



Declaration of Fair and Reasonable Administration



Preamble

Thousands of complaints from entrepreneurs reviewed by the Business Ombudsman Council on malpractice of public administration bodies unquestionably confirm the fact that even technically perfect legislation is not a guarantee of the rights and legitimate interests of business in practice.

We believe that it is the quality of everyday practical application of laws in the spirit of justice and prudence that serves as the main guiding light for compliance with the rule of law principle as the foundation of a law-based state.

Critical assessment and review of the existing manner of administering laws is no less important than modernization of legislation, since it is application and enforcement that will lay the foundation for the future social contract between the state and business, forming the basis for Ukraine's renewal.

At the heart of such an agreement, as a basis for transparent relations between the state and entrepreneurs, there should be good faith, proportionality, prudence, as well as the rest of the general European Union legal principles.

It remains the case that, in the process of implementation, where legislation provides

a choice between several legal options, decision-making is often not guided by the above-mentioned principles, but is rather solely influenced by the need to achieve target indicators or by the fear of attracting the attention of law enforcement bodies.

Adherence by public administration authorities to the implementation principles set forth in this Declaration will help not only to resist negative practices mentioned above, but also contribute to the predictability of the management decision-making process, and as a result, improve the perception of such decisions by business and society.

This Declaration in no way replaces current legislation provisions, but rather seeks to emphasize the need to take into account European Union law fundamental principles in administrative activities, such as reasonableness, proportionality, prudence, impartiality, etc.

We are convinced that applying the principles outlined in this Declaration should not be the exclusive prerogative of the courts. They should first of all be applied by public administration representatives to support business in every possible way and reduce the number of disputes going to court.

Principles

Reasonableness

The reasonableness of the decision made should be an integral part of fair and prudent law application. Public administration bodies must always give convincing arguments in the decision-making process, as well as specify the reasons for rejecting counterarguments presented by businesses.

The adopted decision will not be considered reasonable if its content is limited to quoting legislation, and does not contain an assessment of the circumstances, arguments

and motives on which the decision by the administrative body is based.

Fair enforcement is based on moderation in decision-making. Executive authorities must take into account all the circumstances of the case before taking any final decision and action, assess and compare possible positive and adverse consequences, thereby maintaining a reasonable balance between the interests of business, the state and society.

Proportionality

Decisions and actions of public administration bodies must be commensurate with the situation or violation, if such was committed by business. In particular, it is worth taking into account whether the violation of law committed by the business caused any real losses to the state or local budget or any other damages.

Public administration bodies should avoid applying liability measures to businesses,

if the violation committed is of a technical nature and, due to its insignificance, did not cause damage to the budget or other legally protected interests.

In the event that a public administration body chooses from several enforcement measures on business, preference should be given to the least onerous ones.

Clarity

Any decision of public administration bodies must be presented in such a way that an ordinary person, after reading it, could at least understand all the circumstances of the case: conclusions made by the competent public

administration body; the content of legislation applied; grounds for applying these norms; grounds for rejecting or taking into account counterarguments of an entity in respect of which the enforcement decision was taken, etc.

Impartiality

In their daily activities, public administration bodies must be guided by impartiality and objectivity principles. It means that public administration bodies must act without any personal preferences or sole desire to achieve target indicators; without external influence or unlawful pressure from management or instructions from law enforcement bodies.

Public administration bodies must carefully establish and consider all relevant factual and legal elements of the case, taking into account not only the interests of the administration, but also the interests of all parties involved in the case, thereby showing due care.

Transparency and business participation in decision-making

State authorities should provide business representatives with a real opportunity to participate in the process of shaping important decisions, enabling them to provide arguments to be considered and taken into account, where appropriate.

Public administration bodies should facilitate business access to information about decisions and the materials on which they were based, if such decisions concern business interests.

Timeliness

Fair application of law involves timely decision-making without undue delay. In other words, the essence of this principle is that “slow

administration is poor administration”. Delay in making a final decision violates the principle of legal certainty.

