



Business  
**OMBUDSMAN**  
Council

# SYSTEMIC REPORT

**ADMINISTRATIVE APPEAL:  
CURRENT STATE AND RECOMMENDATIONS**





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## LIST OF ABBREVIATIONS

Abbreviations	Definition
<b>AMCU</b>	Antimonopoly Committee of Ukraine
<b>CEB (-s)</b>	Central executive body (-ies)
<b>CMU</b>	Cabinet of Ministers of Ukraine
<b>Convention</b>	Convention for the Protection of Human Rights of November 4, 1950, ratified by the Law of Ukraine of July 17, 1997 No. 475/97– BP
<b>Council</b>	Business Ombudsman Council – Ukraine
<b>Draft Law</b>	Draft Law of Ukraine "On Administrative Procedure", which the Business Ombudsman Council recommends the Cabinet of Ministers of Ukraine to prepare and lodge with the Verkhovna Rada of Ukraine
<b>Draft Law No. 9456</b>	Draft Law of Ukraine "On Administrative Procedure" of December 28, 2018 No. 9456
<b>ECHR</b>	European Court of Human Rights
<b>ECJ</b>	European Court of Justice
<b>KPI</b>	Key Performance Indicators
<b>MD SFS</b>	Main Department of the State Fiscal Service in the region
<b>MinJust</b>	Ministry of Justice of Ukraine
<b>MinJust Commission</b>	Commission for Handling the Appeals in the Sphere of State Registration Actions under auspices of the Ministry of Justice of Ukraine
<b>Panel</b>	Permanent Administrative Panel of the Antimonopoly Committee of Ukraine for Consideration of Appeals on Violation of Legislation in the Sphere of Public Procurements
<b>PE</b>	Private entrepreneur

Abbreviations	Definition
<b>Report</b>	Systemic Report "Administrative Appeal: Current State and Recommendations"
<b>SACI of Ukraine</b>	State Architectural and Construction Inspection of Ukraine
<b>SEA VAT</b>	Value added tax system of electronic administration
<b>SFS Commission</b>	Central Level Commission for Reviewing the Appeals against the Decisions of Regional Level Commissions that Make Decisions on Registration of Tax Invoices/Adjustment Calculations with the Unified Register of Tax Invoices or Refusal in Such Registrations
<b>SFS of Ukraine</b>	State Fiscal Service of Ukraine
<b>SLS of Ukraine</b>	State Labour Service of Ukraine
<b>SSEC of Ukraine</b>	State Service for Export Control of Ukraine
<b>SSS of Ukraine</b>	State Security Service of Ukraine
<b>SWA of Ukraine</b>	State Water Resources Agency of Ukraine
<b>TND(-s)</b>	Tax notification-decision(-s)
<b>USR</b>	Unified State Register of Legal Entities, Private Entrepreneurs and Public Organizations

## FOREWORD

This Systemic Report of the Business Ombudsman Council (the "**Council**") is focused at improving the existing state of administrative (internal) appeal procedure (the "**Report**").

In Ukraine, government agencies generate a significant number of disputable decisions (actions, inactions). The main reasons for such a situation are both inefficient<sup>1</sup> and corrupt state apparatus<sup>2</sup>. An important reason is also the lack of a quality legal framework governing administrative procedure<sup>3</sup>.

In the light of the foregoing, the possibility of eliminating defects created by the state apparatus promptly and without excessive costs is vital for both businesses and the State. It thus makes administrative (internal) appeal to be a rather urgent topic<sup>4</sup>.

A clear evidence of its relevance is the results of a survey conducted by the Council in the course of preparation of this Report during March-May 2019 among representatives of business. According to it, among **344** businesses that responded to the survey, **96.5%** participated in the administrative (internal) appeal at least once. At the same time, it would be quite premature to conclude that Ukrainian entrepreneurs trust this procedure.

According to the Global Competitiveness Index (GCI) for 2018, Ukraine was ranked **107th**

(out of **140** countries) by "*the Efficiency of the Legal Framework in Challenging Regulations*" index, based on survey results by asking chief executives of companies the question "*In your country, how easy is it for private businesses to challenge government actions and/or regulations through the legal system?*". Such results show dissatisfaction of business with the current state of play in the area of appeal against the public authorities' decisions.

Findings about confidence of business in the mechanism of administrative appeal generated by the results of the survey conducted by the Council are even more striking. **300** respondents (or **90.1%** of those who answered the respective question) believe it is impossible (hardly possible) to expect an impartial, comprehensive and fair consideration of an appeal filed according to the existing administrative appeal procedure in Ukraine.

Despite skepticism of business towards this mechanism, it nonetheless appears to be a quite popular tool among entrepreneurs as an alternative to a lawsuit. If there is an opportunity to challenge a controversial decision (action, inaction) of a government agency within the framework of administrative appeal procedure first, or immediately go to court, **73.3%** of participants of the Council's survey would firstly lodge an administrative

<sup>1</sup> According to the Global Competitiveness Index (GCI) for 2018, Ukraine ranked 110th (out of 140 countries) by the state institutions development indicator.

According to the Index of Economic Freedom (IFE) in 2019, Ukraine ranks 145th (out of 180 countries), which is due, in particular, to low results by indicators from the "Rule of Law" and "Regulatory Efficiency" groups.

<sup>2</sup> Ukraine scored 32 points out of 100 possible in the Transparency International "Corruption Perception Index" (CPI) survey for 2018 and ranked 120th (out of 180 countries).

<sup>3</sup> The solution to this problem is proposed in the Draft Law No. 9456.

<sup>4</sup> There are different views in the doctrine on the issue what correct definition, characteristic and place in the legal system the administrative appeal institution deserves to take, regarding areas to be covered and even regarding correctness of the concept itself. The purpose of this Report, which has practical nature, does not imply going deep into theoretical aspects. Therefore, without claiming to be scientifically accurate, under the notion of the "administrative (internal) appeal procedure" in the Report we mean appealing (reviewing) decisions (and in some cases also actions or inactions) of public authorities through mechanisms existing outside the judicial branch of power.

appeal, and only **26.7%** of respondents would immediately go to court.

Among **203** respondents who answered the Council's open question on how to improve the administrative appeal procedure, only 3 (less than **2%**) expressed the opinion that this mechanism should be entirely eliminated.

A combination of these two trends (a low trust in the administrative appeal mechanism and, yet, a strong aspiration to use it) shows a huge demand of business for its enhancement. Responding to this demand, the Council carried out a comprehensive analysis of the administrative appeal procedure and developed a set of recommendations for its improvement.

The Report commences with an overview of the **current state** in this sphere, where: (i) the optional nature of the administrative appeal procedure in Ukraine is highlighted; (ii) reasons for low confidence of business in the administrative appeal procedure and inclination to seek judicial protection are analyzed; and (iii) differences in the degree of development of administrative appeal procedures in different spheres are described.

The Report then proceeds to ascertaining specific problems of the administrative appeal mechanism and elaborating ways to resolve them. A wide range of issues was categorized based on their belonging to one or another of the **general principles of administrative procedure**, whose observance is the key to a high-quality administrative (internal) appeal procedure.

While formulating recommendations, the Council was inspired by the need for a systemic, comprehensive and effective resolution of the main issues, which – in most cases – is impossible without amending primary

legislation. Therefore, a significant part of the Council's recommendations contemplates adoption of the Law of Ukraine "On Administrative Procedure" (the **"Draft Law"**) and is thus directed to the Cabinet of Ministers of Ukraine (the **"CMU"**). Accordingly, the Council recommends preparing the Draft Law based on the text of the former Draft Law of Ukraine "On the Administrative Procedure" of December 28, 2018 No. 9456 (the **"Draft Law No. 9456"**), which was never voted in the 1st reading albeit registered with the Verkhovna Rada of Ukraine of the 8th convocation<sup>5</sup>.

The analysis starts with the principle of **accessibility and comfort (convenience)** of the administrative appeal procedure. To ensure implementation of this principle, the Council recommends the CMU, *inter alia*, to properly specify provisions originally set forth in the Draft Law No. 9456 stipulating how an administrative act enters into force. In particular, it is suggested to provide that an administrative act should become effective not earlier than the term for lodging an administrative appeal is expired; or – when the administrative appeal procedure is launched – not earlier than this procedure is completed (with possible exceptions due to protection of critically important public interests, when the administrative act comes into force immediately).

Then the Report attends to the **neutrality (impartiality)** principle. Among the noteworthy provisions suggested by the Council to be included into the Draft Law are those foreseeing establishment of the legal framework enabling delegation of power to resolve administrative cases, as well as authorizing public authorities to set up appeal commissions (including the list of issues falling within the scope of their powers). To ensure proper consideration of

<sup>5</sup> The Draft Law No. 9456 is considered to be withdrawn in view of the norms of Part 1 of Article 105 of the Verkhovna Rada of Ukraine's Rules of Procedure, approved by the Law of Ukraine of February 10, 2010 No. 1861-VI. However, the vast majority of its provisions, from the Council's point of view, are relevant. Therefore, it seems appropriate to use the text of the Draft Law No. 9456 as a basis for the development of a new Draft Law.



certain types of administrative appeals, it is also recommended vesting the CMU with the authority to establish special (quasi-judicial) appeal bodies outside hierarchy of authorities, whose decisions (actions or inactions) are challenged.

The next principles the Report focuses on are **openness and transparency**. Among key novelties suggested by the Council to be reflected in the Draft Law, is the idea of ensuring publication of decisions adopted upon completion of administrative appeal procedure (subject to adherence with confidentiality and data protection rules).

Next, the Report turns to the **officiality (ex officio)** principle. The need for practical implementation of this principle finds its reflection in a set of recommendations inducing the CMU to implement a number of relevant provisions deriving from the Draft Law No. 9456 to the succeeding Draft Law. In particular, these are provisions envisaging the right of an appeal authority to collect any evidence necessary for a full and comprehensive consideration of the case upon its own initiative, including unrestricted access to state registries administered by the third party authorities.

**Proportionality** is another principle, whose observance was not left unnoticed in the Report. While endorsing a number of relevant provisions set forth in the Draft Law No. 9456, the Council recommends including several new provisions to the Draft Law aimed at ensuring adequate practical implementation of this principle. For instance, it is suggested to stipulate that this principle should be applied in lieu with the judicial practice generated by the Ukrainian

courts, the European Court of Human Rights and the European Court of Justice.

The Report then attends to the principles of **timeliness and reasonable terms**. Set of comprehensive recommendations issued to the CMU is aimed at adopting the Draft Law provided that it would incorporate respective provisions of the Draft Law No. 9456 (with some of them subject to further concretization) as well as a number of new ones. The Council suggests, inter alia, to implement such notions as "preliminary assessment of appeal" and "deferring consideration of appeal" (by providing time limit to eliminate formal defects). In addition, it is suggested to introduce the rule enabling satisfaction of appeals challenging decisions (administrative acts) based on the "tacit consent" principle.

**Reasonableness, consistency, and systemic nature** are three interrelated principles explored in the next section of the Report. To facilitate implementation of these principles, the Council asks to save a number of pertinent provisions from the Draft Law No. 9456 in the new Draft Law. Besides, the Council recommends the CMU to specify the list of issues due to be scrutinized by the appeal authority while reviewing disputed decisions (actions, inactions) from the standpoint of compliance with the requirements of material and procedural law and ensuring proper identification of all circumstances of the case.

The Report completes with the analysis of the **effectiveness** principle of the activity of an appeal authority. To ensure adherence with this principle, the Council recommends the CMU to adopt a legislative act, which would

determine the procedure for establishing key performance indicators (the "**KPI**") applicable to those executive authorities, whose functions include consideration of appeals filed within the framework of administrative appeal procedure,

which would foresee, *inter alia*, mandatory application of such KPI as "*ratio of subsequent confirmation of decisions issued within framework of administrative appeal procedure by courts*".

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Given a large number of public authorities and areas of public administration and supervision in Ukraine (many of whom evidently experience their own specific problems) the Council could not embark on exercise of addressing each of them in the Report. Nonetheless, the Council is convinced that implementation of recommendations set forth in this Report will contribute to improving the overall quality of administrative (internal) appeal procedure in all areas.

The Report also does not cover issues that some businesses consider to be the source of problems in the area of administrative (internal) appeal procedure, but essentially require a separate comprehensive study: i.e., personal liability of public officials, raising personnel competence level in public sector and combatting corruption.

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## 2 OVERVIEW OF THE CURRENT STATE OF ADMINISTRATIVE APPEAL

Whatever the level of public administration's development may be, a certain percentage of erroneous decisions and improper actions at the part of public authorities appears to be inevitable. Consequently, businesses will always have a need for reviewing, cancelling or suspending illegal or unfair actions and decisions of public authorities.

Since going to court takes a considerable amount of time and expenses, the opportunity for businesses to achieve a pre-trial resolution

of their disputes with public authorities through an administrative appeal procedure is becoming increasingly relevant.

The following comprises an overview of the current state of the administrative appeal procedure in Ukraine. In particular, optional nature and relatively low level of confidence of business in this mechanism is explained, as well as the state of its practical implementation is analyzed.

### 2.1 Optional Nature of Administrative Appeal

In Ukraine, citizens are guaranteed the right (in practice extended to legal entities as well) to lodge complaints with the higher ranked authority to challenge any decisions or actions at the part of lower-ranked public authority<sup>6</sup>. However, this provision remains largely declarative as in most areas of public administration it is not supported by real mechanisms behind it.

The Constitution of Ukraine recognizes the monopoly of courts for exercising justice and does not allow delegating their functions to other authorities or officials<sup>7</sup>. At the same time, the Constitution of Ukraine allows mandatory pre-trial procedure for settlement of disputes to be defined by law<sup>8</sup>. Nonetheless, the case-law of the Constitutional Court of Ukraine run the path of rejection of such initiatives under the pretext

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<sup>6</sup> See Part 1 of Article 16 of the Law of Ukraine "On Citizens' Appeals" of October 2, 1996 No. 393/96-BP, according to which: "An appeal concerning actions or decisions of the state, municipal authority, enterprise, institution, organization, civic association, mass media or an official shall be submitted to a higher body or an official in subordinate order, without prejudice to the right of citizen to apply to the court pursuant to the current legislation and, in case of absence of such a body or disagreement of the citizen with the decision taken on the appeal, it shall be submitted directly to the court".

<sup>7</sup> See Article 124 of the Constitution of Ukraine.

<sup>8</sup> See Part 4 of Article 124 of the Constitution of Ukraine.

of preventing restriction of a person's right to judicial protection<sup>9</sup>.

As a result, an administrative appeal in Ukraine is (and will likely remain) an optional remedy for violated rights. Such an approach is in line with the practice of some European Union Member States (France, Belgium, Italy, etc.), while a number of other states (Germany, the Netherlands, Hungary, Slovenia, Poland, Serbia, Denmark, the Czech Republic, Romania,

etc.) adhere to the concept of mandatory administrative appeal (representatives of both groups of states, however, may have exceptions to the general concept for particular spheres)<sup>10</sup>.

As far as protection of business is concerned, such state of affairs, in the Council's view, may, in fact, be regarded as favorable for businesses, who, depending upon circumstances of a particular case, are actually entitled to choose from one of two options (pre-trial and/or trial).

## 2.2 Low Level of Confidence in Administrative Appeal

The legacy of the Soviet command and control system still causes a significant degree of centralization of decision-making in most areas of government in Ukraine. Despite some steps towards decentralization of bureaucratic verticals, their existence is evident in most areas of public administration, while local departmental "initiatives" are developed largely only within a narrow range of acceptable boundaries, well-defined by the "center".

