SECRETARIAT GENERAL

DIRECTORATE GENERAL OF DEMOCRACY AND POLITICAL AFFAIRS

DIRECTORATE OF DEMOCRATIC INSTITUTIONS

Strasbourg, 3 November 2009
(English only)

DPA/LEX 7/2009

Appraisal of the draft law on the Capital City of Ukraine, the Hero City of Kyiv

Report prepared by the Directorate of Democratic Institutions, in co-operation with Professor Gérard Marcou (France)

SUMMARY

The present draft law is in line with reform projects deemed to enhance the self-government system in Ukraine and is likely to reinforce decentralisation in the capital city area.

There is a clear-cut division between local State administration functions and local self-government functions. The Head of the State administration (appointed and dismissed by the President of Ukraine on proposal by the Cabinet of Ministers) is clearly the representative of the central government, only in charge of the State and national interests locally. The legitimacy of the mayor emanates only from the elections.

New tasks are transferred from State administration to Kyiv self-government bodies and the importance given to the inner city districts should help bringing public services closer to the population. At the same time, the draft law organises the supervision of local government acts in order to ensure their compliance with the law; this new supervisory procedure may anticipate the general reform of supervision on local self-government.

However, there are several conceptual and consistency problems that can seriously affect the success of the planned reform. These are the major concerns:

- The legal regime of the tasks transferred from State administration upon city self-government bodies has to be clarified; it is necessary to indicate if these are intended to be own or delegated functions.

- The administrative means that should accompany and support the transfer of state functions to the local self-government bodies must be addressed, and the transfer of staff from State to local administrations (or the other way round, depending on the special situation of the city of Kyiv) must be organised.

- The draft law should be supplemented with provisions on the election of councils, or at least include references to the legislation on local elections. The draft should refer to the general law on local self-government for issues it does not regulate directly.

- Clear provisions on the organisation of the city administration should be added. In particular, the law must provide for the creation of higher official positions under the authority of the mayor, with a chief executive as a top official.

- The list of competences of the city should be completed and the draft law should provide a general competence clause for the city council, having regard to Article 4.2 of the European Charter of Local Self-Government.

- The draft law curtails the powers of the city council regarding the organisation of the inner city districts and this may weaken city governance. More flexibility should be left to the city council on the allocation of tasks to inner city districts and a better balance has to be found to preserve the policy-making capacity at the city level.

- Provision on the relationships between city and districts authorities, and namely on co-operation, consultation and conflict-resolution mechanisms, should be included in the law; otherwise governance of the city will be more difficult.

- Regulations on the local executive bodies and their operation, both at city and district levels, need to be refined (e.g.: add provisions on deputies of the mayor; avoid the confusion between political and managerial responsibilities at the level of the inner city districts and have a chief executive accountable to the head of the inner city district).

- The supervision mechanism must be reviewed in all its key aspects (acts submitted to the supervision and their publicity; State bodies responsible for supervision and their powers; the supervisory procedure and co-ordination between different State bodies).

In addition, there are other (technical) issues e.g. the lack of recognition of *Hromada* as a corporate person, lack of consistency in the provisions on the powers of the Head of the State administration, doubtful solutions and lack of consistency concerning some of the financial arrangements, etc.

Therefore, the Council of Europe strongly recommends submitting the draft amendments based on the present opinion to the Parliament before the second reading.

INTRODUCTION

The City of Kyiv is subject to specific provisions of the Constitution, on local self-government as well as on State administration. According to Article 118 (par. 1 and 2), "the local State administration exercises the executive power in the regions, districts, and in the cities Kyiv and Sevastopil", and specificities of the exercise of the executive power in the cities Kyiv and Sevastopil are regulated by special laws. Article 133 on the territorial structure of Ukraine also refers to a special legislation for the city of Kyiv (par.3). Lastly, specificities of the exercise of local self-government in the city of Kyiv are also regulated by a special law (art.140, par.2). The special status for the city of Kyiv was established by the law of January 15, 1999, n.401-14, amended several times since then.

The present draft law is intended to review the system. The judgments of the Ukrainian Constitutional Court of 2003 and 2005[1] have paved the way for the reform, since they require the elected mayor and the elected heads of inner city districts to be vested with the exercise of State functions.

As a whole, the draft law is in line with current reform projects deemed to enhance the self-government system in Ukraine and the reform project is likely to strengthen decentralisation in the capital city area. However, there are conceptual and consistency problems that can

[1] The relevant case law of the Constitutional Court of Ukraine can be summarised as follows:
- Inner city districts are administrative territorial units distinct from districts in the enumeration of Article 140 of the Constitution; the competence of the Verkhovna Rada in Article 85 to create or suppress districts applies only to districts *stricto sensu* and not to inner city districts. Therefore, the administrative territorial organisation is not an exclusive competence of the State organs, since the inner organisation of cities may be decided by city councils according to the law; however, the special law on the city of Kyiv makes an exception since this law provides for the existence of inner city districts (13 July 2001, n.11-rp/2001).
- the State administration for the city of Kyiv is set up as an organisation that exercises in parallel local State functions and local self-government functions, and report accordingly to the Cabinet of Ministers and to the city council; the President of Ukraine may appoint as the head of the State administration of the city of Kyiv only the elected head of the city of Kyiv (December 25, 2003, n. 21-rp/2003).
- Similarly, only the elected head of the inner city district may be appointed as the head of the State administration of the inner city district (October 13, 2005, n. 9-rp/2005).

affect the success of the planned reform. These will be examined in three sections: I. the new organisational framework; II. the distribution of responsibilities and co-operation; III. supervision.

It should be noted that:
- on the one hand, numerous provisions of the draft law refer to general local government legislation (thus diminishing the exceptional nature of the capital city status);
- on the other hand, the draft law seems to anticipate a further step in reform of local self-government bodies which has not been finalised yet. Pending this reform, Articles referring to legislation on local self-government shall be interpreted as referring to the law of May 21, 1997 and shall be appraised in the following sections accordingly.