Effectiveness

Effective application of law should ensure economical use of resources and attainment of the best results that could be defended by

the executive authority in the event of a court challenge, taking into account established approaches in the administration of justice.

Legal certainty

Acting contrary to case-law established by national courts, particularly model case decisions of the Supreme Court, is a direct violation of the principles contained in this Declaration, which consigns both the state and business to long-lasting administrative and judicial litigation.

Public administration bodies should make every effort to make the application of laws predictable for business.

During the decision-making process, public administration bodies should take into account the legitimate expectations of business, as well as established legal and regulatory practices in a particular area, especially when it comes to a possible retrospective impact on rights or obligations.

Presumption of legality of a person's actions and claims

State authorities should ensure protection of business rights in relations with public administration bodies, since from the very beginning business is the weaker and more vulnerable party in relations with the state.

Actions, decisions and requirements of business should be considered legitimate, until proven otherwise in an appropriate manner in the course of the work of public administration bodies.

Documented decisions and data quality

Public administration bodies must make every effort to establish the circumstances relevant to the decision of the case and, if necessary, collect documents and other evidence for this purpose on their own initiative and drawing on their own resources.

Information used in enforcement by public administration bodies must be accurate, up-to-date, and legally obtained.

Effective administrative appeal

Public administration bodies must make effective efforts to assess the quality of application of laws by their territorial structural

subdivisions, and facilitate business in every way in availing itself of the administrative appeal process.

Practical application of principles

Quite often, practical application of the aforementioned principles in certain cases may prove to be a challenging task, given the complexity and diversity of legal relations that may arise between business and public administration bodies.

It is possible to achieve compliance with the principles declared in this Declaration by checking and evaluating the relevant decision of the public administration body before its adoption in the light of answers to the following questions.

The checklist below is based on universal questions used by public administration bodies in common law countries in accordance with guidelines for making administrative decisions called Judge Over Your Shoulder.

Negative answers to the questions below (or absence of any answers) will indicate that the decision of a public administration body contradicts the principles proclaimed in this Declaration and violates the rights or legitimate interests of business. The advisability of making such a decision should therefore be carefully reviewed.

Checklist for making decisions

1

Where does the power to make this decision come from and what are its legal limits?

2

For what purposes can the power be exercised?

3

What factors should I consider when making a decision?

4

Is there any established administrative practice, both within and outside the relevant authority, as to exercising such a power?

5

Does anyone have a legitimate expectation as to how the power will be exercised?

6

Can I make this decision or does someone else need to make it?

7

Will my decision be compliant with human rights law?

8

Is my decision compliant with the administrative procedure principles?

9

Will my decision violate the principles enshrined in the legislation or contradict the purpose of the relevant legislation?

10

Are there direct or indirect financial consequences of the decision proportional to the committed violation? If no, what is the reason for the need to make such a decision?

11

Does the power have to be exercised in a particular way, e.g. does legislation impose procedural conditions or requirements on its use?

12

Have I consulted properly with legal advisors or other experts, if this is necessary for a particular case?

13

Will I be acting with procedural fairness towards the persons who will be affected?

14

Could I be, or appear to be, biased?

15

Have I taken necessary considerations into account, and is my decision reasonable?

16

Does the decision need to be, and is it proportionate?

17

What might be the consequences of court intervention in my chosen approach to application?

18

Have I taken into consideration conclusions of the Supreme Court, which are binding when applying this legal provision, or, in their absence, the prevailing practice of national courts?

The said Declaration is a document open for endorsement by all public authorities and local self-government authorities without any restrictions. By adhering to this Declaration, the parties who sign it express their agreement to encourage and support the application of principles proclaimed therein in every possible way.

For its part, the Business Ombudsman Council, relying on its own years of experience and best international comparative practices, will in every way support and assist public administration bodies in the practical application of principles set forth herein.

Business Ombudsman

[... List of parties that signed the Declaration...]

Roman Waschuk

Kyiv “_” _____ 202_

Kyiv “_” _____ 202_