As a result, a kind of "presumption of concerted action's existence", when it comes to decisions and actions of public authorities across their power vertical, got entrenched in the Ukrainian collective consciousness, ultimately triggering

skeptic attitude of the public towards prospects for fair review and rescission of such actions or decisions by the higher-level authorities. This stereotype<sup>11</sup> was not born out of thin air and is largely confirmed by empirical observations<sup>12</sup>.

Therefore, for persons who face public authorities' malpractice, in many cases prompt initiation of court proceedings is perceived as a more appropriate step to take rather than spending time and resources on pre-trial resolution. Out of 344 businesses interviewed by the Council, 87.2% of respondents believe that it is impossible (hardly possible) to rely on an impartial, comprehensive and fair consideration of an appeal filed within the administrative (internal) appeal procedure. If there

<sup>9</sup> See, i.e. the Judgement of the Constitutional Court of Ukraine in a case of the constitutional appeal of Campus Cotton Club Trade House LLC regarding official interpretation of the provision of Part 2 of Article 124 of the Constitution of Ukraine (the case on pre-trial dispute settlement) of July 9, 2002 No. 15-пн/2002; the Judgement of the Constitutional Court of Ukraine in a case concerning official interpretation of Articles 3, 23, 31, 47, 48 of the Law of Ukraine "On Information" and Article 12 of the Law of Ukraine "On Prosecutor's Office" (the case of K. G. Ustyomenko) of October 30, 1997 No. 5-зп/1997; the Judgement of the Constitutional Court of Ukraine in a case of the constitutional appeal of the citizen Dziuba Halyna Pavlivna concerning official interpretation of Part 2 of Article 55 of the Constitution of Ukraine and Article 248-2 of the Civil Procedural Code of Ukraine (the case of H.P. Dziuba on the right to appeal unlawful actions of an official in court) of November 25, 1997 No. 6-зп/1997.

<sup>10</sup> See Administrative Appeal / Dacian C. Dragos, – Springer International Publishing, 2016 (link: [https://www.researchgate.net/publication/304532967\\_Administrative\\_Appeal](https://www.researchgate.net/publication/304532967_Administrative_Appeal)).

<sup>11</sup> See also Section 3.3. "Openness and Transparency", which explains, among other things, the category of perception of an administrative act.

<sup>12</sup> For example, within the framework of administrative appeal against the TNDs, in 2018 the SFS of Ukraine received 23,366 complaints against the TNDs, 3,743 of which were canceled whether fully or partially (i.e., about 16%), and in 2017 15,152 complaints against the TNDs were received, out of which 1,720 were cancelled in full and in part (i.e. about 11%). These statistics do not look very encouraging to the complainants, although the administrative appeal mechanism in the SFS of Ukraine is more developed compared to many other bodies.

is an opportunity to initially challenge an illegal decision (action, inaction) of a public authority administratively or immediately in court, 26.7% of respondents will immediately go to court, despite the fact administrative (internal) appeal is faster and more cost-saving than a judicial one.

Among other things, this approach is also fed by the lack of administrative appeal mechanisms (or its infantile state) in many areas, as well as by a low level of trust even in existing mechanisms at the part of public and business. It is worth noting that among 118 businesses interviewed by the Council, who attempted to name a public authority and/or an area in which there is currently no possibility to file an appeal through an administrative (internal) appeal procedure, and, in their opinion, it would be advisable to introduce such a possibility, – the majority of respondents named authorities in which this procedure actually exists. It might indicate a lack of awareness thereof and its inconvenient and inaccessible nature. It can also evidence the fact that in certain areas the procedure is so formal and ineffective that appellants do not even notice its existence.

Hence, administrative courts – despite being overloaded and lacking confidence in them – are still viewed by the majority of businesses as a more effective tool for combatting abuses of public authorities<sup>13</sup>.

However, even if a new level of the judiciary is achieved (i.e., due to the recent increase of court fees and wages for judges and court apparatus staff), – a small number of skilled judges will continue bearing the immense burden of resolving a large number of similar routine cases, which will again result in a lowering quality of justice and problems while observing reasonable time limits<sup>14</sup>.

Therefore, without effective mechanisms of pre-trial (administrative) settlement of disputes, it is hardly possible to break this "vicious circle".

At the same time, the idea of forced popularization of the administrative appeal by establishing its mandatory nature (which can conventionally be compared with the "stick method") was turned down in Ukraine<sup>15</sup>. Besides, reducing the load on courts by increasing litigation costs (increase of court fees, introduction of the Bar monopoly on representation in court, etc.) is being painfully perceived by the public. Hence, the State is left with a "carrot method" only – to encourage public and businesses to voluntarily use an extrajudicial procedure (currently being not very popular) through its improvement and demonstration of its effectiveness.

<sup>13</sup> It is rather difficult to find the relevant official statistics on this issue. As an example, one can look at data on appeals against the decisions in cases on administrative offenses in 2009-2012: 458 k decisions were challenged in total, of which 95 k decisions (20,7%) – with a higher level body, and 363 k decisions (79,3%) – in court (See an Analytical Review of the State of Execution of Court Proceedings by the Local and Appellate Administrative Courts in 2012, prepared by the Higher Administrative Court of Ukraine) ("Selected Directions of Extrajudicial Review Improvement of Cases on Administrative Offenses", R.V. Myroniuk, September 26, 2013, УДК 342:95).

<sup>14</sup> The brightest overload example within Ukrainian administrative courts system has always been the court of cassation (earlier – the Higher Administrative Court of Ukraine, nowadays – the Cassation Administrative Court within the Supreme Court). In particular, during 2018, some 76,502 cases and materials were considered by this court. During the last year the court handled 37,449 cases and materials (49%) that were pending its resolution (link: <https://court.gov.ua/archive/634645/>).

<sup>15</sup> See also Section 2.1. "Optional Nature of Administrative Appeal".

## 2.3 Development of Administrative Appeal Mechanism in Different Spheres

In Ukraine, legal framework governing administrative appeal and administrative procedure is not codified and lacks proper harmonization.

Almost every sphere of social relations in which there is public administration or supervision (from customs to environmental protection) in Ukraine has its own specific law or code regulating appeal of decisions, actions and inactions of public authorities in its own way<sup>16</sup>.

As the relevant rules were adopted at different times and within different reforms, they are not systemically coordinated. Therefore, collectively they result in inconsistent and fragmented regulation of both the administrative procedure as a whole, and administrative appeal institution as such. At the same time, the degree of detail varies considerably – from a relatively detailed regulation<sup>17</sup> to one provision simply declaring existence of the right to appeal<sup>18</sup>.

Repeated attempts to unify the mentioned issue under a single "umbrella" law were made<sup>19</sup>. However, each time one faced significant practical and theoretical challenges, and in the

nearest future their implementation remains questionable. Under such conditions, the entire scope of spheres in which business interacts with public authorities and may require the administrative appeal mechanism can, in the Council's view, be divided into three virtual groups:

- 1) areas in which the administrative appeal mechanism exists and works;
- 2) areas in which an administrative appeal exists only formally or in an emerging state;
- 3) areas with no administrative appeal.

The bright representatives of the *first group* are tax and customs<sup>20</sup> spheres, state registrars' actions and public procurements. Here business is dealing with actually functioning appeal mechanisms, and it is appropriate to continue discussing them in terms of certain proposals for their further improvement.

The *second group* includes quite a large number of spheres within public authorities' competence. For instance, it is an architectural and construction control, environmental control, consumer rights protection, market

<sup>16</sup> The "core" key laws establishing basic principles of interaction between the public authorities and civic society as well as businesses comprise the Law of Ukraine "On Administrative Services" of September 6, 2012 No. 5203-VI, the Law of Ukraine "On Basic Principles of the State Supervision (Control) in the Sphere of Economic Activities" of April 5, 2007 No. 877-V, the Law of Ukraine "On Permit System in the Sphere of Economic Activities" of September 6, 2005 No. 2806-IV, the Law of Ukraine "On Citizens' Appeals" of October 2, 1996 No. 393/96–BP, the Law of Ukraine "On Civil Service" of December 10, 2015 No. 889-VIII, the Law of Ukraine "On Public Procurements" of December 25, 2015 No. 922-VIII, etc.

<sup>17</sup> See, for instance, Article 56 of the Tax Code of Ukraine of December 2, 2010 No. 2755-VI.

<sup>18</sup> See, for instance, Part 7 of Article 41 of the Law of Ukraine "On Urban Development Regulation" of February 17, 2011 No. 3038-VI.

<sup>19</sup> See, for instance, the Draft Law No. 9456, the Draft Administrative Procedure Code of Ukraine of December 3, 2012 No. 11472 (revoked on December 12, 2012), the Draft Administrative Procedure Code of Ukraine of July 18, 2008 No. 2789 (revoked on March 11, 2010), the Draft Administrative Procedure Code of Ukraine of April 29, 2004 No. 5462 (revoked on February 8, 2005), the Draft Administrative Procedure Code of Ukraine of December 29, 2001 No. 8413.

<sup>20</sup> It is worth noting that an effective procedure in these areas exists only vis-à-vis certain range of issues (appeals against the TNDs, tax claims, decisions on customs value adjustment, etc.). At the same time, some types of decisions, as well as actions and inactions of officials of tax and customs authorities, cannot be appealed within the existing framework of administrative (internal) appeal procedure.

supervision, state supervision of healthcare, etc. Although in these areas the relevant central executive bodies (the **"CEBs"**) are empowered to review decisions of subordinate bodies, – the actual practical exercise of these powers is reduced to handling the appeals under the general procedure for processing incoming correspondence.

Finally, the *third group* combines areas in which (by virtue of conflicts of law and "white spots", or a direct intention of the legislator) the law does not leave any option but judicial protection. Visible place in this group is occupied by municipalities, which have since recently ended up in the spotlight of businesses attention due to growth of their powers spurred by decentralization. In fact, even the notion of the "administrative appeal" can hardly be applied to most of municipal bodies due to the lack of administrative subordination to any authority.

Out of 20 supervisory authorities and regulators being best known for businesses interviewed by the Council, 13 authorities (65%) confirmed that in their work they actually employ administrative (internal) appeal of decisions, 7 (35%) denied its availability or provided vague answer to this question.

At the same time, the analysis of the answers given to the next 35 questions raised by the Council (intended to gather data for a comparative analysis and determine the state of development of administrative appeal procedure in different spheres) revealed there were no qualitative analytical data on this topic in government agencies they were ready to share with the public, and/ or a limited understanding by authorities of the "administrative (internal) appeal" issue and, as a result, answers provided were generally superficial and were not suitable for a comprehensive analysis.

For example, the State Service for Geology and Subsoil of Ukraine, the State Forestry Agency of Ukraine and the State Service for Special Communications and Information Protection of Ukraine provided answers from which one can conclude on absence of administrative (internal) appeal mechanisms in the areas of their competence. Yet, based on the analysis of the current legislation in these areas, in the Council's view, said mechanisms should have existed, and the Council's practice evidently proves that businesses might actually lodge appeals with these authorities.

The State Architectural and Construction Inspection of Ukraine (the **"SACI of Ukraine"**), based on the provided answers, applies the "administrative (internal) appeal" notion only to appeals related to licensing issues lodged with the Expert and Appeal Council of the State Regulatory Service of Ukraine. Nonetheless, the Council is aware that the former authority receives a large number of appeals attempting to challenge decisions, actions and inactions of its territorial bodies from various parties in the sphere of urban development.

The State Fiscal Service of Ukraine (the **"SFS of Ukraine"**) provided generally well-grounded and mostly affirmative answers to the Council's questions regarding availability and state of development of the administrative (internal) appeal mechanism. In particular, this public authority ended up being one of the few who confirmed it was maintaining statistics on outcomes of further judicial appeals against decisions issued within administrative appeal. However, while replying to the question about the total number of decisions (upheld based on outcomes of consideration of administrative appeals) that was subsequently challenged with courts and canceled by them, – the authority indicated that such information was not being collected (although, in the Council's opinion, this answer is inconsistent with the previous one).



A detailed overview of features describing each administrative appeal mechanism existing in Ukraine (including the ones that would be appropriate to set up) is far beyond the scope of this Report, and, actually, is not necessary as the most widespread problems faced by businesses are common for almost all spheres.

Hence, the next chapter of the Report analyzes the key problems in the sphere of administrative appeal procedure in Ukraine (including ways of their resolution) from the standpoint of basic principles based on the best international practices and which, in the Council's view, would be advisable to apply in all areas of public administration, where administrative appeal mechanism application is rational.

### 3 THE MAIN PRINCIPLES OF THE ADMINISTRATIVE APPEAL PROCEDURE

Results of the survey of the Ukrainian business conducted by the Council specifically for this Report reveal that, notwithstanding sectoral and regional peculiarities as well as differences in the size of business and the origin of its capital, entrepreneurs are interested in preserving more or less the same features of administrative appeal procedure.

Thus, among 344 participants of the survey, 53.2% consider the substantiality of decisions rendered upon administrative appeal as the most important aspect of this procedure. 19.8% placed in the first place openness of consideration and the opportunity to take part in the consideration of the case. For 19.5% key aspect is convenience and simplicity of lodging an appeal, the minimum number of formal requirements for its submission and the possibility to lodge an appeal electronically. For another 7.6% of respondents, who gave alternative answer to this question, – two or all of the above aspects are equally important.

203 representatives of business (59% of all respondents) provided one or more of their own suggestions aimed at improving the situation in the administrative appeal sphere. Among the most common suggestions are:

- 27,1%**<sup>21</sup> proposed to toughen liability for unlawful decisions of public authorities and damage caused by them;
- 25,5%** to increase independence, impartiality and objectivity of the appeal authority;
- 16,7%** to overcome corruption;
- 12,3%** to reduce formalism when considering appeals, improve quality, reasoning and motivation of decisions;
- 10,3%** to increase openness, transparency and publicity of the appeal procedure as well as to give to civil society institutions more sufficient role in this procedure;
- 8,9%** to improve effectiveness and timeliness of appeals consideration;
- 6,9%** to unify, improve legal framework governing administrative appeal procedure;
- 4,9%** to increase qualification and level of competence of public officials.

<sup>21</sup> Hereinafter, the percentage (%) of respondents who provided their own proposals in reply to a corresponding question of the Survey on Employing Administrative (Internal) Appeal Mechanism is specified.



Having looked comprehensively at systemic issues identified by businesses during the survey, we concluded that almost all of them contemplate adherence with at least one of the basic operational principles of public administration. Accordingly, the structure of this section of the Report is based on general principles of the administrative procedure (to the extent administrative appeal is one of the constituent elements thereof).

Therefore, the following comprises analysis of 8 principles of administrative procedure<sup>22</sup>, to which we tied the whole range of fundamental

problems in the administrative appeal area, including the Council's recommendations to resolve them. These principles (groups of principles) are as follows:

- 1) Accessibility and comfort (convenience);
- 2) Neutrality (impartiality) of appeal authorities;
- 3) Openness and transparency;
- 4) Officiality (ex officio);
- 5) Proportionality;
- 6) Timeliness and reasonable term;
- 7) Substantiality, consistency and systemic nature of appeal;
- 8) Effectiveness.

## 3.1 Accessibility and Comfort (Convenience)

### 3.1.1 Accessibility

**Accessibility** of administrative appeal procedure – i.e. the opportunity to make use of it in general – is the first principle it is logical to start with the analysis of ways for improving this mechanism in Ukraine.