The report includes in the Annex references to the basic arrangements in five capitals namely: Berlin, Budapest, London, Paris and Moscow. These experiences may help solving the remaining issues.

I. THE NEW ORGANISATIONAL FRAMEWORK

As regards the city government, most significant changes and issues requiring further scrutiny are discussed in the following sub-sections:
- the separation of the local State administration and the self-government bodies;
- the place of the inner city districts within the city structure;
- the elected councils;
- the organisation of the executive bodies among self-government bodies.

A) The separation of the local State administration and the self-government bodies of the city of Kyiv

The major change envisaged by the draft law is the organisational separation between the State administration and the city (decentralised) government. This is welcome and should favour clarification of the respective responsibilities.

Article 6 of the draft law lays down this change: State functions and self-government functions will be performed by different authorities: local self-government is exercised by the territorial community (*hromada*), directly or through elected bodies (paragraph 1); the executive power will be exercised in the city of Kyiv by the State administration of the city of Kyiv (paragraph 2).

This reform is completed by the transfer of a number of tasks of the local State administration in the city of Kyiv to the executive bodies of the city council and of the inner city district councils. In this respect, Article 6, paragraph 2, sub-paragraph 3 establishes that "areas of responsibilities of the executive power in the city of Kyiv, provided by Articles 17-27 of the law on local State administration and other pieces of legislation of Ukraine are carried out (*здійснюються*) by the executive bodies of the Kyiv city council and of the inner city district councils, taking in account peculiarities indicated by the present law".

However the scope of this transfer is unclear. It is not indicated whether these responsibilities will be exercised as delegated tasks, under the authority of a higher State body, or as own tasks, subject only to legal oversight. This question is quite important and should be clarified

by the law, also because, according to the Budgetary Code, financing is different in the two cases.

Another issue is the administrative means that should accompany and support this transfer. Until now, the local State administration has performed local State tasks and local self-government tasks, with no clear distinction between the two. With the separation of these functions, it is necessary to transfer under the authority of the Mayor of the city of Kyiv the personnel who until now have been in charge of the self-government functions, as well as the personnel in charge of the State functions listed in Articles 17-27 of the law on the local State administration (unless the problem is to transfer the personnel and services of the city administration to the authority of the Head of the State administration).

The draft law is silent on this important issue and has to be completed[2]. This transfer is a complex transition process to organise. It requires:

- evaluating the workload for each kind of functions to determine the number of people to be transferred;
- establishing the list of staff to be transferred;
- adopting transitory regulations on the budgetary costs and the budgetary assignment of these personnel;
- organising a new administrative structure under the self-government executive bodies.

In this process, it is necessary to give due consideration to the rights of personnel and to organise consultations. Additionally, it is necessary to think about the allocation of personnel between the city level and the inner city districts.

As a result of this reform, Article 22 provides for the new regulation on the Head of the State administration for the city of Kyiv. She/he is appointed and dismissed by the President of Ukraine on a proposal by the Cabinet of Ministers; so, she/he is clearly the representative of the central government, in charge exclusively of the State and national interests locally. She/he is in charge of the legality oversight of local self-government acts (see below, part III).

Her/his major responsibility is to secure the conditions for Kyiv to carry out its capital city functions and for this purpose she/he has several specific prerogatives, such as taking part in decisions of national and international importance concerning the capital city, taking part in meetings of the Cabinet of Ministers in a consultative (*дорадчий*) capacity on questions affecting the capital city, on the location of administrations and institutions in the capital city and on the appointment and dismissal of their directors.

On this last point, some adjustments are needed: regarding State administration, this power is important since the Head of the State administration has authority over senior officials (directors) from the various ministries. She/he could even be vested with the power to agree or to oppose appointments or promotions of these officials, and to ask for their dismissal. Such powers are more difficult to justify for the heads of State enterprises or institutions, which are not part of, but only supervised by the ministry they depend on. This distinction should be introduced in Article 22, point 4.

[2] An example are the entire set of provisions issued in France to organise the transfer of personnel from the prefectures to the regional and department executive bodies during the years 1982-1986 (indeed until 1994), and between 2004 and 2008.

Finally, it is worth noting that, according to Article 6: "the peculiarity of the executive power in the city of Kyiv is the exercise by the State administration of the city of Kyiv of overseeing supervisory and coordinating functions". Nevertheless, Article 22 on the Head of the State administration for the city of Kyiv does not seem consistent with this statement because it refers to responsibilities of the State administration resulting from the current legislation (paragraph 2), whereas Article 6 deviates from current legislation on this point. The two provisions should be co-ordinated.

B) The place of the inner city districts in the city organisation

According to the decision of the Constitutional Court of 13 July 2001 (n.11-rp/2001), inner city districts are part of the inner organisation of cities. City councils are entitled to create these inner districts and to determine their organisation and their responsibilities. As regards the city of Kyiv, the special status entails the obligation to establish inner city districts, but the legislator is neither bound to set their number and boundaries nor their responsibilities[3]: It is open to the legislator to decide whether to assume responsibility for regulating the inner city districts of the city of Kyiv. The option contemplated by the present draft law reflects the will to strengthen the position of inner city districts throughout the local self-government organisation of the city of Kyiv.

Article 14 of the draft gives the list of responsibilities assigned specifically to inner city district councils, while the present law on the status of Kyiv leaves it to the city council to organise the administration of the inner districts, and thus to determine their tasks (Article 11). This has two main consequences:

1. On the one hand, the draft law curtails the powers of the city council regarding the organisation of the inner city districts and this may weaken city governance. Indeed, it seems that the bulk of municipal functions will be discharged at the inner city district level. The wide responsibilities given to inner city district councils and the lack of conflict resolution mechanisms (see below II, C) could make governance of the city more difficult.

