



**Further support for the execution by Ukraine of judgments in respect of Article 6 of
the European Convention on Human Rights**

EXPERT OPINION

**On draft law No. 3120 On the amendment of some legislative acts of
Ukraine with regard to the ratification of Protocol No. 16 to the Convention
for the Protection of Human Rights and Fundamental Freedoms of 1950**

Executive Summary

October 2020, Kyiv

- This expert opinion on draft law No. 3120, aimed at the implementation of Protocol No. 16 to the European Convention on Human Rights in the national legislation of Ukraine, is prepared within the framework of the Council of Europe Project “Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights” (the Project), which is funded by the Human Rights Trust Fund and implemented by the Justice and Legal Co-operation Department of the Council of Europe. The opinion is prepared by Ms Nina Kucheruk, Attorney, Jurimex Law Firm.
- This expert opinion on draft law No. 3120 was prepared following consultations with the members of the Verkhovna Rada of Ukraine, judges, and representatives of the Supreme Court, and aims at establishing effective procedures for interaction with the European Court of Human Rights.
- Three draft laws were prepared in Ukraine in 2018 after Protocol No. 16 became effective. The previous Council of Europe Project “Supporting Ukraine in the execution of judgments of the European Court of Human Rights”, at the request of the authorities, performed a comparative study of these drafts to determine whether they were consistent with Protocol No. 16 and the European Court of Human Rights Guidelines.¹ Notwithstanding its positive opinions on the two draft laws, none of them have been adopted.
- New draft law No. 3120 was registered in 2020 and, as of today, it is the only draft law intended to implement the provisions of Protocol No. 16 in the existing legislation.² To assist Ukraine in the implementation of the advisory opinion procedure provided for in the Protocol, it was agreed that draft law No. 3120 should be analysed with regard to its compliance with the standards set out in the European Court of Human Rights Guidelines and Protocol No. 16 and to identify its advantages and deficiencies, as well as its consistency with the procedural law and legal regulations of the judiciary.
- To achieve those targets, the expert has been guided by the provisions of Protocol No. 16, European Court of Human Rights Guidelines, the Law of Ukraine “On the ratification of Protocols Nos. 15 and 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms”, the Law of Ukraine “On the judiciary and the status of judges”, and the procedural codes.

General Conclusion

- The Supreme Court, as the highest court within the Ukrainian judiciary, is designated as the instance that may submit requests to the European Court of Human Rights for advisory opinions.
- Despite the fact that Protocol No. 16 entered into force more than two years ago, no procedure for submitting requests to the European Court of Human Rights has been determined.
- As the Supreme Court consists of its Plenary Assembly, the Grand Chamber, and four Cassation Courts, each of these divisions has different competences. It is necessary to determine which of these three divisions would directly submit relevant requests to the European Court of Human Rights.

¹ For further details, see the Expert Analysis “Introduction of Protocol No. 16 to the European Convention on Human Rights: a comparative study of draft laws”, September 2018.

² Draft law No. 3120. For further details, see http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id=&pf3511=68228

- Draft law No. 3120 designates the Grand Chamber of the Supreme Court as the instance that may directly submit requests to the European Court of Human Rights for advisory opinions.

The advantages of draft law No. 3120 and its compatibility with the Council of Europe standards

- The advantages of draft law No. 3120, which reflect its consistency with the European Court of Human Rights Guidelines can be listed as follows:
 - the entity that may directly submit requests to the European Court of Human Rights for advisory opinions has been designated, and this should provide for the thorough and extensive resolution of the issue of requesting the European Court of Human Rights to provide advisory opinions;
 - two grounds for submitting such requests to the European Court of Human Rights have been established (that is fundamental issues of interpretation or application of the rights and freedoms guaranteed by the European Convention on Human Rights and Protocols thereto and if a case is under the consideration of the Grand Chamber of the Supreme Court);
 - an obligation is proposed to suspend proceedings if the European Court of Human Rights is requested to provide an advisory opinion.

The deficiencies of draft law No. 3120 and recommendations regarding their elimination

- Draft law No. 3120 contains, however, a number of deficiencies, and in particular it:
 - grants to the Grand Chamber of the Supreme Court the exclusive right to submit requests to the European Court of Human Rights while it is advisable to give such right to the relevant cassation courts as well. If more entities submit requests to the European Court of Human Rights, then this would lessen the workload of the Grand Chamber of the Supreme Court, shorten the length of the proceedings, facilitate an increase in the number of advisory opinions and a decrease in the number of applications to the European Court of Human Rights, and be consistent with the Law of Ukraine “On the judiciary and the status of judges” in terms of determining the composition of the Supreme Court;
 - does not clarify the notion of fundamental issues of the interpretation or application of rights and freedoms guaranteed by the European Convention on Human Rights and Protocols thereto, which would possibly complicate their identification by the national court;
 - does not provide any requirements for the format and substance of requests for advisory opinions, which may result in their rejection or the need for them to be further developed because of their possible procedural deficiencies or the deficiencies on the merits;
 - limits the powers of the entity designated to request advisory opinions to submit relevant requests to the European Court of Human Rights and suspending proceedings only. However, such entities should also have powers to withdraw requests; initiate their urgent consideration; inform the European Court of Human Rights of any procedural actions that may have an impact on the request; inform parties to the national proceeding of the status of the request; inform the European Court of Human Rights of any further measures taken within the national procedure following the issuance of an advisory opinion, etc.;

- does not regulate the issues pertaining to the translation of the requests and accompanying documentation for the European Court of Human Rights and the advisory opinions received. It would be advisable to provide that the party which initiated the advisory opinion procedure, or, if such initiator is the national court, then the party which initiated the appeal (review) of the case in a court of a higher instance, has an obligation to make available a translation of such documents;
- overlooks the issues of legal expenses for the advisory opinion procedure and legal assistance to the party which enters into the advisory opinion procedure;
- sets up, for all courts, an obligation to suspend the proceeding if the Grand Chamber of the Supreme Court requests an advisory opinion. It is advisable to further enhance this provision of the draft law by imposing a suspension obligation exclusively on the entity that submits a request to the European Court of Human Rights for an advisory opinion, and with regard to the case only, from which such request has been made. It is also advisable to provide for the re-opening of such proceedings in certain cases prior to the issuance of advisory opinions; for example, if the applicant withdraws the complaint or if a party is substituted due to procedural succession;
- does not contain any provisions on the binding/non-binding nature of advisory opinions. Taking into consideration the relevance of the European Court of Human Rights case law for the resolution of disputes in Ukraine and with due regard to the requirement for a judgment to be well grounded, it seems advisable to establish in the procedural codes an obligation on the part of the national courts to provide grounds for a refusal to take advisory opinions into account.
- To sum up, draft law No. 3120 aimed at implementing the provisions of Protocol No. 16 in the national legislation takes into consideration the guidelines on the implementation of the advisory opinion procedure introduced by Protocol No. 16 to the European Convention on Human Rights, but only partially, and does not provide regulation of important issues (establishing requirements for the contents of requests, translation of documents, extending the powers of the national court, etc.).