As mentioned earlier, unlike many other jurisdictions, in Ukraine the law declares the absolute right to appeal any decisions or actions of public authority to a higher-level authority<sup>23</sup>. However, in practice administrative appeal is often unavailable for those whose rights and legitimate interests are violated by public authorities.

In the domestic legal tradition, a public authority's unfair conduct is commonly divided into the following three categories: *decision*, *action and inaction*. The situation is somewhat different for each of them, so they should be considered separately.

#### **a) Accessibility when challenging decisions**

*Decisions* of public authorities (acts of individual action) is a "typical", the most convenient and understandable object of administrative appeal.

In a common case, a decision is formalized, i.e. issued in the form of a written document

<sup>22</sup> There are many approaches to determining basic principles of the activity of public authorities in the doctrine and legal acts. In particular, in Ukraine, for a long time, 10 criteria are supposed to be applied by the administrative courts as benchmarks to ascertain compliance of the contested decisions, actions or inactions (Part 2 of Article 2 of the Code of Administrative Proceedings of Ukraine of July 6, 2005 No. 2747-IV). The authors of the Draft Law No. 9456 made an attempt to define the list of 15 principles of this procedure (Part 1 of Article 4 of the Draft Law No. 9456). The Council applies its own approach to classification of principles that does not claim to scientific precision, but is seen as convenient for structuring the Report and understanding its issues from a practical point of view.

<sup>23</sup> By the way, availability of the administrative appeal is an important prerequisite for ensuring the effectiveness of such institutions as the Business Ombudsman Council. According to the clause 6.1.3 (ii) of the Council's Rules of Procedure, the Council does not investigate complaints subject to any court proceedings. At the same time, the Council actively participates in an administrative (internal/departmental) appeal and this procedure often helps eliminating various instances of business malpractice. Therefore, if such procedure is available to businesses in a particular sphere, – it creates additional opportunities for the Council to help eliminating business malpractices in this area. For example, currently the Council's participation in the procedure of appeal against the tax authorities' decisions is directly prescribed by the relevant regulation (see, in particular, Procedure for Formalizing and Submitting Appeals by Taxpayers and Their Review by Supervisory Authorities, approved by the Order of the Ministry of Finance of Ukraine of October 21, 2015 No. 916). Same applies to the field of state registration (see the Regulation on the Commission for Consideration of Complaints in the Field of State Registration, approved by the Order of the MinJust of January 12, 2016 No. 37/5).

(a resolution, a writ, an order, etc.), whose form and details allow to clearly identify it as a decision.

Difficulties with the possibility of appealing decisions usually occur when they are not properly formalized (e.g. refusal to issue a certain document or to conduct certain actions is documented in a letter of response prepared

in a free form), casting doubts about whether there is a decision as such in place.

At the same time, in many spheres in Ukraine, even duly documented decisions (including those on applying sanctions) cannot be challenged through administrative appeal at all (one of the examples is the sphere of urban development)<sup>24</sup>.

## Case No. 1: Illegal imposition of a fine for violation of architectural and construction regulations

In November 2017, a private entrepreneur performing construction activities (the **"Complainant"**) approached the Council. The Complainant alleged that in January 2017, the Department for the State Architectural and Construction Control of the Executive Committee at Kryvyi Rih City Council unreasonably imposed a fine of UAH 144 k for alleged violation of regulations in the construction sphere.

The current legislation allows the Complainant to appeal the decision imposing a fine only in court within 15 calendar days from the date of its issuance. Such regulation deprived the Complainant of the opportunity to apply the administrative appeal procedure. As a result, in February 2017, the Complainant had to file a lawsuit immediately.

Since the decision was challenged in court, the Council did not consider the issue as to its substantive legality, but investigated the complaint only in relation to unlawful actions of the Department for the State Architectural and Construction Control, which in February 2017 prematurely sent an appealed decision on imposition of fine (which, according to the law, at the same time had "enforcement document" status) for enforcement.

Subsequently, in May 2017, the court dropped the unlawful fine. After the court decision's entry into force (attempts to appeal it failed), in April 2018, unreasonably initiated enforcement proceeding was finally closed. As it became known to the Council from the City Council Executive Committee's response received in June 2018, the Head of the Department for the State Architectural and Construction Control, who abused his powers by sending an enforcement decision, was no longer occupying this position.

Despite successful resolution of this case, it is worth noting that the Complainant had to undergo a tedious litigation and its property remained under arrest for over a year within the framework of enforcement proceeding until the court finally resolved the case.

The case could have been solved much faster and with less effort if there were an administrative appeal in the area of architectural and construction supervision.

<sup>24</sup> See Article 5 of the Law of Ukraine "On Liability for Offenses in Urban Development Sphere" of October 20, 1994 No. 208/94-BP; clause 28 of the Procedure for Imposition of Fines for Offenses in Urban Development Sphere, approved by the CMU Resolution of April 6, 1995 No. 244.

In the Council's view, there are no objective obstacles for introducing administrative appeal of any formalized decisions (especially those bearing sanction and/or being of the restrictive nature). Lack of such a right in many areas narrows the opportunities for protecting rights and legitimate interests of businesses and results in courts overload.

### **b) Accessibility when appealing against actions and inactions**

The situation with actions and inactions is even more complex.

*Actions* of public authorities, which are not accompanied by formalized decisions, but nevertheless affect the rights and legitimate interests of private entities is another possible (though less common than the decision) object of appeal.

The Law of Ukraine "On Citizens' Appeals" provides a right to appeal actions with a higher-level authority in the hierarchy. However, in special laws and sources of secondary legislation, this issue is typically not well elaborated and attention is paid to appeal of formalized decisions only. A good example is tax sphere, where only tax authorities' decisions appeal procedure is regulated clearly and in detail<sup>25</sup>. Meanwhile, in its practical work the Council faces many situations where fiscal authorities were "making troubles" for

taxpayers particularly through actions rather than formalized decisions. Examples include: carrying out so-called "counter-reconciliations" of taxpayers; taking measures to establish a taxpayer's alleged absence at its official seat and establishing a so-called "status 09"; termination of agreements on recognition of electronic reporting with taxpayers, etc.

As regards *inactions*, possibilities of appeal based on extra-judicial procedure are the most limited ones. Even the Law of Ukraine "On Citizens' Appeals" – which declares a "comprehensive" right to lodge appeals with the higher-level authorities – mentions only "decisions and actions" without referring to inactions<sup>26</sup>.

However, as evidenced by the Council's practice, cases of really harmful inactions for businesses by public authorities in Ukraine are quite common. The examples are: failure to provide responses to letters (requests); non-acceptance of reporting; failure to issue permits or other documents based on duly submitted applications (petitions); failure to enter data with registers; failure to enforce court decisions, etc.

In some cases, harmful influence of inaction on the rights and legitimate interests of individuals has been eliminated by application of the "tacit consent" principle<sup>27</sup>. Therefore, in the Council's view, application of this principle should be further expanded.

<sup>25</sup> See Article 56 of the Tax Code of Ukraine of December 2, 2010 No. 2755-VI. Appealing actions and inactions is generally governed by the Procedure for Reviewing Appeals and Organization of Personal Reception of Citizens in the State Fiscal Service of Ukraine and its territorial authorities, approved by the Order of the Ministry of Finance of Ukraine of March 2, 2015 No. 271.

<sup>26</sup> See Part 1 of Article 16 of the Law of Ukraine "On Citizens' Appeals" of October 2, 1996 No. 393/96-BP.

<sup>27</sup> For example, at the end of 2017, the Council frequently received complaints challenging alleged violations of the time limits for consideration of explanations and copies of documents submitted by the taxpayers under the clause 201.16.3 of the Tax Code of Ukraine of December 2, 2010 No. 2755-VI on the part of the relevant SFS Commission. On January 1, 2018, amendments to the Tax Code of Ukraine entered into force, which established the responsibility of the Commission to register a tax invoice or an adjustment calculation based on a "tacit consent" principle in case of violation of the term for consideration of explanations and copies of documents (paragraph 4 of clause 57-1 of subsection 2 of section XX of the Tax Code of Ukraine of December 2, 2010 No. 2755-VI). Presently, this principle continues to operate in this sphere (clause 28 of the Procedure for Suspension of Registration of a Tax Invoice/Adjustment Calculation in the Unified Register of Tax Invoices, approved by the CMU Resolution of February 21, 2018 No. 117). Shortly after the introduction of the "tacit consent" principle, the Council gradually stopped receiving complaints on such instances.

## Case No. 2: Inaction comprising failure to register the VAT payer

In January 2019 the Council has been approached by the lawyer acting in the interests of his client, a newly created company planning prompt launching of operations in the field of architecture (the "**Complainant**"). He informed that at the end of 2018 the company was registered as a legal entity and simultaneously submitted an application seeking registration as the VAT payer starting from January 1, 2019.

Shortly afterwards it turned out that the Main Department of the State Fiscal Service (the "**MD SFS**") in Kyiv city did not register the company as the VAT payer from that date. Besides, a formal decision on registration refusal was not issued. Only after the Complainant's request, the latter got a reply from the controlling authority where it was explained in a free form that registration did not take place as the application allegedly contains a formal defect. Hence, the Complainant was asked to re-submit an application with the MD SFS, based on which it could be registered on a later date.

Despite the need for ensuring registration from January 1, 2019 and existence of reasonable grounds for appealing illegal inaction of the MD SFS, – the Complainant decided not to initiate the appeal procedure and submitted a new application, based on which it was finally registered on January 17, 2019.

The Council discontinued investigation of the Complaint as it was no longer relevant.

One of the reasons that prompted the Complainant to refuse appealing, was a high probability of rejection of its appeal by the SFS of Ukraine for formal grounds, – i.e., as Article 56 of the Tax Code of Ukraine foresees challenging the "decisions" only, rather than "actions" or "inactions" which are not accompanied by the issuance of a formalized decision.

One of the most common extrajudicial ways to respond to public authorities' malpractice is the appeal by an aggravated person to be lodged with authorities (officials) having the power to bring an official who committed malpractice to disciplinary, administrative or criminal liability.

When appealing formalized *decisions*, this way of response is usually optional (auxiliary) since it is the decision itself that is being challenged, and

the issue of holding public officials liable may be initiated independently. At the same time, in case of pre-trial appeal of specifically *actions or inactions*, the perspective of bringing relevant officials to a certain degree of legal liability is often the one and only objective pursued by the appellant<sup>28</sup>.

It should, however, be acknowledged that prosecution of guilty persons is not always a

<sup>28</sup> For example, the main tool employed by individuals to address absence of replies from government agencies to their petitions or requests for access to information is initiating procedure of bringing respective public officials administratively liable as provided for in Article 212-3 of the Code of Ukraine on Administrative Offenses. The respective protocols are to be drawn up by the authorized representatives of the Secretariat or representatives of the Commissioner of the Verkhovna Rada of Ukraine on Protection of Human Rights (pursuant to clause 8-1 of Part 1 of Article 255 of the Code of Ukraine on Administrative Offenses of December 7, 1984 No. 8073-X).

sufficient mean of addressing unlawful actions or inactions of public officials. It proves itself like that only in cases where such actions (inactions) are eliminated and the main incentive for an appellant is to seek punishment of offenders and prevent such incidents in the future<sup>29</sup>.

Meanwhile, appealed actions or inactions during the time when appeal is ongoing are frequently still lasting or causing existence of certain consequences, and the appellant is interested in eliminating them as soon as possible. However, in order to eliminate ongoing actions or inactions (to recognize them as unlawful and to oblige the relevant authority to take certain measures or to refrain from taking certain actions) currently a person may apply only to court. Presently, there is actually no alternative other than judicial in this case (in the sense of a mandatory mechanism provided for by law).

The need for administrative appeal mechanism to challenge ongoing actions and inactions of public authorities and ascertaining scope of challengeable actions and inactions, – are complex issues being the subject of discussions in scientific and expert communities. There are concerns that certain people are likely to abuse their rights for various reasons<sup>30</sup> challenging every small step undertaken by an official or absence thereof. In addition, an excessive multiplication and blurring of issues challenged via administrative appeal mechanism (when, for

example, not only the decision to impose a fine based on conclusion set forth in an audit report is challenged, but also particular actions taken during this audit, such as sending requests for information, sampling, drawing up various intermediate reports, etc.) may considerably complicate the appeal procedure.

Undoubtedly, the legislator should focus on obliging public authorities to issue formalized decisions whenever they create any significant legal consequences for private persons. If formalized decisions were to be issued on all crucial issues in relations between businesses and the government, – then the need for challenging actions or inaction would be less frequent phenomenon<sup>31</sup>.

At the same time, the legislator cannot envisage all possible scenarios in the development of public-private relations and completely prevent occurrence of cases where actions or inactions of public authorities (rather than their formal decisions) will substantially violate rights and legitimate interests of individuals and thus require appeal.

Hence, to ensure comprehensive protection of rights and legitimate interests of business entities, it is reasonable, in the Council's view, to treat actions and inactions as objects of administrative (internal) appeal<sup>32</sup>.

<sup>29</sup> As liability of public officials for their unlawful decisions, actions and inactions is beyond the scope of this Report, – it is suffice mentioning here that such mechanism is poorly developed in Ukraine and that the Council is working on the development of separate legislative changes in this field.

<sup>30</sup> By the way, the problem of abuse of right is to a certain extent addressed in the Draft Law No. 9456. Attempts to resolve this issue were made in foreign practice, too. For example, "impossibility of abuse of the right" principle is provided for in Article 20 (2) of the Law "On Public Administration" of the Republic of Lithuania of June 17, 1999 No. VIII-1234. Its essence is that administrative body is entitled to terminate the administrative procedure if it is established that the applicant acted unfairly and abused his/her rights.

<sup>31</sup> This approach may be illustrated through introduction of a mechanism of suspension of registration of tax invoices/ adjustment calculations, which replaced the practice of termination of agreements on recognition of electronic documents with taxpayers. If earlier actions (regarding termination of agreements on recognition of electronic documents) comprised a subject matter of the appeal, – with introduction of a new mechanism the focus shifted on formalized decisions of the relevant Commissions (on refusal to register a tax invoice or adjustment calculation, inclusion of the complainant in the list of risky taxpayers, etc.).

<sup>32</sup> In this regard, the Council's opinion coincides with the one of the authors of the Draft Law No. 9456 (see, in particular, Article 80 of the Draft Law No. 9456).

## Convenience

In the context of **convenience** of administrative appeal – area adjacent to its accessibility – the following concentrates on the problem of suspension of challenged decisions (actions) while appeal is being handled, as well as on the use of modern technologies (electronic document flow, remote appeal handling, etc.).

### a) Suspending execution of appealed decisions (actions)

The critical feature of administrative appeal procedure causing it to be inconvenient – which sometimes actually deprives it of its sense – is a lack of possibility to suspend execution of the challenged decision (action) during the appeal procedure.

One vivid example is the imposition of fines for unofficially employed persons<sup>33</sup> – issue that has recently gained its significance for domestic business due to intensification of the campaign against informal employment.

## Case No. 3: Imposition of fine for unofficially employed workers

In March of 2019 the Council was approached by the domestic producer of electrical products (the **"Complainant"**). A month before a local department of the State Labour Service (the **"SLS of Ukraine"**) in Dnipropetrovsk region imposed a penalty exceeding UAH 11 million alleging employment of unofficial worker force.

