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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE DRAFT LAW
ON THE CABINET OF MINISTERS

OF UKRAINE

Adopted by the Venice Commission
at its 68th Plenary Session
(Venice, 13-14 October 2006)

on the basis of comments by:

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I. Introduction

1. By a letter of 30 June 2006, the (then) Minister of Justice of Ukraine requested the Venice Commission to give an opinion on the draft law on the Cabinet of Ministers of Ukraine (CDL(2006)060).

2. The Commission appointed Mr Scholsem and Mr Tuori as rapporteurs. The present opinion, drafted on the basis of their comments, was adopted by the Commission at its 68th Plenary Session (Venice, 13-14 October 2006).

II. Background

3. In 2005, in its Resolution 1466 on honouring of obligations and commitments by Ukraine, the Parliamentary Assembly of the Council of Europe called on the Ukrainian authorities *"to adopt the laws on the functioning of the branches of power, as required by the constitution, in particular to enact as soon as possible the laws on the President of Ukraine and on the Cabinet of Ministers of Ukraine"*. The present draft law is of particular importance, since, if adopted, it will become the first law on the Cabinet of Ministers in Ukraine.

4. The text of the draft law was prepared by the Ministry of Justice of Ukraine, approved by the government and sent to the Venice Commission in June 2006. The new government, appointed in August 2006, decided to re-consider the draft. As a result, the final text which is to be submitted to the Verkhovna Rada differs (slightly, it seems) from the one under consideration. The Venice Commission, however, has not been provided with the final text.

III. Relationship between the draft law and the Constitution of Ukraine

A. Contradiction with the Constitution

a. Relations between the President's competence and that of the Cabinet of Ministers

5. The Cabinet of Ministers of Ukraine is regulated under Chapter VI, in articles 113 to 117 and in article 20 of the Constitution.

6. Paragraphs 4 and 5 of Article 21.1 of the draft law regulate the powers of the Cabinet in the field of foreign policy, national security and defence capacity; they provide that the Cabinet of Ministers :

> *4) In the area of foreign policy:*
>
> *a) ensures, within its powers, foreign policy activity of Ukraine;*
>
> *b) makes provisions, in accordance with the law on international treaties, for the resolution of issues related to conclusion and execution of international treaties of Ukraine;*
>
> *c) makes decisions on purchase (construction, renovation) of properties abroad for use by foreign diplomatic missions of Ukraine;*
>
> *5) In the area of national security and defence capacity:*
>
> *a) secures protection and defence of the national frontier and territory of Ukraine;*

b) takes measures to strengthen national security of Ukraine;

c) takes measures to ensure military efficiency of the Armed Forces of Ukraine, identifies; within budget defence appropriations, defines the number of Ukrainian citizens subject to conscription and training;

d) takes measures to secure the defence capacity of Ukraine, and to equip the Armed Forces of Ukraine and other military formations set up according to law with all necessary for the execution of their missions;

e) resolves the issues of social and legal protection of the military servicemen, persons discharged from military service and their families;

f) runs the unified system of civil protection of Ukraine, manages mobilization preparedness of the national economy and its transition to operation in the state of emergency or martial law;

g) deals with the matters of ensuring the participation of Ukrainian servicemen in peace-keeping missions, in accordance with the procedure set down in law;

h) identifies development priorities for the defence industry.

7. According to Article 106 of the Constitution, the President of Ukraine:

1) ensures state independence, national security and the legal succession of the state; (...)

3) represents the state in international relations, administers the foreign political activity of the State, conducts negotiations and concludes international treaties of Ukraine; (...)

17) is the Commander-in-Chief of the Armed Forces of Ukraine; appoints to office and dismisses from office the high command of the Armed Forces of Ukraine and other military formations; administers in the spheres of national security and defence of the State; (...)

8. In the Commission's opinion, the Law on the Cabinet of Ministers should contain an explicit provision on the primacy of the President's competence: the Cabinet may act only if the issue does not fall in the competence of the President.

b. Delegation of powers by the Cabinet of Ministers

9. Article 22 of the draft law on the Delegation of Powers by the Cabinet does not lay down the legal form in which powers may be delegated. In addition, the definition of the powers which may be delegated is extremely vague: all the powers may be delegated provided that it is not explicitly prohibited by the law. Such a vast possibility of delegation cannot be accepted for constitutional reasons. Thus, powers expressly conferred on the Cabinet by the Constitution may not be delegated to any other body. At the same time Article 22.2 states that the Cabinet is liable for the exercise of delegated powers. The nature of this liability (political vs. legal) should be specified.

c. Provisions in respect of the Autonomous Republic of Crimea

10. Article 24 concerning the powers of the Cabinet with regard to the Council of Ministers of the Autonomous Republic of Crimea is in many respects problematic from the point of view of the autonomy granted to this Republic by the Constitution. It contains several provisions which should be included in the Constitution and the adoption of which at the level of an ordinary law may be considered questionable.

11. Article 24 is based on the premise that the bodies of the Autonomous Republic of Crimea also function as state executive bodies. However, they are not mentioned in Article 118 of the Constitution, dealing with local state administration, nor are such functions mentioned in Chapter X of the Constitution.