The budgetary regulations (Article 28) may help to ensure the coherency of the city management since inner city district expenditure would be planned and funded by the city council (see below II, D). Nevertheless, more flexibility should be left to the city council on the allocation of tasks and a better balance has to be found to preserve the policy-making capacity at the city level.

The comparative analysis shows that city councils usually have more discretion in distributing responsibilities than in establishing boundaries of inner city districts. The Annex gives examples on how these questions are dealt with in five other capital cities.

[3] Article 92 of the Ukrainian Constitution provides for the regulation of the administrative territorial organisation of Ukraine by a parliamentary law, but Article 85 (point 29) does not include inner city districts among the categories of administrative territorial units that must be determined by the Verkhovna Rada. Following Article 4 paragraph 2 of the European Charter of Local Self-Government, expressly referred to by the Constitutional Court, local authorities may decide on any question that is not ruled out of their competence and does not belong to the competence of another authority. As a result, neither the constitutional provisions nor the current special status of the city of Kyiv preclude the possibility of the Kyiv city council regulating the organisation of its inner city districts, as long as this is also not precluded by other legislation.

2. On the other hand, the draft law would make the provision of public services closer to the population and facilitate local democracy. Indeed, the draft law recognises explicitly in several articles that territorial communities (*hromada*) exist at the inner city district level[4].

According to Article 5 of the present law on the city of Kyiv, resumed in the draft law, there is one territorial community (*hromada*) of the city, with its own statute adopted by the city council. However, the draft law also recognises territorial communities of inner city districts: Article 3 on symbols refers to territorial communities of inner city districts and Article 28 refers to the "needs" of the territorial communities of inner city districts (paragraph 4).

As a consequence, the rights granted to territorial communities can be exercised at the inner city district level, not only at the city level. To that extent, the reform will be favourable to the exercise of local democracy.

C) The elected councils

According to Article 8 of the draft law, the city council and the inner city district councils are representative bodies of local self-government and they are corporate persons. This provision is similar to the one in the present law (Article 9).

However, an inconsistency should be pointed out. Since the system of local self-government of the city of Kyiv is based on the "territorial community of the city" (Article 7 of the draft law) and territorial communities may express their will directly through direct democracy procedures, there are no reasons why only the representative bodies (the city council and the inner city district councils) are corporate persons, and not the *hromada* itself.

The community represented should be the corporate person, and the councils and other self-government bodies emanating from the *hromada* should be considered as the voice and the arms of the *hromada*. The source of the political will is not the council but the citizens, directly or through elections. The only advantage of the present position of the Ukrainian legislation is to give substance to regional and district (*rayon*) councils that are supposed to represent the "common interests" of the *hromada* in their constituency. Nevertheless, it would be better to redress this inconsistency.

Regarding the election of the councils, the draft law needs to be completed. It provides that the city council will be elected under proportional representation with "open lists" (Article 9), but this is not enough to determine what electoral system is applicable, and this cannot be left to the discretion of the Government. Concerning the inner city district councils, they are said to be set up in accordance with the general legislation on local self-government, but this legislation refers to another law for the electoral system (see law of 21 May 1997, Article 45). The draft law should, at least, refer directly to the law on local elections.

[4] According to the law on local self-government of 21 May 1997, the city councils can recognise territorial communities at the sub-municipal level (Article 6, par. 5). Only territorial communities can be subjects of property rights and make use of the provisions on direct democracy procedures at local level to resolve issues of relevance for these communities (Articles 7 to 9; Article 15). Self-organised bodies of the population at the local level are distinct from territorial communities and can be formed on a smaller scale (Article 14).

D) The executive bodies of the city

Whereas the draft law tends to reinforce the position of the mayor of Kyiv as regards self-government matters, since he will have more autonomy in discharging his functions, the organisation of the executive seems to be weakened.

The mayor is still to be elected directly by all citizens; the draft law only introduces the necessity of organising a second ballot if no candidate attains the absolute majority of votes (Article 17, paragraph 1). This is a good amendment to support the legitimacy of the mayor, which will emanate only from the election, no longer as a result of being vested with State functions by the President of Ukraine.

However, there is no provision on the appointment of deputies of the mayor; moreover, the presidium of the Kyiv city council, with advisory functions, has disappeared (Article 12 of the present law). Article 24 of the draft law maintains the provisions on the first deputy and deputies of the Head of the State administration (present Article 16). However, the separation of State and self-government functions requires that the mayor of Kyiv is also given the possibility of carrying out his responsibilities with a team. This omission is quite surprising given that Article 21 provides for deputies of the heads of the inner city districts. Therefore, it would be necessary to add an Article after the present Article 17, on deputies of the mayor.

Different systems are possible. As a first option, the organisation already accepted for inner city districts could be extended to the city level: the mayor would have to appoint his deputies (the law could determine a maximum number of deputies) subject to their election by the city council as deputies, and distribute tasks among them under his leadership. In such a system, the mayor is the unique holder of the executive functions and this will give him strong authority, but he would have a team of deputies to whom he would delegate part of his powers under his control. Another system, with more collegiality, would also be possible, with the executive function being assigned to an executive collegial body chaired by the mayor.

The draft law provides for the function of the secretary of the city council, vested with the powers of Article 50 of the law on local self-government of 1997. This is basically a support function for the work of the council. The secretary would be elected by the council from among its members. He would no longer be the deputy of the mayor as provided by the present law on the city of Kyiv (Article 14, paragraph 3). This change is correct, but makes the need to organise the executive team of deputies of the mayor of Kyiv even more evident.

The draft is also silent on the organisation of the city administration. Provisions on this issue were not necessary in the present legislation, since the corresponding functions were discharged by the State administration. However, after the reform, the city of Kyiv would need to have its own administration (mainly from transfers of services and personnel from the State administration as mentioned above). This means thousands of municipal employees (for example more than 40 000 for the city of Paris). To manage this administration, the law would have to provide for higher officials under the authority of the mayor, with a chief executive as a top official.