The legislation used to foresee that decisions on imposition of fines could be challenged only in court and set a tough deadline for their enforcement (without interrupting the said deadline by applying to the court). As a result, the Complainant had to immediately challenge the decision in a court. Nonetheless – as the law did not prohibit forcible collection of a fine until adjudication is completed – enforcement proceeding was launched and funds on the Complainant's bank accounts were frozen.

Since the merits of the imposed fine were considered by the court, the Council investigated the complaint only with respect to the reasonableness of the arrest of funds on Complainant's bank accounts, which made payment of salaries and taxes impossible. If the legislation envisaged the administrative appeal of fines imposed for unofficially employed workers and prohibited their forcible collection in the course of appeal (i.e. if this procedure was available and convenient for business entities), – then both the Complainant and the Council would be much more better equipped for settling the dispute within the framework of the pre-trial procedure, with the Complainant being able to avoid court costs and troubles in the form of bank accounts arrest.

<sup>33</sup> See paragraph 2 of Part 2 of Article 265 of the Labor Code of Ukraine of December 10, 1971 No. 322-VIII.

Hence, in the Council's view, quite reasonable appears to be an approach when, according to the general rule, sanctions or restrictive decisions imposed or issued by the public authority would come into force provided that the term for appeal has expired (or, if the appeal started – subject to its outcomes).

By the way, in Ukraine this approach is already employed in taxation sphere, where the notion of an "agreed monetary obligation"<sup>34</sup> exists, which means obligations to pay taxes and penalties for which the appeal procedure is completed or not started at all. From the Council's point of view, it would be reasonable to expand it to other spheres of public administration (by using such terms as "decision entering into force", "decision becoming effective", etc.).

The aforementioned approach cannot be fully applied to areas where the immediate use of restrictive measures is objectively needed to protect public interests (for example, withdrawal of hazardous products from the market, stopping hazardous works, etc.). In these areas, in the Council's view, it is appropriate to reserve the right for the appellant to lodge the motion seeking suspension of relevant decisions or actions while appeal is being considered. In turn, the corresponding appeal authority should be empowered to suspend the appealed decisions or actions, or to refuse in granting such a suspension, taking into account all the circumstances of the case (in compliance with principles of reasonableness, proportionality, etc.). A close analogy is the concept of security for claim in court proceedings.

Provided that the foregoing steps are implemented, the administrative appeal procedure, in the Council's view, will have more grounds to be regarded as convenient and comprehensive alternative to a lawsuit.

## **b) Use of modern technologies**

The use of modern technologies and communications is quite essential in terms of convenience of the administrative appeal procedure.

Since the most common administrative appeal algorithm in Ukraine is approaching a higher-level authority – which is usually the CEB located in Kyiv city – and the majority of appellants and corresponding territorial departments of government agencies are located in other regions of Ukraine, the issue of delays and inconveniences associated with lengthy sending of correspondence (sending appeals and annexes thereto, interim and final decisions on appeals, etc.) has never lost its significance.

If the appeal procedure involves holding a hearing (meeting) in the appellate authority, – then another problem of travelling of both the complainant's and the complainee's representatives to the capital adds up.

It is noteworthy that the situation with the judicial appeal is different – a lawsuit, as a rule, is filed with the district administrative court located in region where the complainant is registered or the decision-making authority is located<sup>35</sup>.

## **i) Electronic document flow**

Hence, the need for introducing electronic document flow in the administrative (internal) appeal procedure appears to be rather urgent.

It should be noted that many government agencies in Ukraine have already introduced the possibility for any person to report on possible illicit actions of officials of this authority in electronic form or through the "hotline"<sup>36</sup>. However, this mechanism is primarily aimed at providing a prompt response to minor signs of unfair or unethical conduct of local officials and detecting allegations of corruption. Hence, it is

<sup>34</sup> See clauses 54.5, 56.15, 56.17, 56.18, 57.3 and other provisions of the Tax Code of Ukraine of December 2, 2010 No. 2755-VI.

<sup>35</sup> See Article 25 of the Code of Administrative Proceedings of Ukraine of July 6, 2005 No. 2747-IV.

<sup>36</sup> Common examples are the "Pulse" service of the SFS of Ukraine and the "Government Contact Center" (Government Hotline).



not an equivalent to a comprehensive appeal procedure (existing in parallel), which businesses often have to resort to while challenging formalized decisions. Besides, the latter procedure is carried out in most public bodies in paper form only.

At present, in Ukraine, there is virtually only one example of completely digitalized administrative appeal procedure – it must be employed when filing and considering the appeals lodged to challenge decisions on refusal to register tax invoices or adjustment calculations with the Unified Register of Tax Invoices, with the Central Level Commission for Reviewing the Appeals against the Decisions of Regional Level Commissions that Make Decisions on Registration of Tax Invoices/Adjustment Calculations with the Unified Register of Tax Invoices or Refusal in Such Registrations (the **"SFS Commission"**)<sup>37</sup>.

Nevertheless, it is hard to deny that electronic document flow speeded up processing of appeals in this area and helped to clear the "rubble" that got formed. Hence, in the Council's view, introduction of electronic

submission of appeals and sending decisions, as an alternative to paper one (subject to the appellant's choice) is a step being long overdue at the present stage of technological development. The implementation of this step will increase the effectiveness of the procedure and help to popularize it among the appellants who got accustomed to using electronic communications.

## **ii) Distanced/remoted consideration of appeals**

Another important issue is introducing the possibility for complainant's and complainee's representatives to participate in a hearing (meeting) held at the appeal bodies via tele- or video conference – i.e., by analogy with similar innovations introduced in the field of judicial proceedings<sup>38</sup>, save for somewhat less formalistic approach inherent for pre-trial appeal procedure.

In the Council's view, it will help promoting the use of administrative appeal among appellants from different regions of the country.

<sup>37</sup> It should be noted that introduction of electronic format was forced by the realities of life. In particular, at the end of 2017, the SFS Commission faced a real "invasion" of paper complaints it simply did not have time to process, and the situation with the timeliness of their consideration was critical. The introduction of an electronic format for submitting complaints in this area seemed an easy task at first glance. After all, there was a ready-made platform for implementation of this initiative in the form of a taxpayer's E-office. All prospective complainants (and they were VAT payers only) used it (directly or through auxiliary software) for submitting tax invoices and other purposes. Nevertheless, the launch of an electronic appeal against the "suspended" tax invoices/adjustment calculations was not without technical problems (such as, for example, a temporary absence of an electronic complaint form in the period when its submission was already mandatory), and introduction of a mandatory electronic document flow through the adoption of source of secondary legislation (the issue was resolved by clause 3 and clause 15 of the Procedure For Considering Complaints against the Commissions' Decisions on a Tax Invoice's/ Adjustment Calculation's Registration in the Unified Register of Tax Invoices or Refuse of Such a Registration, approved by the CMU Resolution of February 21, 2018 No. 117) was criticized in terms of possible conflict with Article 56 of the Tax Code of Ukraine of December 2, 2010 No. 2755-VI.

<sup>38</sup> See, in particular, Part 7 of Article 11 of the Law of Ukraine "On the Judiciary and Status of Judges" of June 2, 2016 No. 1402-VIII, Article 195 of the Code of Administrative Proceedings of Ukraine of July 6, 2005 No. 2747-IV, Article 197 of Economic Procedural Code of Ukraine of November 6, 1991 No. 1798-XII, Article 212 of the Civil Procedural Code of Ukraine of March 18, 2004 No. 1618-IV, Article 336 of the Criminal Procedural Code of Ukraine of April 13, 2012 No. 4651-VI.



## COUNCIL'S RECOMMENDATIONS:

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In order to ensure practical implementation of **accessibility and comfort (convenience) principles** in the administrative appeal procedure, the Council recommends as follows:

**1. The Cabinet of Ministers of Ukraine** – to prepare and lodge with the Verkhovna Rada of Ukraine Draft Law of Ukraine "On the Administrative Procedure" (in replacement of the Draft Law No. 9456 of December 28, 2018) and, within its competence, to facilitate its adoption in order:

**1.1** To retain provision set forth in the Draft Law No. 9456 enabling a person to employ administrative appeal mechanism to challenge not only any decision but also actions and inactions of public authorities.

**1.2** To further specify respective selected provisions which were set forth in the Draft Law No. 9456 to ensure:

**1.2.1** An appellant's discretionary right to lodge appeals and obtain decisions on appeals in an electronic or a hard copy form;

**1.2.2** Administrative act's entering into force is subject to expiration of the term for launching administrative appeal or – if such procedure was launched – not earlier than completion of such an appeal procedure (with possible exceptions – related to critically important public interests – when an administrative act becomes effective immediately).

**1.3** To incorporate new provisions establishing:

**1.3.1** An appellant's right to lodge a motion with an appeal authority seeking suspension of execution or validity of an administrative act (with respect to acts entering into force immediately), as well as prohibition of certain actions by administrative body (its officials) for the period of appeal;

**1.3.2** The right of appellants and administrative bodies to demand participation of their representatives in consideration of appeals by an appeal authority remotely (in particular, via video- or teleconference).

## 3.2 Neutrality (Impartiality) of Appeal Authorities

**Impartiality** – being one of the key elements of the right to good governance<sup>39</sup> – essentially means absence of prejudice and subjectivity in the outcome of the case.

Impartiality is assessed against two interdependent criteria: *objective*, i.e. whether the relevant conditions are in place for an authorized person to make a truly unbiased decision; and *subjective*, which refers to the personal conviction and behavior of the person authorized to hear and decide on the case<sup>40</sup>.

### 3.2.1 Objective Criterion of Neutrality (Impartiality)

There is no uniform approach to the establishment of the appeal authorities. Meanwhile, the majority of developed jurisdictions are still inclined to unify the administrative (internal) appeal procedures by enshrining a generally accepted scheme for their implementation in the legislation.

In Ukraine, however, the framework for administrative (internal) appeal procedures in various areas of public administration differs drastically<sup>41</sup>. There are mainly three most common models for appeal authorities functioning:

**i)** consideration of an administrative appeal by the same authority that issued a disputed decision;

**ii)** consideration of an administrative appeal by the higher-level authority;  
**iii)** consideration of an administrative appeal by the special appeal authority.

The following comprises brief analysis of major advantages and disadvantages of each aforementioned model of the appeal authorities' structure.

#### **a) Consideration of an administrative appeal by the same authority that issued a disputed decision**

From the standpoint of compliance with the principle of impartiality, it is obviously the most controversial appeal model when an administrative appeal is being heard and decided by the authority that has previously adopted the disputed decision. In the literature<sup>42</sup> it is often referred to as "self-control" or "internal" administrative appeal.

Indeed, reconsideration of the decision by the senior executives of the same public authority shifts the responsibility from the official who has made an original decision to the entire public authority or its regional division. On the other hand, good knowledge of the appeal authority about circumstances of the case along with overall flexibility of the review procedure, might be considered as advantages of this appeal model.

<sup>39</sup> See Article 41 of the Charter of the Fundamental Rights of the European Union of December 7, 2000.

<sup>40</sup> See the ECHR Judgment in the case "Aleksandr Volkov v. Ukraine", application No. 8794/04, paragraph 104 (link: [https://zakon.rada.gov.ua/laws/show/974\\_947](https://zakon.rada.gov.ua/laws/show/974_947)); the ECHR Judgment in the case "Fey v. Austria", application No. 14396/88, paragraphs 28, 30 (link: <http://hudoc.echr.coe.int/eng?i=001-57808>); the ECHR Judgment in the case "Wettstein v. Switzerland", application No. 33958/96, paragraph 42 (link: <http://hudoc.echr.coe.int/eng?i=001-59102>).

<sup>41</sup> See also Section 2.3. "Development of Administrative Appeal Mechanism in Different Spheres".

<sup>42</sup> See Alternative Dispute Resolution in European Administrative Law / Dacian C. Dragos, Bogdana Neamtu. – Springer, 2014.

However, under such an organizational model, the third independent party (arbitrator) is actually absent and the appeal may potentially fall into the hands of the same officer, who has made the challenged decision.

In Ukraine, such administrative (internal) appeal model is found mainly within the hierarchy of public administration authorities (i.e. where higher-level authorities actually exist), namely: at the customs<sup>43</sup>; on matters related to receiving access to public information<sup>44</sup>; enforcement of court decisions<sup>45</sup>, etc.

## Case No. 4: Appeal handling by the authority which committed an illegal act

The Council received a complaint from a domestic wholesaler (the "**Complainant**") challenging allegedly manual intervention with the value added tax system of electronic administration (the "**SEA VAT**") and failure to enforce a court decision ordering registration of the tax invoice of the Complainant's counterparty. In particular, the Complainant informed that it had been waiting for over a year for the SFS of Ukraine to enforce court decision, which should result in increase of its SEA VAT registration limit for over UAH 10 mln.

In particular, at the end of the business day in February 2019 the Complainant's registration limit was increased for the amount of UAH 10 mln., thus evidencing the apparent compliance with the court decision. However, in less than a day its' original values had been restored – i.e. proportionally reduced. This prompted the Complainant to approach the Government Hotline alleging manual intervention with the SEA VAT.

The Complainant's appeal was thereafter directed to the SFS of Ukraine, being the sole administrator of the SEA VAT. However, based on the appeal consideration results, the Complainant received a formal reply from the Department of Taxes and Duties of Legal Entities of the SFS of Ukraine, which mentioned nothing about values adjustment in the Complainant's SEA VAT but merely stated that *"the SEA VAT operates automatically and [...] does not enable manual intervention with its work"*.

Thus, consideration of the Complainant's administrative appeal within the public authority whose officials are apparently the only ones who might have been involved in adjusting the Complainant's values in the SEA VAT, resulted in a formal approach to handling and resolving its case.

<sup>43</sup> See Part 1 of Article 25 of the Customs Code of Ukraine of March 13, 2012 No. 4495-VI.

<sup>44</sup> See Part 1 of Article 23 of the Law of Ukraine "On Access to Public Information" of January 13, 2011 No. 2939-VI.

<sup>45</sup> See Part 3 of Article 74 of the Law of Ukraine "On Enforcement Proceedings" of June 02, 2016, No. 1404-VIII.

In the Council's view, ensuring impartiality within the described model at the territorial/regional divisions level could be possible if administrative appeals were to be handled by the *ad-hoc* commissions (working groups) comprising, for instance, of the lead/head or his/her deputy, the head of division/unit whose officer has made the decision as well as the head of legal department. Such a commission (working group) shall not be a structural division of the authority that has adopted the original decision and participation thereunder shall constitute the part of official duties of the relevant officials.

It is worth noting that the Draft Law No. 9456 proposes that, in the absence of a higher-level authority, an appeal seeking re-consideration of the case could be lodged with the same administrative authority, which has adopted an administrative act, provided an appeals commission is set up there<sup>46</sup>. The specific aspects of such a commission's impartial functioning are discussed below.

## **b) Consideration of an administrative appeal by the higher-level authority**

It appears that challenging decisions with authorities placed higher in hierarchy (subordination) is actually the most common model of the administrative (internal) appeal procedure. There are a number of reasons for that.

*Firstly*, the higher-level appeal authority is often the CEB with wide apparatus and resources. As it is usually tasked to ensure implementation of the state policy in a particular sphere on a national level, – it facilitates development of unified approaches to enforcing laws and regulations both at the local and central levels.

*Secondly*, it is at such a high level where the most skilled specialists – who can comment on the merits of an administrative appeal – are concentrated. It is of particular importance when it comes to the need to ensure adherence with the principle of consistency of administrative appeal, when any deviation from the established practices shall be duly substantiated<sup>47</sup>.