12. In the light of the Constitution, the provision on the subjection of the Council of Ministers of the Autonomous Republic of Crimea to the Cabinet (Article 24.2) is also problematic. It is to be doubted whether Article 24.6, which gives the Cabinet the power to address the President or the Verkhovna Rada with the submission to seek the dismissal from office of the Head of the Council of Ministers of the Autonomous Republic of Crimea is in conformity with the latter's autonomy provided by the Constitution.

B. Lack of constitutional basis

13. The following issues which, according to the draft law, would be regulated merely at the level of an ordinary law, can be regarded to be of such a significance that basic provisions should be given at in the Constitution: the general qualifications required for a minister (Article7.1), the requirement that the Prime Minister base his/her proposal of Ministers on the proposal of the coalition of deputies' factions in the Verkhovna Rada (Article 9.1), the termination of the powers of the Prime Minister because of his/her inability to exercise his/her powers for health reasons (Article 13.3, Article 16.2), the ministers' dismissal from office upon a submission of the Prime Minister or – in case of the Minister of Defence or the Minister of Foreign Affairs – upon a submission of the President (Article 19.2 a), the President's right to participate in the meetings of the Cabinet (Article 27.3), the Cabinet's right to block a legislative initiative introduced by other subjects (Article 31.2) and the President's power to suspend the application of an act of the Cabinet on the ground of its incompliance with the Constitution (Article 53.5). Indeed, it can be argued that, in the absence of a constitutional basis, these provisions may not be introduced at the level of an ordinary law at all.

IV. Separation of powers

14. Some of the provisions contained in the draft law seem to endanger the principle of Separation of Powers. This principle implies that the executive branch should act autonomously and not depend on other branches, in particular as regards its internal organisation.

15. Under the present draft law, the date and the hour of the meetings of the Cabinet of Ministers can be changed only if relevant modifications are made to the law (taking into consideration that Article 49.2 on Meetings of the Cabinet of Ministers of Ukraine explicitly provides for the date and hour of the meetings). The procedure of approval by the President is therefore required. Such consequence should not be accepted in the light of the principle of Separation of Powers.

16. According to Article 117 § 1 of the Constitution:

> *"the Cabinet of Ministers of Ukraine, within the limits of its competence, issues resolutions and orders that are mandatory for execution".*

17. This normative power should primarily apply to the structure and rules of functioning of the Cabinet. The executive branch should have discretion as regards its organisation and performance provided that it acts in compliance with the Constitution. Moreover, there is no constitutional provision envisaging the legislative competence of the Verkhovna Rada in the afore-mentioned field (Articles 85 and 92 of the Constitution). Accordingly, in order to comply with the principle of Separation of Powers, a number of issues laid down in particular in the

Section IX (Organisation of Work of the Cabinet of Ministers of Ukraine) of the draft law, should be regulated by the rules adopted by the Cabinet of Ministers.

18. Further concern related to the principle of Separation of Powers arises in respect of Article 38 (Informing of the Verkhovna Rada of Ukraine on Activity of the Cabinet of Ministers of Ukraine), which, as already mentioned, should be part of the Rules of Procedure of the Verkhovna Rada.

19. According to Article 83 of the Constitution of Ukraine:

> ”*Rules on the conduct of work of the Verkhovna Rada of Ukraine shall be laid down in the Constitution of Ukraine and the Rules of Procedure of the Verkhovna Rada of Ukraine”.*

20. Consequently, the adoption of the Rules of Procedure falls under the sole discretion of the Verkhovna Rada, while the inclusion of the above provisions related to the functioning of the parliament in the draft law implies that these provisions are subjected to approval by the President of Ukraine (Article 106.29 of the Constitution).

21. Finally, the Commission notes that Article 19 of the draft law does not make provision for the possibility for the Verkhovna Rada to terminate, upon its own initiative, the powers of a *single* member of the Cabinet of Ministers, contrary to the current practice in this respect[1]. The Venice Commission considers that this change might add to the political stability in the country.

V. Technical drawbacks of the draft law

a. The scope of the law

22. According to Article 92.12 of the Constitution of Ukraine:

> *“the organisation and activity of bodies of executive power (...) is determined exclusively by the laws of Ukraine”.*

23. The draft law on the Cabinet of Ministers is quite extensive, consisting of 11 sections and 58 articles. It is a comprehensive legal act combining issues related to the composition, structure, powers and functioning of the Cabinet of Ministers of Ukraine.

24. The Commission, however, considers that this attempt of codification through an extremely detailed law results in a number of legal problems. The scope of the law covers a great variety of issues, starting from the relations between the main constitutional bodies and ending with social economic benefits of the ministers, such as their right to out-of-turn tickets for intercity transport. It can be doubted whether it is expedient to regulate at the level of a parliamentary law all the details concerning the powers and the functioning of the Cabinet of Ministers or the position of the ministers. At least some of the provisions of procedural or technical nature (for example the provisions on the meeting times of the Cabinet, Article 49.2) could be transferred to the Rules of Procedure which the Cabinet is supposed to adopt (Article 4.3). In addition, as previously stated, some of the provisions dealing with the procedure to be followed in the Verkhovna Rada such as Article 38 (Informing of the Verkhovna Rada of Ukraine on activity of the cabinet of ministers of Ukraine) according to their nature should be laid down in the Rules of Procedure of the Verkhovna Rada rather than in the law on the Cabinet of Ministers.