Article 17, paragraph 2, of the draft law refers to the application to the mayor of Kyiv of the provisions of the general legislation on local self-government, but “taking in account the peculiarities indicated in the present law”. This is not enough: the transition from a unified

administration (for both State and local self-government functions) to two different administrations must be organised by the law. Additionally, the implications of the said "peculiarities" on the organisation of the city self-government have to be detailed by the law.

Also the reallocation of tasks between the city level and the inner city district level requires the transfer of services, institutions and personnel. On this issue, there is only paragraph 3 of the final provisions, which gives three months to the respective councils to organise all necessary transfers. Such a provision is not enough for this purpose, and the deadline of three months is probably too short.

E) The executive bodies of the inner city district councils

The draft law provides for additional responsibilities of the head of the inner district council (Article 19) who is elected by the absolute majority of the council members and from among its members. These election provisions are correct and avoid a conflict of legitimacy with the mayor of the city.

On the other hand, the organisation of the executive committee of the inner city district and the function of the head of this executive committee raise questions. The head of the executive committee is now only the head of the self-government administration, and in principle should no longer be in charge of State tasks under stricter control of the higher State authority[5]. He has the profile of an administrative mayor. He is elected by the council at the absolute majority of its members, on a proposal of the inner city district head, but not from among its members (Article 20, which could be compared with Article 15 of the present law). This confirms that he must be a public servant rather than a politician.

Thus, it does not seem adequate to require the same majority as for the head of the inner city district, who is a political figure, and even less adequate to provide that members of the executive committees are elected by the council on proposal of the head of the executive committee (Article 11). This entails a risk of confusion between the political and the managerial responsibilities, and a potential conflict of authority between the head of the executive committee and the head of the inner city district. It would be better to have an executive committee consisting of the head of the inner city district and his/her deputies (political level), a chief executive appointed by him/her (or if preferred elected by the council upon his proposal) and a team of heads of division also appointed by him/her.

II. THE DISTRIBUTION OF RESPONSIBILITIES AND CO-OPERATION

The new organisation of Kyiv is deemed to improve decentralisation in the city and to take care of the capital city functions. Five questions will be discussed here:

- the distribution of responsibilities between the State administration and the city as a whole;
- the capital city functions (and co-operation arrangements on their execution);
- the distribution of responsibilities between the city and the inner city districts;
- the financial relationship between the city and the inner city districts; and
- the co-operation with neighbouring local governments.

[5] See however the remarks on the lack of clarity in the nature of new functions transferred under Article 6 paragraph 2, sub-paragraph 3 (section I, A, above).

The analysis will not go into detail on the proposed allocation of functions, but will focus on problems of relationships resulting from it.

A) The distribution of responsibilities between the State administration and the city government

The draft law establishes a clear-cut distinction between the responsibilities of the city government and the responsibilities of the State administration. But they are called upon to co-operate in the exercise of their respective duties in order to develop the capital city functions (Article 1, paragraph 5; Article 4, paragraph 2; and Article 30).

The tasks of the State administration of the city of Kyiv are determined by Article 16. These are:
1) ensure compliance with the law, not only by local self-government but also by heads of all institutions, enterprises, organisations or departments in its jurisdiction;
2) make decisions on state properties, exploitation and protection of forests, minerals and natural resources, the environment;
3) coordinate activities of territorial branches of central government departments and bodies and support them in the implementation of their tasks.

The duty to ensure compliance with the law seems too broadly formulated, and it is doubtful that the State administration is equipped with the specialised personnel of lawyers to perform such a broad task. Furthermore, this would create conflicts with the Prokuratura, which is also in charge of overseeing the legality of administrative acts and regulatory acts adopted by local self-government bodies and officials (Article 121 of the Constitution)[6].

Therefore, the provisions of the draft law should be more narrowly formulated, probably limited to the supervision of State agencies over which the head of the local State administration has authority and of self-government bodies. The law should also include a provision on co-operation with the Prokuratura, such as a duty for the Head of the State administration to refer cases to the Prokuratura for prosecution.

As already mentioned, the legal regime of the tasks of the State administration transferred to city self-government bodies has to be clarified. If they remain State tasks, we can assume that they are performed under the control (not only legality oversight) of the Head of the State administration. If they become self-government tasks this is different. There is no indication on this point in the provisions on the supervisory powers of the Head of the State Administration.

On points 2 and 3 of Article 16, the recommendation is to give stronger powers to the Head of the State administration. Instead of the rather vague open clause of Article 22, paragraph 2: he/she should: 1) have authority over all local agencies of ministerial departments, in order to be able to enforce unity in the State policy implementation; 2) be exclusively entitled to receive delegations from the ministers; 3) be the financial authority for all local agencies of the ministerial departments; 4) be the general authority exercising police powers (especially in environmental and economic matters). These powers should be stated in Article 16, since Article 22, paragraph 2 refers to the application of the general legislation subject to specificities resulting from the special legislation on Kyiv.

[6] In Russia, the legality supervision of local self-government is performed by the Prokuratura.

In Kyiv, the State administration and its Head have the additional function of ensuring the capital city functions are carried out, as provided by Article 4. This function will be performed directly or in co-operation with the city self-government bodies. Article 22 of the draft law regulates the duties of the Head of the State administration for the implementation of the capital city functions. These duties concern the participation in, or the implementation of, State decisions, and not the decisions of the city self-government bodies.

Article 1, paragraph 5, (resumed from the present law with very few amendments) states that: "the status of capital city imposes upon local self-government bodies and bodies of the executive power additional duties and entitles them to additional rights from the State". No specific obligation can be inferred from this provision for the city self-government bodies; we can expect that it will be used as a bargaining basis between the city government and the central government on respective commitments.