*Thirdly*, such an appeal model bears features of the conventional adversarial proceedings, where central authority acting as an arbitrator applying officiality (*ex-officio*) principle<sup>48</sup> is well positioned to handle appeal independently and impartially by adopting a balanced decision.

Nowadays, filing of an appeal with a higher authority in the hierarchy is actually the most common way of launching administrative (internal) appeal procedure in Ukraine: many government agencies have established the administrative appeal departments and sometimes even organized special appeals commissions as, for example, in the field of state registration<sup>49</sup>.

<sup>46</sup> See Part 2 of Article 81 of the Draft Law No. 9456.

<sup>47</sup> See also Section 3.7. "Substantiality, Consistency and Systemic Nature of Appeal".

<sup>48</sup> See also Section 3.4. "Officiality (*ex officio*)".

<sup>49</sup> See the MinJust Order "On the Activity of the Appeals Commission in the Field of State Registration and the Commission on Accreditation of the State Registration Authorities and Monitoring Compliance of Such Authorities with the Requirements of Accreditation" of January 12, 2016 No. 37/5.

## Case No. 5: A higher level authority's formal approach to handling an appeal

In November 2018, Gomelsklo-Ukraine Trading House LLC, a company with foreign investments (the "**Complainant**") turned to the Council with a complaint challenging failure to refund overpaid corporate profit tax in the amount exceeding UAH 1 mln. It was reported, in particular, that MD SFS in Kyiv city, having confirmed this overpayment record, left the Complainant's application without consideration. The reason for this was the pending court proceedings on cancellation of the Complainant's tax notifications-decisions (the "**TNDs**") worth over UAH 500 k whose existence prompted the MD SFS in Kyiv city to conclude that "*it is impossible to identify the amount of overpaid monetary obligations*".

The Complainant decided to appeal the said decision with the SFS of Ukraine arguing that since the court had not yet decided on the case – the disputed TNDs were "non-agreed" – and thus could not affect the existing overpayment amounts.

In the Council's view, the SFS of Ukraine has considered the Complainant's appeal quite formalistically as, having quoted provisions of tax legislation, it ordered the MD SFS in Kyiv city to consider the merits of this appeal and take the necessary measures. In other words, the appeal was forwarded to exactly the same authority, which had earlier refused to handle the Complainant's application until completion of the TNDs' judicial review.

In just a week later the Complainant received another refusal from the MD SFS in Kyiv city on the merits of his claims. Notably, the appeal consideration was limited to repeating the same arguments that were employed before.

In late February 2019 the Council recommended the MD SFS in Kyiv city to refund the overpaid amount claimed by the Complainant and confirmed by the supervisory authority's records, despite the existence of the ongoing court proceedings on the TNDs' legality. The implementation of this recommendation is currently being monitored.

Higher-ranked appeal authorities arrange handling of administrative appeals lodged by businesses either within their respective structural divisions or by setting up specialized in-house commissions (working groups). The Draft Law No. 9456 stipulates that any administrative proceedings (including the administrative appeal) shall be carried out and corresponding administrative act shall be adopted by an official authorized by the authority's head in accordance with the law pursuant to internal individual act<sup>50</sup>.

Meanwhile, one should realize that such divisions/commissions are accountable to and controlled by the leadership of the public authority under whose auspices they had been established. Consequently, this kind of appeal model may be only relatively impartial.

Naturally, the heads of such supervisory authorities (or their deputies) may not always be personally involved in every single appeal procedure due to the diverse nature of their duties. Yet, nowadays the typical feature of this appeal model is that persons – who directly

<sup>50</sup> See Part 1 of Article 23 of the Draft Law No. 9456.

studied the materials, analyzed the compliance of the contested decisions (actions, inactions) with the legislative requirements, heard the parties concerned within the framework of formal hearings – upon such consideration of appeals are usually entitled only to make the decisions of an advisory nature (opinions) or prepare drafts of final decisions, which are still subject to further formal approval by the leadership of a particular public authority.

The provisions of the Draft Law No. 9456 tend to preserve this state of things. In particular, the appeal authorities are granted an opportunity to set up appeals commissions acting on a voluntary basis<sup>51</sup>. Meanwhile, it is envisaged that the decision of such commission will be issued in the form of an opinion containing recommendations, which will be mandatory for consideration by the head of the relevant administrative authority, another authorized official or collegial administrative body. Upon consideration of such an opinion the said officials will make the final decision; while its failure to be taken into account shall be separately justified and attached (along with the opinion itself) to the final decision on the appeal<sup>52</sup>.

Meanwhile, acclaimed international sources maintain that public administration will not work effectively if the decision-making power is largely concentrated at the top. Hence, for the government to work in a balanced and stable manner, it is vital to delegate powers

to lower levels. It will also contribute to better management, resources optimization and increase professionalism of civil servants<sup>53</sup>.

Hence, in the Council's view, administrative appeal procedure in the hierarchical model should largely be based on practical application of delegation of powers mechanism. The latter contemplates internal delegation of managerial functions by the head within the public authority to ensure effective handling of appeals (to avoid overloading CEB management with a large number of relatively simple and common cases). Such an approach is supposed to ensure that the final decision-making procedure is not affected, while boundaries of responsibility for the decisions taken are not blurred.

Delegation of powers means transferring competence regarding consideration and decision-making in administrative cases of a particular category to a certain official or a collegiate body. A distinguishing feature of delegation is that a head<sup>54</sup>, having authorized another person (a collegiate body) to perform certain functions, can no longer perform such a competence until a decision on delegating is cancelled or revoked<sup>55</sup>.

Determining limits of delegation of powers should always remain the head's prerogative, namely: to entrust the delegated person with execution of only procedural actions within the framework of administrative appeal and reserve his/her right for making a final decision,

<sup>51</sup> See paragraph 3 of Part 1 of Article 81 of the Draft Law No. 9456.

<sup>52</sup> See paragraph 3 of Part 3 of Article 81 of the Draft Law No. 9456.

<sup>53</sup> See The Delegation of Administrative Decision-Making Powers: a Tool for Better Public Performance/F. Cardona. – SIGMA/OECD, pp. 8-9 (link: <https://pdfs.semanticscholar.org/a77f/0f71b61afe9c8947f255206eb13b62fab572.pdf>).

<sup>54</sup> See clauses 2, 30 of Part 4 of Article 19 of the Law of Ukraine "On Central Executive Bodies" of March 17, 2011 No. 3166-VI, according to which a CEB head, within his/her competence, organizes and controls compliance with the Constitution and laws of Ukraine, acts of the President of Ukraine, CMU acts, orders of ministries, as well as within his/her powers gives instructions to be mandatory followed by civil servants and officers of the CEB central office and its territorial bodies.

<sup>55</sup> See The Delegation of Administrative Decision-Making Powers: a Tool for Better Public Performance / F. Cardona. – SIGMA/OECD, pp. 6-7 (link: <https://pdfs.semanticscholar.org/a77f/0f71b61afe9c8947f255206eb13b62fab572.pdf>).

or, for example, to authorize another person (a collegial body) for a complete administrative appeal handling, including adoption of the final decision in cases that, let's say, meet certain criteria (in monetary or territorial terms, depending on the nature of possible consequences, etc.). The third option possible is more extreme, i.e. to completely delegate the administrative appeal function; however, it is rather unlikely that any head would take such a risk, since it is he/she who bears ultimate public and media responsibility for the entire scope of activities of the respective public authority as such. Notably, the head may also revoke or cancel his decision on delegation at any time.

Here it shall be noted that, in the Council's view, the most appropriate for Ukraine form of organizing an appeal authority is the appeals commission (as a collegial body), and not the delegation of this function to a certain official who would make the decisions at his sole discretion. Such an approach will contribute to the objectivity of appeals handling and the deliberateness of decision-making process, by limiting the power of individuals.

An important aspect of delegation should be publication of the respective decision (order, directive). Accordingly, from the moment it was published, no one but an authorized person (collegial body) is entitled to take actions and make decisions entrusted by the head.

It is also worth noting that delegation of powers and delegation of signing authority do not mean the same thing. Thus, the right to sign certain documents does not mean actual delegation of powers. That is, if a person is only entrusted to sign certain documents on behalf of the authority or under control of his/her supervisor, – it means that the decision was actually taken by the head and it is the latter, rather than the signatory, who shall be held

liable for it. Thus, delegation of competence means actual transfer of the right to resolve a certain range of issues and holds an authorized person responsible for the decisions made<sup>56</sup>.

And if delegation of powers (as already mentioned above) is the exclusive right of the head, and, therefore, is (under the general rule) not subject to "sub-delegation" to third parties, then (if necessary) the signing authority may be further delegated by the person authorized by the head.

### **c) Consideration of an administrative appeal by the special appeal authority**

From the standpoint of adherence with impartiality criterion, the organization of appeal bodies in the form of special (quasi-judicial) tribunals operating outside the hierarchy of public authorities, the decisions (actions or inactions) of which are challenged, possesses the greatest set of advantages.

Such special appeal authorities are highly competent, whereas the manner in which the appointment of members is made in conjunction with collegiality of the decision-making process are aimed at ensuring their impartiality. The composition of such appeal authorities may include not only civil society representatives, recognized industry experts, but also scholars and judges.

However, proper way for setting up such special appeal authorities requires significant resources and, therefore, a political will for their separate establishment and, above all, impartial functioning.

Nowadays the examples of the *de-jure* and/or *de-facto* independent special appeal authorities in Ukraine may be found, in particular, in the field of public procurements<sup>57</sup>, suspension of tax invoices/adjustment calculations registration<sup>58</sup>,

<sup>56</sup> See The Delegation of Administrative Decision-Making Powers: a Tool for Better Public Performance / F. Cardona. – SIGMA/OECD, p. 7 (link: <https://pdfs.semanticscholar.org/a77f/0f71b61afe9c8947f255206eb13b62fab572.pdf>).

<sup>57</sup> See Part 3 of Article 8 of the Law of Ukraine "On Public Procurements" of December 25, 2015 No. 922-VIII.

<sup>58</sup> See clause 56.23 of the Tax Code of Ukraine of December 2, 2010 No. 2755-VI.

intellectual property<sup>59</sup>, licensing of economic activity<sup>60</sup>. However, while the Antimonopoly Committee of Ukraine (the "**AMCU**") (which handles appeals in the field of state and public procurements) is indeed beyond the hierarchy of other government agencies, – the rest of

the special appeal authorities can be hardly recognized as real quasi-judicial tribunals, as they are (to the certain extent) dependent on the public authorities, within which they are established and operate.

## Example No.1: Arbitrary interpretation of legislation by a special appeal authority

In late 2017 – early 2018 the Council received a number of complaints challenging inactivity of the SFS Commission, whose merits referred to the failure to receive for a long time (*sometimes exceeding 2-3 months*) the SFS Commission's decisions on the results of handling the appeals challenging suspension of registration of tax invoices/adjustment calculations.

While investigating this category of complaints, the Council demanded that in case of failure to send the decision within the prescribed 10-day period from the date of receipt the appeal by the SFS of Ukraine, – such an appeal shall be a subject to automatic satisfaction and the relevant tax invoices/adjustment calculations – to unconditional registration<sup>61</sup>.

However, the SFS of Ukraine assured the Council that such appeals were addressed primarily to the SFS Commission and not to the SFS of Ukraine as such. Therefore, a 10-day countdown shall begin from the very day when the SFS of Ukraine's office has handed over the corresponding administrative appeal to the SFS Commission.

The above interpretation enabled the SFS Commission to circumvent the imperative requirement on compliance with the "tacit consent" principle upon the 10-day period expiration, and empowered it to take the side of the supervisory body even in the cases when much more than 10 calendar days had passed since the appeal had been received by the SFS of Ukraine<sup>62</sup>.

After all, the problem was largely solved in the spring of 2018 by taking a set of measures that included amendments to by-laws (*in particular, the possibility of appeals submission and communication on the results of their handling in the electronic form was introduced*<sup>63</sup>) as well as a number of organizational and technical measures at the SFS of Ukraine level.

<sup>59</sup> See the Order of the Ministry of Education and Science of Ukraine "On Approval of the Regulation of the Appellate Chamber at the State Department of Intellectual Property" of September 15, 2003 No. 622.

<sup>60</sup> See Article 5 of the Law of Ukraine "On Licensing of Types of Economic Activity" of March 02, 2015 No. 222-VIII.

<sup>61</sup> See clauses 56.23.3, 56.23.4 of the Tax Code of Ukraine of December 2, 2010 No. 2755-VI.

<sup>62</sup> In its practice the Council faced instances when the complainants owned some uncontested evidence of the appeals receipt by the SFS of Ukraine (copies of the appeals with the office's incoming stamp on them or postal receipts, descriptions of the attachments and acknowledgements of receipt signed by the representatives of the SFS of Ukraine, etc.). Nonetheless, the SFS Commission used to officially reply to the Council's requests that the relevant appeals "were not received by the SFS Commission". Therefore, the Council understands that the SFS Commission considers itself to be an independent unit and appeal shall be specifically lodged with it for a 10-day period to start.

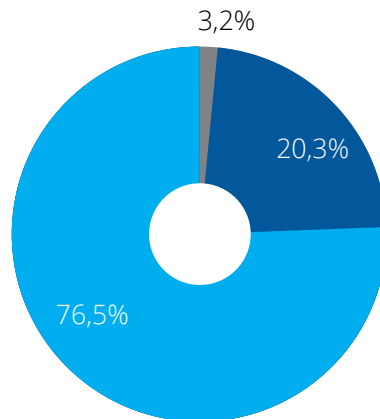
<sup>63</sup> Although this novelty is controversial in the view of possible contradiction with the requirements of clause 56.3 of the Tax Code of Ukraine of December 2, 2010 No. 2755-VI.



It is also worth noting that today business actually calls for establishment of special appeal bodies outside the hierarchy of authorities, whose decisions (actions or inactions) are challenged. It was confirmed, in particular, by

the results of the Council's survey conducted in March-May 2019 among 344 businesses in Ukraine: **76,5%** of respondents believe that it is a special appeal authority that shall perform the administrative (internal) appeal function.

**Chart No. 1.**  
Responses to the question No. 3 of the Survey on Employing Administrative (Internal) Appeal Mechanism.



**In your opinion, who shall handle the administrative appeals?**

- The lead/head of the public authority whose official has made the contested decision (action or inaction)
- Higher level public authority
- Special appeal authority

Thus, in the Council's view, the preferred way of improving the current administrative (internal) appeal procedures from the standpoint of the appeal authorities' neutrality (impartiality) comprises creation of the special bodies for consideration of appeals (appellate institutions), especially where the number of appeals received from business is significant.

Summing up specified in this section, neutrality (impartiality) of appeal authorities requires ensuring that the manner of their formation and functioning complies with the minimum independence, standards namely:

- i)** the administrative appeal cannot be handled by a person, who has made an original decision (committed a wrongful action or inaction);
- ii)** heads of the higher-level authorities should delegate their decision-making competence (function) and focus exclusively on the most important issues;
- iii)** in the spheres with significant number of appeals from business the CMU shall be entitled to establish separate and special (quasi-judicial) appeal bodies operating outside the hierarchy of public authorities, whose decisions (actions or inactions) are challenged.

### 3.2.2 Subjective Criterion of Neutrality (Impartiality)

As to the subjective criterion of impartiality, it is ensured by introducing the recusal procedure in the administrative appeal, which, among other things, shall provide for:

- i) the list of grounds entitling the appellant to file a reasoned motion seeking recusal of an appeal authority's official;
- ii) the procedure for handling the appellant's motion on recusal;
- ii) the obligation of an appeal authority's official to declare a self-recusal action in the event of conflict of interests.