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1 The possibility of a vote of non-confidence of parliament in a single minister is examined in the Venice Commission’s opinion “on the possible introduction of the entitlement for former MPs to resume their parliamentary seat upon ceasing their governmental functions (CDL(2006)057).“

b. Non-normative provisions

25. The legal significance of some provisions remains unclear. They seem to be of a theoretical rather than of a normative character. Thus, it can be doubted whether Article 2 (Principal Objectives of the Cabinet of Ministers of Ukraine) of the draft law is meant to create legally relevant competence or whether the provisions are of a merely programmatic nature. The legal relevance of Article 3.1 (Principles of Activity of the Cabinet of Ministers) appears to be uncertain as well. One can also doubt whether Article 3.2 of the draft law, according to which *"illegal interference of any bodies, officials, enterprises, institutions, organisations or associations of citizens in dealing with issues belonging to the competence of the Cabinet of Ministers of Ukraine is impermissible"*, is really needed. The same applies in respect of the provisions laid down in Article 20 (General Issues of Competence of the Cabinet of Ministers of Ukraine), Article 41 (Relations of the Cabinet of Ministers of Ukraine with the National Bank of Ukraine and other State authorities), Article 42.1 (Relations of the Cabinet of Ministers of Ukraine with Bodies of Local Self-government), Article 43 (Relations of the Cabinet of Ministers of Ukraine with Associations of Citizens).

26. The Commission would suggest to avoid such non-normative clauses in the text of the draft law.

c. Deputy ministers

27. According to Article 23.9 paragraph 2, the Cabinet appoints and dismisses the deputy ministers upon the relevant proposals of ministers. However, there is no general provision on the position of a deputy minister. Such a provision should be added.

d. Incompatibility between the office of minister and the status of MP

28. Article 7.2 of the draft law reads as follows:

> "*Members of the Cabinet of Ministers of Ukraine shall not combine their office with any other job (save for teaching, research or creative activities out of working hours), nor can they be a member of the governing body or supervisory council of an enterprise or profit-seeking organisation.*"

29. The draft law does not mention explicitly the incompatibility between the office of minister and the status of MP, and it does not specify if the former ministers are allowed to resume their mandates as deputies after the termination of their offices as ministers. In the Commission's view, it would be appropriate that the law be as clear as possible on this matter[2].

e. Repetition, *expressis verbis* or otherwise, of constitutional provisions

30. Some of the constitutional provisions are repeated in the draft law, at times *expressis verbis* and at times with certain changes (for example, Articles 116 of the Constitution and Article 2 of the draft law do not coincide totally: some tasks of the Cabinet of Ministers are listed in identical terms – see Article 2, §§ 1.1, 1.3, 1.4, 1.5 and 1.7, but some others not -See Article 2 §§ 1.2, 1.6 and 1.8)

[2] Both issues are dealt with in the Venice Commission's opinion "on the possible introduction of the entitlement for former MPs to resume their parliamentary sear upon ceasing their governmental functions" (CDL(2006)057).

31. It might be considered informative to gather in a single law all the provisions concerning the Cabinet of Ministers. However, such a legislative solution should be avoided, since either the repetition is *expressis verbis,* thus useless (except for the aim of codification), or it is phrased differently, or omitted, in which case doubts may arise as to the position of the provisions in the hierarchy of norms.

f. Level of details

32. In some cases the draft is detailed to such an extent that it becomes difficult to ensure full conformity with the Constitution. Article 21 of the draft law, for example, describes the powers of the Cabinet of Ministers of Ukraine. The first paragraph of this Article outlines six major areas of competence of the Cabinet of Ministers, while the second paragraph prescribes that *«the cabinet of ministers of Ukraine exercises also other powers defined in the Constitution and laws of Ukraine ».* It could be argued that there is no need for such a detailed enumeration in the first paragraph, in the light of the vast powers assigned by the second clause. It would be advisable to introduce a more coherent approach in this respect.

VI. Conclusions

33. The law on the Cabinet of Ministers of Ukraine is of crucial importance for the functioning of the executive branch in the country.

34. The draft law under consideration requires certain improvements. Particular attention needs to be paid to the following aspects:

- A better co-ordination is necessary between the provisions of the draft law and the Constitution of Ukraine (Relations between the President's competence and that of the Cabinet of Ministers, Delegation of powers by the Cabinet of Ministers; Provisions in respect of the Autonomous Republic of Crimea);
- Some competences which the law attributes to the Cabinet of Ministers would require a constitutional basis, which at present lacks;
- Due respect for the principle of Separation of Powers would require to exclude the reciprocal interferences between the normative powers of the Cabinet of Ministers and the Verkhovna Rada.

35. A number of technical amendments and improvements is also suggested.

36. The Venice Commission remains at the disposal of the authorities of Ukraine for any further assistance in the preparation of this important law.