B) The capital city functions

The capital city functions are determined by Article 4 of the draft law; the city government and the executive power have to concur jointly to the realisation of these functions. This is already in Article 4 of the present law, but the difference is that now the city government and the State administration are distinct administrations.

The capital city functions are summarised in three points (instead of five in the present law[7]):

i) create conditions for the activity of State authorities in the capital city and for the Representations of foreign States and international organisations;
ii) take decisions necessary for the location and the functioning of ministries and other central government bodies as well as foreign representations;
iii) provide the infrastructure and public services needed by central government bodies and foreign representations.

Basically, these three functions are a matter of planning, investments and property; they do not seem to require a specific regulation:

- the ministries, other central government bodies and numerous cultural and scientific institutions are used to occupying premises that are State properties managed by the central government;
- diplomatic Representations and Representations of international organisations are used to buying or, less frequently, leasing the premises they need;
- public services needed by central government bodies and foreign representations are the same as for any other institution and are provided on a contractual basis.

The real issue is to ensure adequate capacity and quality of services for all citizens. Depending on local conditions, this can justify specific efforts (at least temporarily) to reach international standards. This does not justify *per se* increased control by the central government of city self-government; if increased control is necessary, this has to be an exception based on clear and specific grounds[8].

[7] Two functions have been dropped: co-operation with central State organs for drawing up and implementing programmes and projects affecting the capital city (point 4), and the renovation and conservation of historical and cultural heritage (point 5).

[8] In the past, the capital function as the seat of major government institutions has sometimes justified direct control by the central government of the capital city government to prevent political risks (e.g. the case of

More generally, the development of metropolitan cities is necessary for the participation of the country in the world economy, and capital cities are usually the best placed to be such metropolitan cities. This requires specific attention to the level of infrastructure rather than stronger control of the city self-government bodies.

This view is supported by other provisions of the draft law. According to its Article 4, paragraph 2, the capital city functions are carried out by the city self-government bodies "taking in account proposals of the bodies of the executive power", and they are guaranteed by the State. But the list of responsibilities of the city council (Article 15) and of the inner city district councils (Article 14) no longer refer to the capital city functions.

Therefore the capital city functions appear to provide guidance more than they impose duties. However, city self-government bodies and the State administration are requested to co-operate in the fulfilment of these functions. Financial support and planning control are the basis for this co-operation.

Article 30, paragraph 1, point 1, provides for a financial guarantee of the State: there will be a special earmarked appropriation in the State budget for financing expenditure incurred by the city government in carrying out capital city functions.

According to Article 30, paragraph 1, point 2, the State is committed to compensate, on the basis of an agreement, expenditure incurred by the city government in relation with the use of premises, facilities or public utilities by diplomatic representations and representations of international organisations that have to be located in Kyiv in accordance with Ukrainian legislation. This point is unclear: while the official representations of foreign States have to be located in Kyiv, with regard to international organisations, it should be clarified whether there are legislative provisions for determining those that have to be located in Kyiv, because only in this case the city of Kyiv would be entitled to compensation by the State. As mentioned before, diplomatic representations (of foreign countries or international organisations) are most often owners of the premises they occupy, or lease them and therefore pay a loan, and their use of public utilities is based on contracts with the service providers. Therefore, what are the costs envisaged by this provision?

Article 30, paragraph 2, of the draft resumes Article 21, paragraph 2 of the present law on Kyiv. It looks like a provision for implementing the statements of Article 30, paragraph 1, but at the same time it creates another justification for compensation: damages incurred by the city as a result of national or international events or as a result of emergency situations caused by bodies subordinate to State authorities. Also the provision is unclear:

- First, does this guarantee also apply when national or international events are organised solely at the initiative of the city of Kyiv?

Paris until the early 70s). This is usually no longer the case in modern democratic states. In European countries, a specific legal regime for the capital city can be found where the size of the capital city justifies a government organisation that deviates from standard local self-government institutions (e.g. Paris, London, Prague, Budapest); this is sometimes owing to the federal structure of the state (e.g. Berlin, Moscow and Vienna are federal entities in addition to being capital cities) or to other circumstances (Madrid, Brussels). However, specific legal arrangements for capital city functions usually do not entail specific institutional arrangements. For Paris, there is only one specific provision, allowing the municipality of Paris to conclude contracts with foreign public law legal entities (but not States) to develop its international attractiveness (CGCT: art. L.2512-11).

- Second, the notions of "emergency situation" and of "subjects subordinated to State authorities" have to be more precisely determined. For example, if the purpose of this provision is to provide guarantees to the city in case of damages arising from police action to restore public order, this should be said clearly; but in such a case, the condition of fault of police forces should be dropped. In most cases it will be almost impossible to provide evidence of such fault, and the damages will almost never be compensated by the State.

The above-mentioned financial provisions are reflected in the budget of the city of Kyiv, under Article 28 of the draft law. Its paragraph 1 refers to specific intergovernmental transfers aimed at implementation of the capital city functions. Under paragraph 2, the city budget must include expenditure on capital city functions; part of this expenditure may be delegated to inner city districts, with corresponding budgetary transfers from the State, by the city council. Paragraph 3 restates the guarantee of the State to ensure the implementation of the capital functions by the Kyiv city council.

Article 30, paragraph 3, provides that the general plan of the city of Kyiv, and amendments to it, have to be approved by the Cabinet of Ministers after their adoption by the city council. This restrains the self-government rights of the city of Kyiv in planning matters. However, such central government control on urban planning in the capital city is not unusual, because national interests may be at stake, and not only local interests[9].

To sum up, the capital city functions call for co-operation between city self-government bodies and the State administration for the city of Kyiv, but they do not entail undue restrictions to the local self-government rights of the city of Kyiv that are enlarged by the reform.

