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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMPATIBILITY

**OF THE DRAFT LAW ON AMENDING THE CONSTITUTION OF
UKRAINE AS TO DECENTRALIZATION OF POWER
As submitted by the Verkhovna Rada to the Constitutional Court of
Ukraine on 16 July 2015
(CDL-REF(2015)035)**

**WITH PRELIMINARY OPINION
ON THE PROPOSED CONSTITUTIONAL AMENDMENTS
REGARDING THE TERRITORIAL STRUCTURE
AND LOCAL ADMINISTRATION OF UKRAINE
(CDL-PI(2015)008)**

SECRETARIAT MEMORANDUM

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I. Introduction

1. Following an urgent request on 19 June 2015 by the Speaker of the Verkhovna Rada and Chairman of the Constitutional Commission, Mr Volodymyr Groysman, on 24 June 2015, the Venice Commission issued a Preliminary Opinion on the proposed constitutional amendments Regarding the territorial structure and local administration of Ukraine (CDL-PI(2015)008). This Preliminary Opinion related to the draft constitutional amendments prepared by the Working Group on the Judiciary within the Constitutional Commission (CDL-REF(2015)021).
2. Following the Preliminary Opinion, several changes were made to the draft constitutional amendments (CDL-REF(2015)035), which were submitted on 16 July 2015 to the Constitutional Court for its decision on the conformity with Articles 157 and 158 of the Constitution of Ukraine.
3. By decision of 30 July 2015, the Constitutional Court of Ukraine found that the proposed draft constitutional amendments were compatible with the requirements of Articles 157 and 158 of the Ukrainian Constitution.
4. On 31 August 2015 the Verkhovna Rada adopted the constitutional amendments on the decentralisation in the first reading.
5. The present memorandum examines whether and to what extent the text as sent to the Constitutional Court on 16 July follows the recommendations contained in the Venice Commission's Preliminary Opinion of 24 June 2015.

II. Preliminary remarks

6. The Preliminary Opinion of 24 June 2015 welcomed the introduction of a form of decentralisation of state power largely compatible with the European Charter of Local Self-government. It expressed support for the well-drafted amendments and welcomed in particular:
 - The proposed abolition of the supervisory powers of the Prosecutor General (deletion of Article 121 § 5)
 - The proposed regulation of local finance, notably the duty of the state to ensure the adequacy of the financial resources of the local self-government units as well as to provide financial means for additional tasks (Article 142).
7. The revised constitutional amendments have maintained these very positive features.

III. Analysis of the follow up to the recommendations

8. In the Preliminary Opinion, two key recommendations (referring to Articles 118 and 133) and several other recommendations had been formulated. These recommendations will be examined article by article.

Article 85

9. The Preliminary Opinion noted that settlements will not be local self-government units, and subsequently recommended (§ 7) deleting the power of the Verkhovna Rada to classify settlements as cities and to name and rename settlements. In the revised version of Item 29 of Article 85, the Verkhovna Rada's power to classify settlements as cities has been removed. The power to rename designate and rename settlement has instead been maintained. This recommendation has thus only partly been followed.

10. The Preliminary Opinion recommended (§ 8) deleting the last sentence of Item 30 of Article 85, providing for exceptions to the calling of elections by local institutions of local self-government “in cases provided in the Constitution of Ukraine”. Indeed, there appeared to be no such cases in the Constitution. In the revised version of Item 30 of Article 85, the last sentence has been deleted. This recommendation has therefore been followed.

Article 92

11. The Preliminary Opinion recommended (§ 9) removing from Item 19 of Article 92 the sentence “the order of functioning of the state authorities and local self-government bodies in the state of emergency or martial law, environmental emergency”, which appeared unnecessary. This recommendation has not been followed.

Article 106 item 8¹ and Article 144 paragraphs 3, 4, 5 and 6

12. The Preliminary Opinion recommended (§ 11) that “the President’s power [...]should be limited to suspending – as opposed to terminating – the powers of the self-government bodies”. The revised paragraph 8¹ of Article 106 now reads: [The President of Ukraine] “shall suspend the powers of the head of hromada, of the council of hromada, the council of rayon or oblast’, and appoints temporary authorized State official in cases prescribed by the Constitution”. The revised paragraphs 3 and 4 of Article 144 now read: “3. Where any act approved by the head of hromada, council of hromada, rayon or oblast’ council is non-complying with the Constitution of Ukraine, pose a threat to breach the state sovereignty, territorial integrity or pose a threat to national security, the President of Ukraine ceases the effect of the respective act with parallel appeal to the Constitutional Court, suspends the powers of the head of hromada, of the council of hromada, the council of rayon or oblast’, and appoints temporary authorized State official. The temporary authorized State official shall direct and organize the activity of relevant executives of local self-governing hromadas, of the executive committee of rayon or oblast’ council.” This recommendation of the Venice Commission has therefore been followed.

