

SECRETARIAT GENERAL

**DIRECTORATE GENERAL OF DEMOCRACY AND
POLITICAL AFFAIRS**

**DIRECTORATE OF DEMOCRATIC
INSTITUTIONS**



Strasbourg, 26 March 2009
(English only)

DPA/PAD 1/2009

**Comments
on the Concept of the Law on Sevastopol,
City With Special Status**

Document prepared by the Council of Europe (Directorate of Democratic Institutions) in cooperation with Professor Gérard Marcou (France) and Professor Paweł Swianiewicz (Poland).

1. GENERAL REMARKS

The Council of Europe experts recommend that the following issues are considered further by the Task Force which will work on the drafting of the Law on Sevastopil.

Jurisdiction over the City

According to the Constitution of Ukraine, Sevastopil is a city with a special status that has to be regulated by a special law (Article 133, par.3), as well as its local State administration (Article 118), because of peculiarities of local self-government (Article 140). However, unlike the special law on the status of Kyiv, the law on Sevastopil has never been adopted. An important consequence of these constitutional provisions, not explicitly mentioned in the concept, is that Sevastopil is not subject to the jurisdiction of the Autonomous Republic of Crimea, although it is located on its geographical territory.

A major option reflected both in the document under review and in the Concept paper of September 2008 on the Administrative-Territorial Reform (ATR concept) is to keep Sevastopil as a city directly subject to central government. The new harmonised nomenclature of territorial levels will thus establish Sevastopil as an administrative-territorial unit of the same level as Crimea (i.e. in the new organisation proposed in the ATR concept, Sevastopil would be an administrative-territorial unit of the regional level).

Legislative framework

The draft law that is being prepared has to take account of:

- the Constitution of Ukraine;
- the provisions of the local government law of 1997, which is still in force;
- the current projects in the field of decentralisation and local government reform (in order to be consistent with their trends) and, additionally;
- the special geopolitical situation of Sevastopil, as reflected in the document.

Structural issues

Sevastopil has a territorial structure typical of the organisation made possible by the local government law of 1997: several local councils, exercising equal self-government rights at different territorial levels on the same area. At present, there is only a State regional administration of the whole regional area of Sevastopil as a unique regional authority, whereas elected councils, including the city council of Sevastopil, administer only parts of this area.

The paper proposes to establish self-government bodies at the regional level, with an elected regional council and an elected head, and own budget, whereas at the lower – municipal – level three city councils (Sevastopil, Inkerman and Balaklava) and two village councils (Kacha and Orlyne) should be elected. According to the proposal, the new law should regulate only the regional level, whereas the current local government law should apply to the municipal level (point 2 of the Concept).

This option seems quite reasonable. However, it raises terminology issues (point 6) and the experts are not sure if it is fully consistent with the present constitutional framework. The Constitution provides for special legislation for the city of Sevastopil, but not for the region of Sevastopil. In addition, according to Article 140 paragraph 1, only a city, not a region, is a territorial community and, according to paragraph 4, regional and district councils are only established to represent common interests of local communities (*hromadas*). Therefore, unless the Constitution is modified, it does not seem possible to establish a regional council of Sevastopil with the special legislation provided by paragraph 2 of Article 140.

However, since Sevastopil is subject to special legislation, it remains quite possible to provide for an integrated government system (i.e. City government with inner *hromadas* or districts), covering the whole regional area – i.e. the territories of the five existing *hromadas* of Sevastopil, Inkerman, Balaklava, Kacha and Orlyne. Article 140 paragraph 2 would be a sufficient basis for

the law on Sevastopol to deviate from the general scheme that could be enacted by the law on the territorial organisation of Ukraine if it were to be adopted. There would be no problem with the fact that such an area would embrace rural areas and villages; this happens in Ukraine and everywhere else in urban areas.

In other terms, the experts would consider as a rational solution for the Sevastopol “City-Region” the establishment of a consolidated city government including less urbanised peripheral areas which would be linked to the city core. Elected councils could be maintained within the wide city area, but this would not necessarily imply the establishment of *hromadas* at a grassroots level; the experts would suggest having district councils as a form of internal de-concentration of the city government.

The establishment of such a consolidated government system would be an effective option, for the following reasons:

- it would take advantage of the unity of the urban area and ensure a more integrated city government than a regional level with limited powers above the municipal level;
- it would also rule out the status of oblast capital for the municipal entities, since there would be no oblast – but a special City-Region government – and possibly no inner *hromadas* within the City-Region area;
- such an option would not only imply a less fragmented management of the in-patient therapeutic medical institutions (point 8), but also of any other service with wide catchment areas, as well as of utilities and networks.