The draft law does not include provisions on how this co-operation should be worked out. The solution could be to add in Article 30 a provision similar to the one in Article 33, paragraph 1, concerning the co-operation with neighbour local governments, which refers to contractual arrangements or other procedures.

C) The allocation of responsibilities between the city and the inner city districts

The responsibilities of the inner city district councils are indicated by Article 14, before the list of the responsibilities of the city council (Article 15). The present law on Kyiv does not list the responsibilities of the inner city districts. The new regulation deviates also from the law on local self-government of 1997, according to which it belongs to the city council to "determine the scope and limits of powers exercised by sub-municipal (in the event they are formed) councils and their executive bodies, in the interests of sub-municipal territorial communities" (Article 26, paragraph 2, point 1).

The competence of inner city district councils (Article 14) comprises the bulk of public services provided to individuals, namely: general education, primary health care, social

[9] For example, the planning decisions necessary for the organisation of the Olympic games in London are under direct control of the Head of the government office for the region of London and of the Secretary of State; in France, the law of 1995 transferred responsibility for the general planning scheme of the region to the regional council of Ile-de-France – the capital region, subject to approval by a government decree, but the Government did not approve the general planning scheme adopted in September 2008 by the regional council of Ile-de-France.

assistance including the management of social housing; they are also responsible for parks and open spaces, sport places of general use and some regulatory functions for building and area development. Their competence extends to other issues assigned to them by the city council with adequate resources.

The competence of the city council (Article 15) includes: municipal public utilities, roads and streets, planning and building permits, economic development, main sport and cultural infrastructures, fire brigade, waste disposal. The city council is also empowered to resolve other issues assigned by other laws to its competence.

Both lists of competencies are "closed": the competence of the inner city district council may vary only by a decision of the city council (which can only extend the scope of competence as determined by the law)[10]; the competence of the city council may be modified only by the law.

Moreover, in comparison with the list in the law of 1997 (Article 26) the two lists are not complete and there is no general competence clause in the Ukrainian law. Therefore, it would be necessary to include either in Article 14 or in Article 15 (not both!) a provision referring to the general law on local self-government for issues not regulated by the law on Kyiv; otherwise some decisions could be challenged before a court for being *ultra vires.*

More flexibility is probably desirable to the benefit of the city council, which should be able to rearrange the allocation of tasks when necessary without depending on the adoption of a law. Therefore, the draft law should provide a general competence clause for the city council (not the inner city district councils). The last sentence of article 15, referring to issues assigned by the laws, is neither sufficient, nor precise enough. It should state clearly that other tasks assigned by the laws to the city of Kyiv are within the competence of the city council, and it can delegate them to inner city district councils when this is appropriate.

The law should also leave to the city council the possibility of rearranging the distribution of tasks in sensitive areas such as health care, education, social services, which are of particular importance for the population. In the present draft the city council has neither a planning nor guidance power in respect of inner city district councils. The law should provide for a special procedure for this purpose, and the new arrangement should not deprive the inner city district councils from their operational responsibility under the law.

The elections for the city council and the inner city district councils are held separately; their executive bodies are also independent of each other. This is fine. However, the draft law neither makes provision for consultation (with the exception of proposals by the inner city district councils concerning the general city planning document to be adopted by the city council) nor for a forum of any kind for resolving disputes or reconciling opposed views on any city policy issue.

Mechanisms of this kind are perhaps not necessary in a city government system based on a unified State administration, but as a result of the reform relations must be organised between both levels. Therefore, the recommendation is to add provisions in that direction. For example:

- a committee of heads of the inner city districts under chairmanship of the city mayor;

[10] Of course, this does not prevent the Parliament to modify directly the competence of the inner city district councils, but this is not at present the idea.

- a procedure for submitting proposals by inner city district councils to the city councils for setting the budget;
- the possibility of including members of inner city district councils in city council commissions;
- the possibility of including city councillors from a given inner city district in commissions of this inner city district council.

D) The financial relationship between the city and the inner city districts

Even for the establishment of the city budget, there is no procedure for involving the city district councils, and the provisions of Article 28 of the draft law raises questions.

There are a city budget and inner city district budgets, but the expenditure types are divided between the inner city districts by the city council. Moreover, the inner city districts have no own resources, but only transfers from the city budget. In that case, it would be clearer to distinguish, on the one hand, the city budget and, on the other hand, the sections of the city budget assigned to inner city districts. These sections could be based on expenditure proposals from the inner city councils, and their execution entrusted to these councils.

Determining budgetary transfers between the city budget and the inner city district budgets on the basis of a formula approved by the city council on the basis of the parameters set out by the law (Article 28, paragraph 5) is a significant improvement and will bring more transparency to the inter-budgetary transfers inside the city. Revenue sharing will be based on the estimate of the costs of the functions assumed respectively by the city and by the inner city districts. However, the list of parameters needs refinement.

There are four parameters:
1) budgetary norms for the expenditure sectors with their respective coefficients;
2) the number of residents and of users for the respective social services;
3) the index of the relative taxpaying capacity on the respective inner city districts;
4) revenue forecasts of the city budget taken in account in inter-budgetary transfers.

Concerning the latter, it is assumed that the provision refers to inter-budgetary transfers between the State and the city of Kyiv, but this is not clear and needs to be specified.

Concerning the third parameter, there is no reason for taking the tax paying capacity of the respective inner city districts into account, if they do not have any direct tax revenues. However, if this provision means that local tax revenues come directly under the budgets of the respective inner city district, such a proposal would raise serious concerns, because it would mean that the better-off tax payers keep the resources for their own benefit in their residential area, thus making redistribution of resources within the city more difficult, if not impossible. Therefore, the recommendation is to delete this parameter.