To date, the Council is aware of certain provisions enabling recusal (self-recusal) actions within the framework of administrative appeal procedures in the field of intellectual property<sup>64</sup> and public procurements<sup>65</sup>. Although the Draft Law No. 9346 also contains procedural provisions on recusal of an official from the administrative body dealing with the case, – it is unclear whether relevant provisions shall also apply to the stage of an administrative (internal) appeal<sup>66</sup>.

## COUNCIL'S RECOMMENDATIONS:

In order to ensure practical implementation of the principle of **neutrality (impartiality) of appeal authorities**, the Council recommends as follows:

**2. The Cabinet of Ministers of Ukraine** – to prepare and lodge with the Verkhovna Rada of Ukraine Draft Law of Ukraine "On the Administrative Procedure" (in replacement of the Draft Law No. 9456 of December 28, 2018) and, within its competence, to facilitate its adoption in order:

**2.1** To retain provisions which were set forth in the Draft Law No. 9456 and which foresaw establishment of the unified framework for the administrative (internal) appeal procedures in all spheres of public administration.

**2.2** To further specify general provisions which were set forth in the Draft Law No. 9456 by:

**2.2.1** Setting forth the rules governing delegation of powers to resolve administrative cases, which would foresee:

**2.2.1.1** Obligation of public authorities to develop internal criteria determining when issuance of decision upon completion of administrative appeals shall be carried out directly by the head of a public authority or could be delegated to authorized persons (collegial bodies);

<sup>64</sup> See clauses 14.3-14.5 of Section 14 of the Regulation of the Appellate Chamber at the State Department of Intellectual Property, approved by the Order of the Ministry of Education and Science of Ukraine "On Approval of the Regulation of the Appellate Chamber at the State Department of Intellectual Property" of September 15, 2003 No. 622.

<sup>65</sup> See paragraph 3 of Part 3 of Article 8 of the Law of Ukraine "On Public Procurements" of December 25, 2015 No. 922-VIII.

<sup>66</sup> See Articles 24, 25 of the Draft Law No. 9456.

**2.2.1.2** Rule that the delegated authority cannot be exercised by a person other than an authorized one;

**2.2.1.3** Mandatory publication of decisions on delegation of powers in the framework of administrative appeal (as well as decisions on revocation and cancellation thereof);

**2.2.1.4** Prohibition of further delegation (sub-delegation) of powers granted to authorized persons within the framework of the administrative appeal;

**2.2.1.5** Possibility for further delegation (sub-delegation) of the signing authority by authorized persons within the framework of the administrative appeal;

**2.2.2** Authorizing public authorities to set up appeal commissions, whose activities shall comply with the minimum neutrality (impartiality) guarantees in accordance with the requirements established by the Cabinet of Ministers of Ukraine regarding:

**2.2.2.1** Method of forming composition of appeal commission on a permanent (for authorities with a significant number of appeals) or temporary (for authorities with a small number of appeals) basis, as well as method of distributing the administrative appeals in the manner excluding occurrence of conflict of interests;

**2.2.2.2** Inclusion of civil society representatives to the appeal commission's composition;

**2.2.2.3** Procedure of recusal (self-recusal) of an appeal commission's member;

**2.2.2.4** Peculiarities of organizational, informational and logistic support aspects in the activities of appeal commission ensuring absence of its excessive dependence on a public authority under whose auspices it operates;

**2.2.2.5** Competence of the public authority's head to delegate his authority to adopt final decision upon completion of administrative appeal to the appeal commission acting as a collegial body;

**2.2.3** Existence of the administrative appeal procedure to enable challenging decisions (actions or inactions) of those authorities, where higher-level bodies do not exist, even if relevant appeal commissions were not created therein;

**2.2.4** Introducing recusal (self-recusal) procedure via-a-vis a person authorized to consider the administrative appeal.

**2.3** To incorporate a new provision vesting the Cabinet of Ministers of Ukraine with authority to establish special (quasi-judicial) appeal bodies operating outside the hierarchy of public authorities, whose decisions (actions or inactions) are challenged to enable handling of certain types of administrative appeals.

**3. The Cabinet of Ministers of Ukraine** – to develop and approve a model regulation on appeal commission set up within the public authority, whose provisions would regulate such commission's activities in compliance with the Clause 2.2.2. above.

**4. The Ministry of Economic Development and Trade of Ukraine** while elaborating the Draft Concept on Reforming the System of the State Supervision (Control) – to consider the idea of creating special (quasi-judicial) appeal bodies operating outside the hierarchy of public authorities, whose decisions (actions or inactions) are challenged, to enable handling certain types of administrative appeals.

## 3.3 Openness and Transparency

The principles of **openness and transparency** contemplate that state institutions should operate as openly as possible. It is aimed at making activities of the state bodies more open, reliable and predictable.

Although these principles are mentioned in many legal acts<sup>67</sup>, domestic legislation does not contain a uniform definition of its substance, specifically in the context of administrative appeal. In some cases, the principle of openness is mentioned alongside with the principle of publicity<sup>68</sup>. Therefore, in this Report, the principles of openness and transparency are viewed as an integral comprehensive concept/notion<sup>69</sup>.

In the context of applying the principles of openness and transparency within administrative appeal procedure, it can be divided into two components:

- i)** institutional openness and
- ii)** procedural openness.

### 3.3.1 Institutional Openness

*Institutional openness* is commonly understood as the availability of information about a particular authority responsible for considering an appeal and rendering final decision. Institutional openness comprises of the following elements:

- i)** availability of information about the composition (the procedure of formation) of the structure of the appeal authority;
- ii)** possibility of obtaining information on the mode of operation of such an authority and its location, etc. Such information is usually available on the website of the respective state authority.

While investigating individual complaints, the Council's employees have to visit various state authorities' websites on a regular basis. As a rule, most such websites allow to promptly receive information about their leadership team, structure, mode of operation, appeal procedure, contacts, etc. However, during consideration of appeals challenging decisions of the SFS Commission to suspend registration of tax invoices/adjustment calculations, the Council faced difficulties in obtaining information on personal composition of the SFS Commission considering such appeals.

Besides, it is worth emphasizing that a state authority's website should be adapted for visually- and hearing-impaired persons<sup>70</sup>. However, not all public authorities have adapted their websites for people with special needs, as well as do not fully provide physical conditions of access for the disabled to offices where the appeals are considered.

### 3.3.2 Procedural Openness

The following comprises analysis of such elements of *procedural openness* as

- i)** in advance notification about appeal's consideration;
- ii)** the right to get acquainted with the materials of the case;
- iii)** the right to receive the text of the decision and the third parties' right to access the decision;
- iv)** the right of the appellant and other parties concerned to participate in the appeal's consideration; and
- v)** the right of attendees to record the hearing with the use of technical tools.

<sup>67</sup> See, for example, the Law of Ukraine "On Public Procurements" of December 25, 2015 No. 922-VIII; the Law of Ukraine "On Permit System in the Sphere of Economic Activities" of September 6, 2005 No. 2806-IV; the Code of Administrative Proceedings of Ukraine of July 6, 2005 No. 2747-IV.

<sup>68</sup> See the Law of Ukraine "On Enforcement Proceedings" of June 2, 2016 No 1404-VIII.

<sup>69</sup> In the theory of administrative law, there are different approaches to distinguishing the foregoing concepts. However, existing theoretical approaches do not have a significant impact on application of openness and transparency principles.

<sup>70</sup> See the Procedure for Functioning of Executive Authorities Websites, approved by the Order of the State Committee for Information Policy, Television and Radio Broadcasting of Ukraine, the State Committee for Communications and Informatization of Ukraine of November 25, 2002 No. 327/225.

### **a) In advance notification on appeal's consideration**

A proper in advance notification of the appellant and other parties concerned about the date, time and place of the appeal's consideration – is a necessary pre-condition for participation in the hearing. However, in practice such a guarantee is not always ensured properly. At present, the legislation does not provide for any unified template for informing parties of the administrative appeal about forthcoming appeal's consideration. Such a loophole may be tackled by the terms of the Draft Law No. 9456. In particular, it is foreseen that both parties of the administrative appeal and persons facilitating consideration of the case<sup>71</sup>

are engaged by the administrative authority to provide explanations and participate in procedural actions through giving (sending) an invitation<sup>72</sup>.

In the Council's view, the positive aspect of the Draft Law No. 9456 is introduction of uniform requirements for invitations and notices as well as requirements for their sending<sup>73</sup>. It is worth noting that the Draft Law No. 9456 establishes an additional requirement for a prior notice – 7 calendar days. Today, in some administrative appeal procedures, due and timely notification of the parties to the case is not always fully ensured. Below is the case illustrating this problem.

## **Case No. 6: Improper notification of the appellant about the appeal's consideration**

The Council received a complaint from the founder and the head of two agribusinesses located in Zaporizhzhia region (the "**Complainant**"). The Complainant reported he was erroneously excluded from the founders and dismissed from the post of director. The actions of the corresponding state registrar were appealed with the Commission for Handling the Appeals in the Sphere of State Registration under auspices of the Ministry of Justice of Ukraine (the "**MinJust Commission**" and the "**MinJust**" respectively). The Complainant asked the Council to participate in consideration of the appeal challenging registration actions, which, in his opinion, were conducted based on forged documents. The corresponding registration actions were canceled by the decision of the MinJust Commission in view of substantial violation of the procedure for notarizing documents<sup>74</sup>.

<sup>71</sup> In accordance with the Part 1 of Article 31 of the Draft Law No. 9456.

<sup>72</sup> See Part 1 of Article 38 of the Draft Law No. 9456.

<sup>73</sup> See Part 3 of Article 38 of the Draft Law No. 9456.

<sup>74</sup> The MinJust even covered this case as part of a separate publication on its official website (link: <https://minjust.gov.ua/en/news/ministry/olena-cukmanova-antireyderska-komisiya-zapobigla-zahoplennyu-agropidpriemstv-yaki-obroblyayut-9-tis-ga-zemli>).

It is worth noting, though, that the Complainant and the Council learned about the date, time and place of the appeal's consideration only in the evening on February 6, 2018, i.e. which was one day prior to the day of the hearing. Taking into account the Complainant's remote location, publication of information on the appeal's consideration the day before such a review cannot be considered a due notice. In accordance with the established procedure<sup>75</sup>, the MinJust Commission shall notify the appellant not later than two days prior to consideration of its appeal in one of the following ways: 1) a telegram; 2) announcement on the official website; 3) by e-mail. The MinJust Commission's common practice is publishing information on the ministry's official website.

Nonetheless, as the MinJust Commission's announcements do not refer to the specific date and time of their publication, – there is no opportunity to ascertain whether the minimum notice period was actually met<sup>76</sup>. Moreover, the information on the call for consideration of appeals made in February 2018 was eventually deleted from the MinJust's website (instead, information on appeals consideration in other months of 2018 remains available).

### **b) The right to get acquainted with the appeal materials**

An important element of openness and transparency of an administrative appeal is the right for the persons involved in the consideration of the appeal to get acquainted with the materials of the case. Indeed, from the standpoint of ensuring comprehensiveness, objectivity and completeness of consideration, it is important for the appellant to know what other evidences (other than those submitted with the appeal) are at hand of the appeal authority. Otherwise, the appellant is deprived of the opportunity to provide its explanations or objections regarding evidence additionally received by the appeal authority. Even in cases when the opportunity of getting familiar with the case file is explicitly provided, such a right is not always ensured properly<sup>78</sup>.

For instance, in the Case No. 7 (placed below) the Complainant was able to get acquainted with the materials of the case only after several requests made with the MinJust Commission. The solution to this problem is proposed by the Draft Law No. 9456. In particular, it obliges each appeal authority to inform participants of administrative proceedings about the procedure of getting acquainted with the materials of the case as well as their rights and duties. The materials of the case are provided for familiarization, as a rule, in the administrative authority's premises and in the presence of its official. It also foresees the possibility of providing access to the materials of the case if it is considered electronically<sup>79</sup>.

<sup>75</sup> See the Procedure for Considering Complaints in the Field of State Registration, approved by the CMU Resolution of December 25, 2015, No. 1128.

<sup>76</sup> See, for example, the link: <https://minjust.gov.ua/m/ogoloshennya-pro-zasidannya-komisii-18-bereznya-2019-roku>.

<sup>77</sup> See the link: <https://minjust.gov.ua/m/ogoloshennya-pro-zasidannya-komisii-18-bereznya-2019-roku>.

<sup>78</sup> Paragraph 6 of clause 1 of Part V of the Procedure for Formalizing and Submitting Appeals by Taxpayers and Their Review by Supervisory Authorities, approved by the Order of the Ministry of Finance of Ukraine of October 21, 2015 No. 916, stipulates that a person who filed a complaint is entitled to get familiar with the materials of the inspection and administrative appeal in electronic and written form, to make copies and excerpts there of by using technical means.

<sup>79</sup> See clause 4 of Part 1 of Article 55, paragraph 2 of Part 1 of Article 57 of the Draft Law No. 9456.

### c) The appellant's and third parties right to access the text of the decision

An equally important element of transparency is the possibility of obtaining a well-grounded decision following consideration of the appeal, and the opportunity for parties concerned to get familiar with the decision made by the appeal authority. However, the existing practice shows that there is no uniform approach to making decisions available for participants and third parties involved in the appeal procedure.

There are some positive examples where the appeal authority ensures publication of the decisions, thus making them public<sup>80</sup>. However, in the administrative appeal procedure, the full text of the decision is available mostly to the appellant only, and the appeal authority does not provide publication of its decisions<sup>81</sup>. However, in the Council's view, public authorities shall

- 1) grant the participants with access to both the case materials and adopted decision; and
- 2) publish decisions in impersonal form.

It should be noted that the lack of adequate transparency and publicity in the work of some appeal authorities has already been addressed in one of the Council's systemic reports<sup>82</sup>. In particular, in the systemic report on raidership, the Council emphasized that since conclusions issued by the commissions of the MinJust and/or respective MinJust's orders are not made public, such lack of transparency might even prompt the one to interpret it as an implied sign of a corruption component.

In this regard, it would be appropriate to borrow the practice from the AMCU Permanent Administrative Panel for Consideration of Appeals on Violation of Legislation in the Sphere of Public Procurements (the "**Panel**") and introduce publishing decisions on their own websites. Publication of decisions (including impersonalized information about the appellants) should contribute to ensuring uniformity of the appeal authority's practice, thus making its work predictable and prevent corruption.

## Case No. 7: Appealing repeated raidership attacks

The Council considered a complaint lodged by the founder and the head of SSK LLC (the "**Complainant**"). The Complainant noted that the state registrar, in the absence of any documents, excluded him from the shareholders of the company and dismissed from the position of the head. The state registrar's actions were appealed with the MinJust Commission. The Council's investigator in charge participated in the consideration of the appeal and upheld the Complainant's position.

<sup>80</sup> A good example is the publication of decisions of the AMCU Panel (link: <http://www.amc.gov.ua/amku/control/main/uk/publish/category/84106?page=38>). Also a good example of ensuring openness and transparency is publication of the decisions of the Qualification and Disciplinary Commission of Prosecutors (link: <https://www.kdkp.gov.ua/decision>) (although this Commission is not an executive authority, in the Council's opinion, it is a good example of practical implementation of the principle of openness).