It would also be important to discuss the following questions:

- Should the City Council be entrusted with those responsibilities usually dealt with by an *oblast* level? In terms of alternatives, the option of integrating Sevastopol under the authority of the Autonomous Republic of Crimea (ARC) as regards current administration and local government should not be ruled out; it could be a subject for negotiations. In any case, the military premises can only be under the direct authority of the Ministry of Defence, subject to existing arrangements with Russia, since they are at present shared on the basis of a separate agreement.
- Is it acceptable to have a one-tier City government system (with inner districts without the status of *hromadas*, as suggested by the experts) or is it better to establish a two-tier system (City and *hromadas*)?
- Would the City government be entrusted with the responsibilities of the *rayon* level? Or should these responsibilities pertain (fully or in part) to the ARC? Or, if two government levels are established (City level and five *hromadas*), should *rayon* responsibilities go (at least partly¹) to the *hromadas* or to the biggest ones²?
- If a unique government structure is established for the whole City-Region: i) how to draw the boundaries of the inner territorial units (how many districts and on which basis to set their limits); ii) what would be the institutional arrangements for the inner units and the scope of their responsibilities (i.e. what would be the functions in service delivery which would not hamper the coherency of the urban policies and could be managed at the district level) and how to finance the responsibilities entrusted to districts?

¹ One possibility would be to split these responsibilities (some would remain at the City level and others would accrue local government sphere of responsibilities).

² One possibility would be that the *rayon* powers go to the Sevastopol *hromada* (which would then be stronger than the others) and to the Sevastopol City-Region for the rest of the territory (the other *hromadas* having a normal status).

Military presence and special supervisory powers

As regards supervisory powers of the State administration on self-government bodies, the question is whether the presence of the military forces would justify special supervisory powers upon local self-government, such as the approval of, or a veto right over, the decisions of self-government bodies having “foreign armies under their jurisdiction”.

First of all, it seems inaccurate to say that self-government bodies may have “foreign armies under their jurisdiction”. As a rule, local governments have no jurisdiction upon army personnel and premises, either foreign or domestic. In addition, special supervisory powers could be justified only when a decision of a local authority obstructs the activity of the military, directly or indirectly; in such cases the State administration could veto or suspend immediately a local government decision, subject to judicial review. As an example, in France, the prefects can refer an act to the administrative court on this unique ground (they do not have to argue that this act is unlawful) (CGCT: article L.1111-7, al.4). In the past, in France there has never been any special supervisory regime for municipalities where a military base is located.

2. SPECIFIC REMARKS

The experts' specific remarks are integrated into the text of the Conceptual grounds and highlighted in grey.

Conceptual grounds of the Draft Law of Ukraine “On Sevastopil, City with Special Status”

Part 2 of Constitution's of Ukraine Article 133 provides the register of administrative and territorial units of regional level. These are: Crimea Autonomous Republic, cities of Kyiv and Sevastopil.

Part 3 of the same Article says that cities of Kyiv and Sevastopil have special status.

Article 118 of the Constitution says that executive power in Oblasts, rayons, cities of Kyiv and Sevastopil is guaranteed by local state administrations. Peculiarities of executive power execution in Kyiv and Sevastopil are regulated by separate acting Laws of Ukraine.

Part 2 of Constitution's Article 140, which regulates local self-governance, says “Peculiarities of local self-governance in the cities of Kyiv and Sevastopil are regulated by separate acting Laws of Ukraine”.

The context of Articles 133, 118 and 140 makes it possible to conclude that cities of Kyiv and Sevastopil are the regions with self-governance, which is peculiar to territorial communities, but at the same time self-governance in them is regulated by separate acting laws.

According to the Law, in Kyiv we can see two powers within one body – Kyiv State Administration, which is the executive power and self-governing body (executive body of Kyiv city council). Besides, Kyiv mayor also unites two positions. He is the head of self-governing body and head of executive power, i.e. head of city state administration

Such unification resulted in loose of state control over legality of Kyiv administration decisions and un-possibility to guarantee Part 2 of Constitution's of Ukraine Article 144 in the city of Kyiv.

The meaning of the text above is unclear. If it means that the self-governing status of the oblast (or Kyiv or Sevastopil) would automatically entail a weakening of the legal supervision of local governments, the experts do not agree with the analysis. The examples of Poland or France indicate that self-government at regional level may very well coexist with strict control of legality through special state organs (governors and Regional Accountancy Chambers in Poland or the Regional Audit Chamber - *Chambre Régionale des Comptes* - in France).

