfer to another position elsewhere. A supplementary list has to be established for the candidates who resign, to fill vacancies that will occur before the next competition is organised. Then, the law has to organise the in-service promotion, giving a long term perspective to newly recruited civil servants. Such a system will attract good candidates and will give an opportunity to assign qualified people in remote places. In such a system it is almost impossible to distort the selection procedure of the candidates. It is easy to implement given the narrow concept of local government service retained by the draft law and it is even more necessary because it is focused only on personnel of executive level. For the personnel of lower categories the procedure should be decentralised with specific procedures. This will ensure equal access to administrative positions in the local government service and the selection of the best candidates, and will help local government to keep its best professionals.