<sup>81</sup> See the Procedure for Considering Complaints by Supervisory Authorities about Claims for Payment of Arrears on Payment of a Unified Contribution to the Mandatory State Social Insurance and on Decisions on Imposition of Fines and Penalties, approved by the Order of the Ministry of Finance of Ukraine of December 9, 2015 No. 1124, and the Procedure for Formalizing and Submitting Appeals by Taxpayers and Their Review by Supervisory Authorities, approved by the Order of the Ministry of Finance of Ukraine of October 21, 2015 No. 916.

<sup>82</sup> See the Council's Systemic Report "Combating Raidership: Current State and Recommendations" (link: [https://boi.org.ua/media/uploads/ii\\_2017\\_sytem\\_ua\\_digital.pdf](https://boi.org.ua/media/uploads/ii_2017_sytem_ua_digital.pdf)).

Although respective registration actions were annulled, after a while the same state registrar repeatedly carried out similar registration actions, this time by using a notary's forged seal<sup>83</sup>. These registration actions were canceled for a second time. The MinJust's order issued based on the MinJust Commission's conclusion was sent to the Council and the Complainant. According to the Complainant, the latter several times approached the MinJust with a request to provide the MinJust Commission's conclusion. Instead, the conclusion, which should contain a substantiated decision, was not disclosed neither to the Complainant nor the Council. The MinJust's order does not contain any reasoning and evaluation of evidence that resulted in cancellation of registration actions.

For such situations as described above, it is important to grant the parties involved in the appeal's consideration with the opportunity to get familiar with justification and reasoning of the adopted decision, understand actual and legal grounds for findings as well as make sure that the evidences provided were examined directly by the appeal authority.

In most European Union countries, general access to information of administrative bodies is recognized by law. A question may arise as to how and when a state authority should act if the law does not specifically acknowledge that its administrative decisions are public. In this regard it appears that public authorities should, in the context of administrative appeal, maintain an appropriate balance between *openness and transparency* and *confidentiality and protection of*

*personal data*. Thus, if an administrative authority cannot come up with compelling arguments justifying the need to protect confidential information and arguments against publication of its decisions, – preference should be given to openness and transparency principles. Accordingly, decisions made upon appeal's consideration should be published at least in an impersonal form<sup>84</sup>.

#### **d) The appellant's and third parties' right to participate in the appeal's consideration**

Usually, in most cases, the appellant (or its representative) is provided with the opportunity to participate in the appeal's consideration. However, the issue of a third party's participation in the appeal's consideration remains more problematic and unresolved.

<sup>83</sup> The notary in charge confirmed that he had not acted in any way against the Complainant, but his seal (forged by unidentified persons) was used to conduct corresponding registration actions.

<sup>84</sup> See General Administrative Law as an Idea of Regulation: Foundations and Tasks of the Taxonomy of Administrative Law: Monograph / Schmidt-Assmann, E. – K.I.C. Publishing, 2009.



A typical example of participation of third parties in the consideration of the appeal may be the involvement of the other parties concerned: the Council, business associations, embassies representatives, etc. Usually, the appellant's participation in the consideration of its appeal is secured by the provisions of the Law of Ukraine "On Citizens' Appeals"<sup>85</sup>. However, in practice,

there are cases where state authorities ignore this guarantee, arguing that open consideration of an appeal is not directly stipulated by the secondary legislation. Below is an example of the case where, in the Council's view, the approach applied directly contradicts openness and transparency principles.

## Case No. 8: The SFS of Ukraine's failure to hold a public hearing of an appeal seeking correction of information in the integrated taxpayer's card

The Council received a complaint lodged by Caterpillar Financial LLC (the "**Complainant**") to challenge the decision of the MD SFS in Kyiv city, according to which the Complainant was refused to correct information in the taxpayer's integrated card. The Complainant disagreed with this decision and appealed it with the SFS of Ukraine. The Council upheld the Complainant's position and asked the SFS of Ukraine to hold a public hearing of the appeal.

However, the SFS of Ukraine denied this request arguing that the procedure for reviewing appeals involves public hearing only in respect of an appeal lodged to challenge the TNDs<sup>86</sup>. Therefore, since there was no public hearing of the appeal, the Complainant and the Council were deprived of the opportunity to provide their explanations on the merits of the case. In the end, the SFS of Ukraine refused to satisfy the appeal.

The foregoing is an example of the case when the SFS of Ukraine has applied the approach directly contradicting the principles of administrative appeal procedure's openness and transparency. It is worth noting that the same approach was also employed by the SFS of Ukraine in other cases investigated by the Council (for example, appeals challenging refusal in VAT refund).

Nonetheless, the Council is aware of cases involving quite progressive approaches at the part of some state authorities when it comes to providing the Council's representatives and others with the opportunity to be present during appeal's consideration as well as to present their position. For instance, such bodies include the AMCU<sup>87</sup> and the SLS of Ukraine, which is evidenced by the following two cases from the Council's practice.

<sup>85</sup> In accordance with paragraph 4 of Part 1 of Article 18 of the Law of Ukraine "On Citizens' Appeals" of October 2, 1996 No. 393/96-BP, the person who filed a complaint is entitled to be present during consideration of the complaint.

<sup>86</sup> See the Procedure for Formalizing and Submitting Appeals by Taxpayers and Their Review by Supervisory Authorities, approved by the Order of the Ministry of Finance of Ukraine of October 21, 2015 No. 916.

<sup>87</sup> AMCU Permanent Administrative Panel for Consideration of Complaints on Violation of Legislation in the Sphere of Public Procurements.

## Case No. 9: Challenging tender/procurement documentation with the AMCU

The Council considered a number of complaints lodged by a vendor of server equipment (the **"Complainant"**) contending that the State Judicial Administration of Ukraine, being a customer in the procurement procedure, included discriminatory terms and conditions to the tender documentation and groundlessly rejected the Complainant's bid. The customer's actions were appealed with the AMCU Panel. In accordance with the existing procedure for considering the appeals<sup>88</sup>, other persons – apart from the customer and tender procedure participants – are not entitled to participate. Nonetheless, the AMCU never objected to the Council representatives' participation in the appeal consideration and always took into account the Council's position expressed in writing. Following the appeal consideration, the AMCU obliged the customer to align tender documentation with legislative requirements.

## Case No. 10: Challenging the SLS of Ukraine's inspection results

The Council received a complaint from an agribusiness company located in Dnipropetrovsk region (the **"Complainant"**), challenging the results of the labor law inspection. In particular, the Complainant asked the Council's representatives to be present during the consideration of the appeal challenging the order issued on the basis of the inspection's findings.

The procedure for consideration of the corresponding category of cases does not provide for the option of the third parties (such as the Council or other institutions) to participate in the case consideration<sup>89</sup>. However, despite the fact that the possibility to attend the appeal's hearing is not directly established by the current legislation, the SLS of Ukraine's Main Department in Dnipropetrovsk region provided an opportunity for the Council's representative to participate in the consideration of the appeal and comment on the appeal's merits during the meeting.

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<sup>88</sup> See the Law of Ukraine "On public procurements" of December 25, 2019 №922-VIII

<sup>89</sup> See the Procedure for Imposition of Fines for Violation of Labor Legislation and Employment of the Population, approved by the CMU Resolution of July 17, 2013 No. 509.

### **e) The right to record the hearing by technical means**

A proper implementation of the principles of administrative appeal's openness and transparency is impossible without providing the right to record the hearing by technical tools. In the Council's view, it is advisable to borrow experience from the judicial process on this issue. In particular, in accordance with the procedural law, persons present in the courtroom, mass media representatives may take photos, make video- and audio recording in the courtroom using portable video- and audio equipment without obtaining a separate court permit<sup>90</sup>. An exception to this rule can only be an appellant's motion seeking closed hearing of the case.

The foregoing proves that practical implementation of openness and transparency principles directly influences perception of both the administrative act and outcomes of the appeal's consideration. Quite often, the notion of perception and legitimization are used interchangeably. However, even correct, from the legal viewpoint, decision made under a non-transparent procedure may, as a result, be perceived as unlawful. That is, insufficient openness and transparency of the appeal procedure, impossibility for third parties to be present during consideration of an appeal or to review the decision may very negatively affect perception of such a decision by both the person to whom the decision is addressed and society as a whole.

## **COUNCIL'S RECOMMENDATIONS:**

In order to ensure practical implementation of **openness and transparency principles** in the administrative appeal procedure, the Council recommends as follows:

**5. The Cabinet of Ministers of Ukraine** – to prepare and lodge with the Verkhovna Rada of Ukraine Draft Law of Ukraine "On the Administrative Procedure" (in replacement of the Draft Law No. 9456 of December 28, 2018) and, within its competence, to facilitate its adoption in order:

**5.1** To retain provisions which were set forth in the Draft Law No. 9456 and which foresaw:

**5.1.1** In advance notification of the parties to the proceedings about the place and time of the appeal's consideration and the procedure for familiarization with the appeal materials;

**5.1.2** Disclosure of the full text of a decision containing substantiation and motivation for its adoption to participants of the proceedings.

**5.2** To incorporate new provisions, which would establish:

**5.2.1** Possibility of participation of the appellant (its representatives), representatives of the authority that made the decision (whose official committed an action or inaction) and third parties facilitating the proceedings (particularly on the initiative of the authority and/or based on the motion of the participants of the appeal) in the appeal's consideration;

<sup>90</sup> See, for example, Part 5 of Article 10 of the Code of Administrative Proceedings of Ukraine of July 6, 2005 No. 2747-IV.

**5.2.2** Technical recording of appeal's consideration by the persons present (save for closed hearings);

**5.2.3** Publication of the adopted decisions in depersonalized form.

**6. The Cabinet of Ministers of Ukraine** – to develop and approve a model regulation on appeal commission set up within the public authority, whose provisions would envisage:

**6.1** Prior notification of the participants of the proceedings about the place and time of appeal's consideration;

**6.2** Access to materials of the case prior to and during appeal's consideration;

**6.3** Access to the full text of the decision by the appellant and other persons who participated in the consideration of the appeal;

**6.4** Publication of decisions made on the basis of the outcomes of appeal's consideration on a respective authority's website;

**6.5** Technical recording of the appeal's consideration process by the persons present.

**7. The Cabinet of Ministers of Ukraine** – to ensure adaptation of central executive bodies' websites to people with special needs.

### 3.4 Officiality (ex officio)

Historically, the principle of officiality (lat. – "ex officio") emerged in administrative proceedings. Literally, it means that court on its own initiative undertakes measures prescribed by law to discover all the circumstances in the case, including identification and reclamation of evidence<sup>91</sup>. In other words, the court should not limit itself to evidences furnished by the parties. That is, in administrative proceedings, this principle is intended to maintain a balance between adversarial and party-disposition principles of litigating a case<sup>92</sup>. By virtue of this principle, an administrative court acts

like a separate institution conducting its own investigation and can directly check circumstances relevant to the case.

The following concentrates on such aspects of employing officiality (ex officio) principle in the context of administrative appeal procedure as (i) its substantial scope and practical significance; (ii) engaging other public authorities into appeal procedure; and (iii) ensuring unrestricted access to the data contained in state registries administered by other public authorities.

<sup>91</sup> See Part 4 of Article 9 of the Code of Administrative Proceedings of Ukraine of July 6, 2005 No. 2747-IV.

<sup>92</sup> This principle was reflected in legal framework governing administrative procedure of civil law jurisdictions, which used German regulation of the administrative procedure as a basis. In particular, in the Federal Republic of Germany legislation, this principle is defined as the "principle of research" (German – "Untersuchungsgrundsatz").

### 3.4.1 Substantial scope and practical significance of officiality (ex-officio) principle

It is worth noting that the current legal framework governing administrative appeal procedure in Ukraine does not even mention this principle. Such situation, however, can be corrected after the adoption of the new Draft Law on the basis of the Draft Law No. 9456, whose text, to the large extent, incorporated this principle from German administrative law. In particular, according to the Draft Law No. 9456, officiality (ex officio) is one of the administrative procedure principles, and therefore it shall be directly applied in the administrative appeal procedure<sup>93</sup>.

Thus, according to the Draft Law No. 9456, in the context of the administrative appeal, the substance of officiality (ex officio) principle comprises as follows:

- i) the administrative authority shall be obliged to substantiate circumstances relevant for resolution of the case and, if necessary, collect documents or information for this purpose on its own initiative, including, without involving the person, to arrange the request for documents and information, obtain the approvals and opinions necessary for resolution of the case;
- ii) the administrative authority shall not demand from a person any documents or information which are possessed by public

authorities, enterprises, institutions or organizations belonging to the sphere of their management;

- iii) the administrative authority shall have the right to demand any data and documents necessary for the resolution of the case from other public authorities, whose sphere of management includes administration of the respective state registries.

Thus, practical implementation of the principle of officiality (ex officio) obliges appeal authority not to be limited to passive perception of evidence provided by the parties to proceedings (an appellant, an authority, whose decision, action or inaction is challenged, etc.). To this end, the appeal authority is vested with the right, on its own initiative, to collect evidence which, in its opinion, is necessary for a comprehensive and objective consideration of a particular appeal.

As such, the principle of officiality (ex officio) is intended to ensure the best possible establishment of all the facts and evidence testifying both in favor of and against the appellant. This approach is aimed at laying the proper foundation for an objective and comprehensive consideration of a case.

As a rule, in the administrative appeal practice, collection of evidence by the appeal authority on its own initiative is quite rare. In the vast majority of cases, the appeal body is limited to examining the evidence already provided by the appellant and/or by the authority whose decision is

<sup>93</sup> See clause 13 of Part 1 of Article 4, Article 17 of the Draft Law No. 9456.

being challenged. In some cases, the appeal body may additionally demand disclosure of materials constituting the ground for issuance of the disputed decision. It is primarily caused by tough deadlines for consideration of the appeal and the lack of clear regulation of the exact manner in which public authorities should mutually cooperate in the administrative appeal

procedure and provide relevant information to each other (including the one from official registers).

Below is case from the Council's practice where the officiality (ex officio) principle has not been properly enforced.

## Case No. 11: Erroneous levying of social insurance contribution fee caused by use of outdated information

The Council had considered a complaint lodged by a private person (the "**Complainant**"), who was erroneously treated as an entrepreneur by the MD SFS in Lviv region. In particular, the controlling authority issued several requests to pay debt allegedly accrued with regard to social insurance contribution fee. The claims were made on the grounds that information about the Complainant as a private entrepreneur (the "**PE**") is contained in the Register of Insurance Carriers.

At the same time, according to the information from the Unified State Register of Legal Entities, Private Entrepreneurs and Public Organizations (the "**USR**"), the Complainant was not granted with the PE status. It should be emphasized that according to current legislation, the Register of Insurance Carriers is formed based on information from the USR.

Disagreeing with the claims, the Complainant filed an appeal with the SFS of Ukraine requesting, inter alia, that information about him to be deleted from the Register of Insurance Carriers. Following the appeal consideration results, claims to pay social insurance contribution fee were canceled. However, the Complainant's demand to delete him from the Register of Insurance Carriers was not satisfied.

By refusing to delete information about the Complainant from the Register of Insurance Carriers, the SFS of Ukraine neither checked nor took into account absence of information on the Complainant in the USR, even though the USR data is the primary source of information for the Register of Insurance Carriers' formation.

The foregoing case is quite convincing example of the officiality (ex officio) principle violation and negative consequences it can cause. Besides, ignoring official information from public registers – that influenced outcome of case consideration – can also be considered as violation of good faith principle as well. Thus, in this example, to justify the legality of the adopted decision, it appears that the fiscal authority deliberately abstained from checking information of the official register.