If, on the other hand, the idea behind the text is that it would be better to establish a local government executive body distinct from the head of the state executive power, the experts suggest that this is clearly stated. This would be a step forward in meeting the requirements of the European Charter of Local Self-government and, in addition, would offer an opportunity to improve the supervision mechanisms (e.g. the head of the state administration at city level could also be entrusted with a supervisory role vis-à-vis the local self-government bodies).

Though Sevastopol is smaller than Kyiv, still, it is a separate region for its territory is 900 square meters, population – 379 000 and its territory allocates several towns and settlements. That is why it is reasonable to use here same governance model that works in *oblasts*.

We can say that city, the region Sevastopol comprises of territorial communities and, simultaneously, can be considered as rayon and region.

Separate Law on Sevastopol, the city with special status should identify region's administrative and territorial structure (region's administrative and territorial units) as well as system of executive power and self-governance bodies and peculiarities of functioning and interaction.

The mandate/responsibilities of territorial communities' (which are the part of Sevastopol) self-governing bodies, order of their creation and activities, city council deputies' status should be regulated by current legislation of Ukraine.

1. Administrative and territorial structure.

On the territory of Sevastopol, city, the region we can see administrative and territorial units of 2 levels, i.e. city, the region and municipal rayons with special status:

- City of Sevastopol (within the boundaries of Gagarin and Lenin rayons),
- City of Balaklava (within the boundaries of to-days Balaklava rayon, excluding Inkerman and Orlynivska village councils),
- City of Inkerman (within the boundaries of today's Inkermanska and Verkhnyosadivska village councils, Bartenivka, Merenziyevi hory, Lyubymivka and Shturmove micro-rayons, territories of Sevastopol hospital, Bel'bek airport, Fruktove, Kamyshly and Dal'ne),
- Kacha (within the boundaries of today's Kachynska and Andriyivska village councils),
- Orlyne (within the boundaries of Orlynivska village council, Rezervne and Honcharne).

2. Self-governance structure, mandate/responsibilities.

On the level of administrative and territorial unit Sevastopol, city, the region Sevastopol regional council is to be created. It elects its head, approves the budget and Sevastopol region social and economic development plan. It also approves other decision within the limits of the mandate guaranteed for rayon and oblast by current legislation of Ukraine.

On the level of administrative and territorial units following self-governing bodies are to be created:

- Sevastopol city council,
- Inkerman city council,
- Balaklava city council,
- Kacha village council,
- Orlyne village council.

These councils create their bodies of executive power. Their deputies' elections as well as corresponding heads of city and village councils are regulated by current legislation of Ukraine. The mandate/responsibilities of the above city and village councils as well as city and village councils' heads are regulated by corresponding articles of the Law of Ukraine "On Local Self-Governance in Ukraine".

Sevastopol city council can create on its territory municipal rayons as well as self-governing bodies and separate units of Sevastopol city council legislative power.

Please refer to general remarks concerning structural issues. The experts would also require further clarifications on the following issues:

- What is the actual territory of the area governed by the council of Sevastopol at present?
- How would the territory for the new authorities be determined?
- What are at present the boundaries of the territory subject to the national government, with respect to the territory administered by the Republic of Crimea?

3. Executive power structure.

Sevastopol city state administration (SCSA) works on the level of Sevastopol, city, the region. Its mandate is regulated by the Law of Ukraine "On Local State Administrations". SCSA serves as Sevastopol regional council executive body. It guarantees execution of the current law by all administrative and territorial self-governance bodies of the city, the region.

Because of Sevastopol special status we propose that SCSA should approve the decisions of self-governance bodies that have foreign armies under their jurisdiction (excluding internal structure) and SCSA should have the right of veto for the decisions of above self-governance bodies.

This is not an issue of veto but of the proper allocation of functions. Local governments should not be responsible for functions which interfere with decisions relating to foreign armies, which should be reserved for national authorities. At the same time, a general veto right (the text suggests it would be applicable to any decisions of self-governance bodies) would not comply with the principles enshrined in article 8 of the European Charter of Local Self-Government, which prescribes that: i) there should be an adequate legislative basis for supervision (determining the cases and procedures); ii) state supervision over local self-governments should normally be limited to legal supervision; and iii) the intervention of the state supervisory authority must be kept in proportion to what is necessary to achieve the result (i.e. in this case, to avoid interferences or conflicts between the local self-government decisions and those adopted by the army).

As for Balaklava city council, the right for suspension and taking into court should work, as it is proposed by draft law #1313, submitted by the President of Ukraine.

More information is needed on the draft law 1313.

These and other peculiarities of interrelations between Sevastopol city state administration and self-governance bodies should be considered by the Law on the Status of Sevastopol.