E) The co-operation with neighbour local governments

Article 33 concerns co-operation of the city of Kyiv with local self-governments and the State administration of the Kyiv region (*oblast*) for developing the capital city functions. This provision is very similar to Article 25 of the present law on Kyiv, but it is still an important and quite relevant part of the draft law, since the city development cannot be confined to the

administrative boundaries of the city. As with every city, the metropolitan development of the city of Kyiv tends to expand outside its administrative area.

This co-operation, for the city of Kyiv, involves both the self-government bodies and the State administration. Their relationships with neighbouring authorities have to be worked out on the basis of contractual arrangements or other procedures (Article 33, paragraph 1).

The co-operation envisaged would comprise two elements:

- providing the institutions of the Kyiv region with the premises they need within the city of Kyiv, and involving them in joint programmes of interest for them, such as communications, environment, development of labour resources (Article 33, paragraph 2);
- the support by local self-governments and the State administration of the Kyiv region to the development of the capital city functions: programmes for the land developments needed by the city of Kyiv, improvements in the transportation system, ensuring suburban regulations, environmental protection, food supply of the city, if necessary boundary changes to adjust the limits of the city of Kyiv to the needs of its expansion (Article 33, paragraph 3).

The financial guarantee of the State is extended to this co-operation with the Kyiv region (paragraphs 4 and 5). Kyiv region expenditure in support of developing capital city functions is to be compensated by the State budget; however this will be carried out via State budget funds granted to the city of Kyiv. The justification for this indirect compensation mechanism is unclear and it could cast doubt upon the level of compensation guaranteed to the local authorities within the Kyiv region, for example if the State grant has already been allocated by the city of Kyiv. It would be better, therefore, for the Kyiv region local authorities involved in the programmes instrumental to developing the capital city functions to be compensated directly by the State.

III. THE SUPERVISION OF LEGAL ACTS OF CITY SELF-GOVERNMENT BODIES

In the present law on Kyiv, there is no provision on supervision, which is subject to general provisions of the Constitution and of the law of 1997. The draft law regulates the regime of the self-government bodies' legal acts and in particular the supervision procedure in Articles 12, 13 and 23.

These provisions make an attempt to work out a new system of supervision based on a strict legality assessment and preserving self-government rights. They are therefore particularly important. However, these provisions envisage a double oversight procedure with conditions and time limits that will make its application difficult. Furthermore, the publicity of legal acts of local authorities in the register held by the Ministry of Justice is not sufficient.

A) The publicity of legal acts of local authorities

Under Article 12, regulatory acts of self-government bodies, officials of the city and inner city districts come into force with their publication, which takes place after they are sent to the Head of the city State administration and to the local office of the Ministry of Justice for their registration. According to Article 13, this registration serves as a "notification" (*повідомний характер*).

These provisions are not satisfactory. First, they apply only to regulatory acts; there is no provision on administrative acts, in particular such as licences, building permits, appointments or dismissal of civil servants, that can also be illegal. These acts should also be published, because they may affect the legal interests of third parties. Additionally, since they are issued in response to applications, they must reach the applicant in the forms provided by the law. This is a matter of administrative procedure rather than of local government organisation, but this is very important.

Secondly, the registration of the regulatory acts by the local office of the Ministry of Justice does not seem to be a "notification". This seems more a kind of notary function for guaranteeing the validity and authenticity of a document. Whether the office of the Ministry of Justice will be able to guarantee the validity and authenticity of registered acts depends on the type of monitoring it is able to perform. If it is unable to perform the right type of monitoring, the local office of the Ministry of Justice will be no more than a local archive for the city of Kyiv, and in this case the registration procedure is useless.

Lastly, there is no provision for the publication of the regulatory acts and their registration cannot replace official notice to the public. The draft law has to be completed on this point, in order to guarantee citizens' access to these acts. For a city like Kyiv in particular, there should be an official bulletin for official publications, with paper and electronic edition, and at least a reference of the publication of regulatory acts in main daily newspapers.

According to Article 13, paragraph 3, the transmission of regulatory acts has to be made within three days of its adoption, and the local office of the Ministry of Justice has similarly to carry out the registration within 3 business days (paragraph 4). Three days is probably too short a time limit for the transmission, unless an electronic transmission system is installed and is reliable.

A registration procedure by the local offices of the Ministry of Justice is also organised in Russia and it could be interesting to look at this experience.

B) The supervision procedure

The transmission of regulatory acts to the local office of the Ministry of Justice is the basis for the legality assessment that it has to carry out within a ten day time limit (Article 13, paragraph 5). The local office of the Ministry of Justice has then to inform the local authority and the Head of the State administration of the conclusions of this assessment (ibid.). If it concludes that the regulatory act is illegal, it is empowered to turn to the court for judicial review (according to the Code of administrative justice) and ask the court to declare the act unlawful (paragraph 7).

Concurrently, the Head of the State administration has the power to suspend (*зупинити*) a regulatory act that he considers unlawful within 15 days of its reception; he/she must at the same time in this case refer the act to the court and ask for it to be declared unlawful (paragraph 6). If the court rejects the claim of the Head of the State administration, or considers that this claim cannot be examined, the challenged regulatory act is restored from the moment the court takes its decision (paragraph 6, second sub-paragraph).

The supervisory function of the Head of the State administration as regulated by Article 23 is, however, different. It is not only carried out in respect of regulatory acts, but also

administrative acts (*акт розпорядчого характеру*). To carry out the legality assessment, the Head of the State administration may turn to the local office of the Ministry of Justice, but he is obliged to do so as regards regulatory acts (paragraph 1). Different time limits are provided as regards the exercise of the power to suspend the act considered unlawful, and the power to suspend may be exercised with respect to regulatory acts and to administrative acts (paragraph 2). The Head of the State administration must refer the suspended act at the same time to the court for the court to cancel it (*скасування***)** if it is unlawful (paragraph 3), and cannot merely declare it unlawful. The suspension has no effect if the act is not referred simultaneously to the court, and its legal force will be restored if the court rejects the claim or considers the claim cannot be examined. However until the court decision, the registration procedure is interrupted and the act may not be implemented (paragraph 5).