13. The Preliminary Opinion further recommended that “a short deadline should be put to the Constitutional Court to decide the matter”. Paragraph 4 of Article 144 now reads: “The Constitutional Court of Ukraine shall decide on such appeal of the President of Ukraine without any delay.” This recommendation has therefore been followed.

14. The Preliminary Opinion further expressed the view that “[t]he self-government bodies should immediately resume their powers in case the Constitutional Court ruled that the President’s suspension decision was unconstitutional and the interim authorised government official should immediately cease his or her functions. In the opposite case, new local elections should be immediately called by the Verkhovna Rada. This should be explicitly provided for in the Constitution” (§ 11). Article 144 paragraphs 5 and 6 now provide: “5. Should the Constitutional Court of Ukraine recognize the act of the head of hromada, of rayon council or of oblast’ council as compliant with the Constitution of Ukraine, the President of Ukraine shall revoke the act issued pursuant to paragraph 3 of this Article. 6. Should the Constitutional Court of Ukraine recognize the act of the head of hromada, of rayon council or of oblast’ council as non-compliant with the Constitution of Ukraine, the Verkhovna Rada of Ukraine, as proposed by the President of Ukraine, shall terminate the powers of the head of hromada, of hromada’s council, of rayon council or of oblast’ council, and call pre-term elections as prescribed by law”. This recommendation of the Venice Commission has therefore been followed.

15. The Preliminary Opinion found (§12) that in order to guarantee constitutionality it was necessary to provide for an obligation of the President to bring the act of the local self-government body which he or she has annulled before the Constitutional Court, instead of leaving this possibility to the affected local self-government authority or to 45 MPs. Pursuant to the revised Article 144 § 3, the President “ceases the effects of the respective act with parallel

appeal to the Constitutional Court". The former last paragraph of Article 144 has been deleted. This recommendation has therefore been followed.

16. The Preliminary Opinion pointed to some contradictions in the deadlines fixed in the proposed amendments for calling pre-term elections (§13). These deadlines appear to have been harmonized (see revised Article 141 paragraphs 7 and 8 and Article 144 paragraph 3). This recommendation has thus been followed.

Article 118

17. The Preliminary Opinion (§ 15) contained the key recommendation to maintain the current manner of dismissal of the Prefects (identical to the manner of appointment), that is to say dismissal by the President upon suggestion of the Cabinet of Ministers. Revised Item 3 of Article 118 provides that "Prefect shall be appointed and dismissed from office by the President of Ukraine upon recommendation of the Cabinet of Ministers of Ukraine". This key recommendation of the Venice Commission has therefore been followed.

18. The Venice Commission's suggestion (§ 17) to remove the power of the Prefect "to form the composition of the prefect's office, which is established to ensure the prefect's activities" from Article 118 and to leave it to the ordinary legislation has also been followed.

Article 119

19. The Preliminary opinion recommended (§ 18) reformulating Item 4 of Article 119 in order to limit explicitly the Prefect's power of coordination and organisation of the activities of territorial units of central executive bodies and local self-government bodies to cases of emergency and martial law, "as this power may not be a general one with respect to local self-government bodies". Item 4 has been reformulated and now reads: [The Prefect in the respective territory shall:] "direct and organise the activity of territorial offices of central executive bodies and ensure their interaction with local authorities in the state of war or emergency, of extraordinary ecological situation". The exceptional nature of the Prefect's powers in this respect has been clarified, and the Venice Commission's recommendation has been followed.