4. Inter-budget relations.

Revenues and expenses of Sevastopol city, the region are calculated in the same way as for oblast budget. Revenues and expenses of Sevastopol, Balaklava, Inkerman city councils, Kacha and Orlyne village councils are calculated as for oblast capitals. Those councils that do not have budget health/medical institutions providing social services for oblast capitals transfer corresponding funds to other self-governance bodies. It is done on the basis of agreements between corresponding councils, as it is regulated by Budget Codex of Ukraine.

Regulating such complicated inter-budgetary relations through bottom-up voluntary arrangements has never been really successful.

Inter-budget settlements from state budget are transferred separately to the budget of Sevastopol city, the region and self-governance budgets.

5. Balaklava status.

Because of the fact that to-date Balaklava does not have the status of the city, this status should be approved by Verkhovna Rada of Ukraine.

6. Sevastopol regional council elections.

Taking into account the experience of proportional elections to oblast councils of 2006, it is reasonable to make changes in election legislation. Sevastopil regional council should be elected by multi-mandated *okrugs*, created on the territory of ATO, i.e. municipal rayons of Sevastopil city with special status.

What was the experience of 2006?

6. Problems to be solved by draft law.

Terminology. Because of the fact that Constitution speaks only about the city of Sevastopil, while we have the region with other cities and villages and agricultural lands, it seems difficult to identify the very city of Sevastopil and city with special status (city, the region).

To implement this draft law concept we'll have to create another one representative organ of regional level, i.e. Sevastopil regional council and Balaklava city council.

Partially, it can be compensated by liquidation of rayon councils and rayon state administrations.

7. Possible risks.

Possible resistance can appear from Sevastopil city council, which would like to have same status as Kyiv city council, as well as from different political forces and movements, which can consider new model as first step to loose the city hegemony in the region.

Still, the new model presupposes the transfer of un-characteristic for state mandate to the level of self-governance. Cities of the region will obtain more autonomy, which will serve for growth of competitiveness and result in attraction of investments to the region.

What additional responsibilities would be transferred to the self-government level?

Is it competitiveness between cities of the region, or is it general competitiveness of the whole region? The impact of suggested arrangements on investment attractiveness may be over-estimated.

Besides, asymmetric model of interrelations between self-governance bodies of different communities and local state administration, which is either connected with presence or absence of foreign armies, will make it possible to estimate the status of demilitarized zone after foreign military units are out of jurisdiction of corresponding councils.

New model of interrelations between local self-governance and state administrations will make it possible to estimate the perspectives of administrative reform on oblast level.

Clear distribution of responsibilities and territory's demarcating among the communities of small Sevastopil region will pilot administrative and territorial and self-governance reform in Ukraine.

8. Alternatives

Administrative and territorial units of state level like Sevastopil, Balaklava, Inkerman, Kacha and Orlyne can have the status of oblast capital (as it is proposed by the document) or community *hromada*? (as proposed by the Concept of Administrative structure).

Five units with the status of oblast capitals? Or is it *mista oblastnoho znachennia* (Cities of oblast significance)?

Two statuses differ from each other by transfer of responsibilities of in-patient therapeutic medical institutions to either self-governing bodies or to regional level. Depending on the status, we should choose the mechanisms of accumulating/calculating the revenues of corresponding administrative units.

The most striking characteristic of Sevastopil is a very small territory with a similar status to the oblast tier. In the case of such a "territorial fragmentation" at the regional level, the most urgent issue may be dealing with free-ride consumption of public services. For example, health care services are provided not only to Sevastopil citizens, but also to residents of surrounding areas. If so, the way of financing these services should be one of the main focuses of the specific Sevastopil regulations (the problem of free-riders is probably greater there than in a typical

Ukrainian oblast). The assumption that one may trust in voluntary horizontal contracts between local government administrations may be – as other examples from Ukraine suggest – unrealistic.

As for control responsibilities/mandate of Sevastopil city state administration, it could have the right of veto for the decisions of self-governance bodies in accordance with current legislation (it can be one month), which is the less strict norm than previous mechanism of documents'/laws agreement. At the same time, taking to the court (it concerns the decisions/activities of Sevastopil city state administration) should be initiated by self-governance body (Polish model).

How is the right of veto exercised according to the legislation in force? Further explanations would be required. The Polish case is not referred to properly. In Poland the state administration (governor) may void the self-government council decision only in case of violation of national laws (and this decision may be questioned by local government in court). This concept suggests a more general right to veto self-government decisions. Therefore this cannot be called “a Polish model”. On the basis of which criteria would the court decision be made?