The impression is that two different procedures have been put into the draft law without any coordination. Furthermore, the role of the Prokuratura resulting from Article 121 of the Constitution is not taken into account. Therefore, the supervision procedure needs to be reconsidered as follows:

- Supervision must embrace both regulatory acts and administrative acts. To limit the volume of administrative acts to be transmitted and checked, and in order to focus on main issues, the law could list the acts which must be transmitted (as, for example, in the French legislation).

- The law has to decide which authority has to perform the supervision: the Head of the State administration (as the prefect in France), the local office of the Ministry of Justice or the local office of the *Prokuratura* (as in Russia). The choice should depend on where there is supervision can be performed effectively. The expert would recommend vesting this function in the Head of the State administration and ensuring that his office is equipped with the adequate human resources.

- If the choice is on the Head of the State administration and the Ukrainian government wants to keep the registration procedure, the Head of the State administration (and not the local self-government bodies) should be responsible for transmitting the regulatory acts subject to registration to the local office of the Ministry of Justice (or the Prokuratura should do it if it is preferred as the supervisory body).

- The Head of the State administration should also be responsible for referring the case to the Prokuratura in cases where prosecutions should follow (or the local office of the Ministry of Justice should do it if it is preferred as the supervisory body).

- The supervisory authority should not have the power to suspend the act of the local self-government bodies it challenges; however, it should be entitled to ask the competent court to suspend the challenged act.

- It is correct to leave the final decision on the lawfulness of the act, subject to appeal, to the court. However, the court must have the power to quash the illegal act, and not only to declare its illegality (if the competent authority withdraws the act declared unlawful it may create a situation of legal uncertainty in cases where the court decision fails to be executed).

ANNEX – Examples of organisational arrangements in other capital cities

Budapest (1.8 million inhabitants) is a capital city with special status and a rank equivalent to a Hungarian department (*megyei*), organised on a two-tier local government basis (city level and inner city districts). Under the special law on Budapest, there are 23 inner city districts. The special law sets the respective responsibilities at city level and at district level, both having their own assembly and executive body. Both levels are on the same footing with regard to the Constitution, with neither subordinated to the other. As a result, concurrent initiatives requiring further co-operation may arise.

Berlin (3.4 million inhabitants) is both a city and a *Bundesland*. The 12 inner city districts (*Bezirke*) are established by the constitution of the *Land* Berlin of 1995, as amended in 2006. Boundary changes require a law of the *Land*, except in case of minor changes agreed by the inner city district councils concerned (Article 4). The districts are part of the administration of the city and have limited autonomy. The city council is a regional parliament and is only directly in charge of questions significant for the whole city. The Senate (Government), however, may issue principles and guidance that are binding for the districts (Article 68).

London, (7.5 million inhabitants) is a city-region including 32 boroughs, equivalent in status to a county in the British organisation, with a London Authority vested with limited powers. According to the Local Government Act 1972, boundary changes of the London boroughs are ordered by the Secretary of State on a proposal of the Local Government Boundary Commission, a procedure that is not specific to London (sections 47, 48(1) and 51(1); see also for example: The City and London Borough Boundaries Order 1993, n°1445). The competence of the Greater London Authority is formulated in a very open way which nonetheless strictly prevents this Authority from impinging upon the competence of the London boroughs (Greater London Authority Act 1999, c.29, sections 30 and 31).

Paris, (2 million inhabitants) is equivalent in status to a French department and is divided into inner city districts in a unitary organisation. The division of the city into inner districts and their boundaries are fixed by the law, but can be modified by a government decree subject to prior agreement of the city council (CGCT: art. L.2511-3). The responsibilities of the district councils and mayors are delegated by the city council and the city mayor (depending on the tasks): tasks that may be delegated (namely the management of neighbourhood infrastructures) are set by law. Otherwise, the district councils have an advisory function to the city council (art. L.2511-13 to 20). Neighbourhoods are designed by the city council on proposals from inner city district councils, which are then entitled to establish neighbourhood councils (art. L.2511-10-1).

Moscow (7 million inhabitants) is a city-region with the status of a subject of the Russian Federation, and the city government has a State character. However, the State administration and the local self-government are organised separately. The present organisation is determined by the law of Moscow of 15 October 2003 (n°59) on the names and boundaries of municipal units within the city of Moscow. Basically, the territorial organisation of the city of Moscow includes 9 territorial units of the State administration (*okrug*), and 125 inner city districts (*raion*), the boundaries and names of which are determined by a law of the city of Moscow. In each territorial unit of the State administration, there is a prefecture subordinated to the city government; in each inner city district there is a municipal self-government, with its own elected assembly and executive body. Additionally, a number of territories from the periphery are integrated into adjacent inner city districts and territorial units of State

administration, although they are located outside the city of Moscow's boundaries (for example, the airport Shemetevo on the territory of the Moscow region (*oblast'*)). A number of questions of local significance, belonging usually to the competence of local self-government bodies, is regulated at the city level, e.g. by the State administration; the competence of the municipal self-government bodies is determined by city legislation. A similar system exists for **Saint-Petersburg**, the other city with the status of a subject of the Federation (see: N.A Ignatiuk / A.V. Pavlushkin, *Municipalnoe pravo*, Moscow, IusticInform, 2007, pp.43 and sq).

To sum up, the city level prevails in Berlin and Paris; the inner city district level prevails in London (its case being in this respect close to the scheme of the Ukrainian draft law) and authorities in Budapest are on an equal footing. In Moscow, local self-government authorities are established at the inner city district level. In Budapest, Paris, London and Moscow the State and the decentralised (self-government) administrations are separate; in Berlin they are fused.