20. The Preliminary opinion recommended (§ 19) to specify, in the second paragraph of the last item of Article 119, the respective competences of the President and of the Cabinet of Ministers with respect to the power to revoke acts relating to the executive state administration, in order to avoid possible conflicts among the two state institutions. The second paragraph of the last item of Article 119 has indeed been reformulated and now reads: "Acts issued by prefects in execution of the powers set forth in sub-paragraphs 1 and 4 of the first paragraph of this Article may be revoked by the President of Ukraine, and the ones issued in execution of powers set forth in sub-paragraphs 2 and 3 of the first paragraph of this Article may be revoked by the Cabinet of Ministers of Ukraine. Acts issued by prefects in execution of powers determined by sub-paragraph 5 of the first paragraph of this Article, shall be revoked by the President of Ukraine and in cases provided for by the laws – by the Cabinet of Ministers of Ukraine." The division of competences between the President and the Cabinet of Ministers (in principle: acts relating to local self-government for the former, acts relating to executive state administration for the latter) has been clearly indicated. The recommendation by the Venice Commission has therefore been followed.

Article 133

21. The previous formulation of Article 133 paragraph 2 provided that "one or several settlements (villages, urban villages, cities) with adjacent territories shall make a community". The Preliminary Opinion welcomed as a very positive developments that "the territory of Ukraine will be totally divided into communities (with the ensuing planning and tax-levying

powers belonging to them)” (§ 24), but recommended (§ 25) not mentioning “settlements” and instead inserting a sentence referring to the division of the whole territory of Ukraine into communities. The revised Article 133 paragraph 2 provides that “The territory of Ukraine shall be divided into hromadas. Hromada is a primary unit in the system of administrative and territorial structure of Ukraine”. This recommendation of the Venice Commission has therefore been followed.

22. The Preliminary Opinion further suggested (§ 26) to remove the last paragraph and to replace it with a sentence in paragraph 3 whereby the law shall regulate how the will of the people who live on the territory of the community will be taken into account in changing boundaries and naming the communities. This suggestion, however, has not been followed.

23. The Preliminary Opinion further noted that Article 133 did not leave any space for providing for special arrangements for certain administrative territorial units and regretted that it would not be possible “in the future to adapt the legislation to the specificities of certain areas without amending the Constitution. The Preliminary Opinion consequently formulated the key recommendation of adding in paragraph 1 a sentence enabling the creation, by law only, of some categories of administrative/territorial units or the adoption of special arrangements for or within administrative territorial units. This suggestion has not been followed as such. Instead, a transitional provision has been proposed (paragraph 18) according to which “Specific arrangements for self-government in some parts of Donetsk and Luhansk oblasts shall be set forth in a separate law”. The Venice Commission’s key recommendation to provide a constitutional basis for possible future special arrangements to be adopted by parliament has therefore been followed in substance.

Article 140

24. The Preliminary Opinion (§ 28) suggested merging and reformulating paragraphs 1 and 7 of Article 140 to read: “Local self-governance shall be executed by the people living on the territory of the community both directly, through referendums and other forms established by law, and through the local self-governance bodies”. Revised paragraph 1 of Article 140 reads: “Local self-governance shall be executed by the territorial community both directly or through the local self-governance bodies by means of autonomous regulation of locally significant social affairs and managing them within the framework of the Constitution and the laws of Ukraine”. Paragraph 7 has been deleted. This recommendation of the Venice Commission has therefore been followed.

25. The Preliminary Opinion suggested deleting the last paragraph of Article 140 as it was unnecessary in the Constitution. This suggestion, however, has not been followed.

Article 141

26. Following partly a suggestion by the Venice Commission (§ 31), the restriction on the right to be elected as hromada’s head, deputy of hromada’s council, rayon council and oblast’ council has been limited to convictions “for an intentional crime” and serving a sentence for a “crime”.

Article 143

27. The Preliminary Opinion recommended (§ 35) to reformulate the last paragraph of Article 143 in order to clarify that subordination to the executive state authorities is only justified in case of delegation of competences. The revised last paragraph of Article 143 reads: “the executives of the local self-governing hromada, executive committees of rayon council, oblast’ council, on matters of delegated powers, shall be subordinated to the respective executive bodies which

have delegated these powers”. This recommendation of the Venice Commission has therefore been followed.

Article 144 paragraph 1

28. The Preliminary Opinion recommended (§ 36) deleting the first paragraph of Article 144 which appeared to be superfluous. This recommendation has not been followed.

29. The Preliminary Opinion further recommended (§ 37) to empower the Prefect to suspend (and not to terminate) the acts of local self-government on ground of non-compliance with the Constitution or the laws of Ukraine, and be required to refer the matter to the competent court. This recommendation has not been followed: the prefect retains the power to “terminate” such acts “with parallel legal recourse”.

IV. Conclusions

30. Key recommendations were followed, as well as most of the other recommendations, with some – mostly minor – exception.