### 3.4.2 Engaging Other Public Authorities into Appeal Procedure

In the course of appeal consideration there is often an objective need to clarify position of other public authority, obtain additional information from it, do the inspection with its assistance, approve the procedure for actions to remedy the person's violated rights, hold a joint meeting, etc.

At the same time, legislation, as a rule, very rarely determines the procedure for interaction between different government agencies, including cases when one of them considers the individual appeal.

In the Council's view, the possibility and procedure for such interaction should be determined at the legislative level by incorporating thereunder requirement for "sincere cooperation"<sup>94</sup>.

Meanwhile, the public authorities should establish relationships with other government agencies, whose engagement appears to be reasonable (particularly given common experience). Such cooperation may be formalized by signing Memoranda of Cooperation and Exchange of Information. It is intended to accelerate interaction processes, increase the substantial quality of information obtained and ensure government agencies' unity in restoring violated rights of individuals.

## Case No. 12: Lack of proper cooperation between different government agencies that resulted in the entity's rights violation

The Council received a complaint lodged by Hydroenergoresurs LLC (the "**Complainant**") to challenge failure of the State Water Resources Agency of Ukraine ("**SWA of Ukraine**") to conduct timely consideration of the Complainant's application seeking approval of a small hydroelectric power plant construction project.

The Complainant advised that the SWA of Ukraine actually refuses to approve its project (suspends consideration of application for approval), with reference to the fact that for its approval under the provisions of Article 86 of the Water Code of Ukraine a preliminary approval of the small hydroelectric power plant construction project is necessary from the Regional State Administration as well as the State Service on Geology and Subsoil of Ukraine, being a CEB implementing state policy in the field of geological study and rational use of mineral resources.

Meanwhile, at that time the State Service of Geology and Subsoil of Ukraine did not consider hydroelectric power plant construction projects at all, due to absence of procedure for considering such applications. Under these circumstances, the company lodged the appeals with the Ministry of Ecology and Natural Resources of Ukraine and the CMU.

<sup>94</sup> The Council uses the notion of "sincere cooperation" by putting the similar meaning as in Part 2 of Article 4 of the Treaty on European Union.

During the complaint's consideration, the Council initiated several meetings with the senior executives of the State Service for Geology and Subsoil of Ukraine and the SWA of Ukraine, in the frames of which all issues regarding different understanding by government agencies of requirements of Article 86 of the Water Code of Ukraine were resolved. Following the additional study of the circumstances of the case by the SWA of Ukraine, the Complainant's project was approved.

At the same time, in the Council's view, in such circumstances, when the legislation directly provides for cases of individuals' rights implementation dependence on joint and/or alternate actions of different government agencies, – it is necessary to ensure that interaction between such authorities adheres to "sincere cooperation" principle.

### 3.4.3 Access to the data contained in state registries

In the Council's view, when handling the appeals, public authorities should go beyond internal information and information provided by the appellant. Where relevant, the appeal authority should check information from open sources (official registers, etc.) and, if necessary, apply to other public authorities to confirm or refute the information obtained during consideration of the appeal. For this purpose, public authorities should act under the principle of maximum assistance to each other. It should be noted that at present, a considerable amount of information that can be taken into account during consideration of appeals is already public<sup>95</sup>. In particular, now there are over a hundred of open registers and databases in Ukraine, many of which allow getting information for free.

It is worth noting that positive processes of data integration between some state registries may be witnessed lately. In particular, in November 2017 synchronization has been achieved between data of the State Register of Real Rights Over Immovable Property and the State Land Cadastre<sup>96</sup>.

In addition, in 2019 information interaction (exchange) between the State Register of Real Rights Over Immovable Property, the USR as well as the Unified State Register of Court Decisions is due to be<sup>97</sup>. Such informational interaction is intended to reduce the number of possible errors during registration actions and counteract raidership attacks more effectively.

Moreover, in May 2019 "Trembita" – a state electronic information resources interaction system designed to speed up data exchange between government agencies and facilitate the process of administrative services delivery – was launched<sup>98</sup>.

<sup>95</sup> See the Regulation on Data Sets to be Published in the Form of Open Data, approved by the CMU Resolution of October 21, 2015 No. 835.

<sup>96</sup> See the Procedure for Access of State Registrars of Real Rights Over Immovable Property and Use of Information from the State Land Cadastre, approved by the CMU Resolution, dated July 12, 2017 No. 509. This issue was the subject of the Council's recommendation issued based on its Systemic Report "Combating Raidership: Current State and Recommendations" (link: [https://boi.org.ua/media/uploads/ii\\_2017\\_sytem\\_ua\\_digital.pdf](https://boi.org.ua/media/uploads/ii_2017_sytem_ua_digital.pdf)).

<sup>97</sup> See the joint Order of the MinJust and the State Judicial Administration of January 29, 2019 No. 270/5/94 "On Informational Interaction between the State Register of Proprietary Rights over Immovable Property, the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organizations and the Unified State Registry of Court Decisions".

<sup>98</sup> Trembita is based on an X-ROAD – improved Estonian data exchange platform being the foundation of Estonian digital society. Trembita is currently being implemented by the State Agency for E-Government of Ukraine in cooperation with the Academy of Electronic Governance, Cybernetica Ltd and SoftXpansion Ltd within the framework of EGOV4UKRAINE Project at the U-LEAD with Europe Program (link: <https://trembita.gov.ua/ua>).



The first agreement on connecting to Trembita was concluded between the State Agency for E-Governance of Ukraine and the Ministry of Finance of Ukraine. In the future it is planned to conclude similar agreements between the SFS of Ukraine, the Pension Fund of Ukraine, the MinJust and the Ministry of Internal Affairs of Ukraine, as well as other agencies and institutions<sup>99</sup>.

The Council is hopeful that introduction of such integrated information systems will make it possible to avoid errors while delivering administrative services, and, consequently, to reduce the number of grounds for challenging administrative decisions.

## COUNCIL'S RECOMMENDATIONS:

In order to ensure practical implementation of **officiality (ex officio) principle** in the administrative appeal procedure, the Council recommends as follows:

**8. The Cabinet of Ministers of Ukraine** – to prepare and lodge with the Verkhovna Rada of Ukraine Draft Law of Ukraine "On the Administrative Procedure" (in replacement of the Draft Law No. 9456 of December 28, 2018) and, within its competence, to facilitate its adoption in order:

**8.1** To retain provisions which were set forth in the Draft Law No. 9456 and which foresaw:

**8.1.1** The right of an appeal authority to collect any evidence necessary for a full and comprehensive consideration of the case on its own initiative;

**8.1.2** Prohibition for an appeal authority to demand directly from the appellant any documents or information being in possession of the appeal authority or any other public authority;

**8.1.3** The right of an appeal authority to demand any data and documents necessary for the resolution of a case from other authorities in charge of administration of official registers.

**8.2** To incorporate new provisions, which would establish a requirement to adhere to "sincere cooperation" principle between public authorities within the administrative appeal procedure, particularly by signing Memorandum of Cooperation and Exchange of Information between them.

<sup>99</sup> See link: <https://www.e.gov.ua/projects/vzayemodiya-reyestriv-interoperabelnist/trembita?v=5be989456869a>.

## 3.5 Proportionality

Historically, the principle of **proportionality** – as a measure of proportionality of government agencies' actions – derived from criminal law and was gradually expanded to administrative one. The experience of Germany was essential to its formation<sup>100</sup>, where the essence of the principle was encapsulated in the famous expression that *"the police should not shoot at sparrows with cannons"*<sup>101</sup>.

Nowadays the principle of proportionality is directly enshrined in the acts of the European Union<sup>102</sup>. The fundamental importance of this principle is also reflected in the work of leading European judicial institutions: The European Court of Justice (the **"ECJ"**) and the European Court of Human Rights (the **"ECHR"**)<sup>103</sup>.

It is due to the ECJ's case-law that the principle of proportionality was significantly developed and the test for checking compliance with it was created<sup>104</sup>. The essence of the test is limited to three basic questions, namely:

- 1) Is the measure suitable to achieve a legitimate aim?;
- 2) Is the measure necessary to achieve that aim or there are less restrictive means available?; and

- 3) Does the measure have an excessive effect on the applicant's interests?

It is noteworthy that in certain decisions of the ECJ, there is an inter-connection between the principle of proportionality and the principle of legal certainty<sup>105</sup>. It appears to be quite reasonable, because if verification of adherence with requirements of proportionality is impaired by ambiguous legislation, – then adverse consequences of this are to be borne by the state rather than an individual<sup>106</sup>.

In the Ukrainian legislation, the principle of proportionality was introduced in 2005 in the Code of Administrative Proceedings of Ukraine, where the courts became obliged to check proportionality of the contested decisions, actions or inactions.

At the same time, no clear obligation was established at the legislative level for public authorities themselves to apply (while carrying out administrative procedures in general, and administrative appeals in particular) not only proportionality principle but also other criteria due to be employed by courts while ascertaining compliance of the former's decisions, actions or inactions.

<sup>100</sup> See, in particular, American Balancing and German Proportionality: The Historical Origins Moshe Cohen-Eliya International Journal of Constitutional Law, Volume 8, Issue 2, April 1, 2010, pp. 263–286 (link: <https://doi.org/10.1093/icon/moq004>, <https://academic.oup.com/icon/article/8/2/263/699991>).

<sup>101</sup> See Institutionen Des Deutschen Verwaltungsrechts / Fleiner F. – Tübingen, 1928.

<sup>102</sup> See, in particular, Article 5 (4) of the Treaty on European Union of February 7, 1992.

<sup>103</sup> See the ECHR Judgement in the case "Spjorrong and Lonnroth v. Sweden", application No. 7151/75, paragraph 69, where the observance of the proportionality principle was clarified through the question of "whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights".

Meanwhile, it should be noted that the ECHR approach to proportionality control is very flexible depending on the category of the case, method of restricting the individual's, rights, certain circumstances, etc. (see the Judgement of the Supreme Court of the United Kingdom in the case "Mellat v Her Majesty's Treasury" (No. 2) [2013] UKSC 39, paragraph 70).

<sup>104</sup> See Gráinne de Búrca The Principle of Proportionality and its Application in EC Law, Yearbook of European Law, Volume 13, Issue 1, January 1, 1993, pp. 105–150 (link: <https://doi.org/10.1093/yel/13.1.105>).

<sup>105</sup> See the case C-318/10, paragraph 59: "As it is, a rule which does not meet the requirements of the principle of legal certainty cannot be considered to be proportionate to the objectives pursued".

<sup>106</sup> See clause 8 of Part 3 of Article 2 of the Code of Administrative Proceedings of Ukraine of July 6, 2005 No. 2747-IV (as amended on July 6, 2005).

It created a certain imbalance, since courts had to check public authorities' compliance with the obligations regarding which the vast majority of the latter believed it did not apply to them at all in view of the appropriate mandatory provision being absent in the legislation.

An attempt to overcome such an imbalance was the rule developed by court practice obliging public authorities, while carrying out their activities, to take into consideration relevant criteria-principles, including proportionality<sup>107</sup>.

Despite this fact, as for the existing administrative appeal practice, the principle of proportionality, in the Council's view, has never been practically applied properly and clearly needs further improvement.

Hence, the following comprises analysis of application of proportionality principle within the framework of administrative appeal procedure as: (i) a criterion for the contested decision's evaluation on its merits; and (ii) a benchmark for carrying out administrative appeal procedure.

### **3.5.1 Criterion for Contested Decision's Evaluation on Its Merits**

In its practice the Council faces not at all rare instances when public authority does not take into account the severity of consequences that might be borne by an individual as a result of a certain decision, action or inaction.

Therefore, in their activities public authorities should take into account that negative consequences of their decisions, actions or inactions for an individual and public interests should be minimal, – especially while scrutinizing such decisions within the framework of administrative appeal.

In this context, the proportionality principle becomes particularly important when the law neither regulates certain social relations clearly enough, nor establishes procedural guarantees at the stage prior to the issuance of the negative decision or when discretionary powers are being exercised.

The following case from the Council's practice demonstrates disproportionate nature of the public authority's actions when the refusal to extend all the permits resulted in excessively negative consequences for the complainant.

<sup>107</sup> See the Ruling of the Supreme Administrative Court of Ukraine of May 29, 2014 in the case No. 801/6411/13-a: "Public authorities should take into account these criteria-principles knowing that the administrative court will be guided by them in case of appeal against the corresponding decisions, actions or inactions. Besides, these criteria-principles, at the same time, are an important benchmark while exercising discretionary powers of the public authority. The legislative consolidation of these criteria-principles allows an individual or a legal entity to build an understanding of the quality and nature of appropriate decisions or actions it has the right to expect from a public authority".

## Case No. 13: Disproportionate decision on refusal to extend permits

The Council received a complaint lodged by Knauf Gips Donbas LLC (the "**Complainant**") to challenge business malpractice of the SLS of Ukraine's Main Department in Donetsk region and the SLS of Ukraine itself, comprising groundless refusal to extend validity period of permits authorizing execution of hazardous works and operation (use) of hazardous machines, mechanisms, and equipment.

The Complainant reported that it had received 49 permits whose terms of validity were due to expire in 2017-2018. As the law envisages the possibility to extend validity of these permits for another 5 years, the Complainant approached the SLS of Ukraine's Main Department in Donetsk region with applications seeking extension of the permits.

The SLS of Ukraine's Main Department in Donetsk region refused to extend the validity of the permits in view of the fact that during operation on a front loader (subject of one of the permits) an accident occurred (the worker twisted his ankle). Disagreeing with this decision, the Complainant addressed the SLS of Ukraine, as a higher-level authority, with an appeal seeking cancellation of refusal to extend the permits. The Council's representative participated in the appeal's consideration.

In the course of consideration, the Council's investigator emphasized that the nature of the taken decisions was disproportional. Eventually, the SLS of Ukraine refused to satisfy the appeal. The mentioned decision is final and the Ukrainian legislation does not foresee its further pre-trial appeal. In such circumstances, the Council had to discontinue consideration of the case.

The next case can be assigned to the category of issues in which the law neither clearly regulates a certain sphere of relations, nor does it establish a clear appeal procedure. In the Council's opinion, it clearly illustrates disproportionality of restrictions imposed on a legal entity, especially given not obvious nature of the alleged violation.

The case was about imposition of sanctions in the field of foreign economic activity. It should be noted that, despite cancellation of respective sanctions in the field of foreign economic activity<sup>108</sup>, – the following case is an interesting example when the law enforcement agency (the

State Security Service of Ukraine or the "**SSS of Ukraine**") undertakes actions directly leading to the adoption by another authority of a negative administrative act for an entity. At the same time, cancellation of the relevant act also directly depends on the law enforcement agency itself. Therefore, the complainant and the Council had to deal with an unformalized (ad hoc) internal appeal mechanism (review), when protection of the complainant's rights was carried out not by liaising with the public authority that actually adopted the administrative act, but rather with the law enforcement agency that initiated its adoption.

<sup>108</sup> Article 37 of the Law of Ukraine "On Foreign Economic Activity" was excluded by the Law of Ukraine "On Currency and Currency Transactions" of June 21, 2018 No. 2473-VIII.

## Case No. 14: Disproportionate application of restrictions in the field of foreign economic activity

The Council received a complaint from the Institute of Monocrystals of the National Academy of Sciences of Ukraine (the "**Institute**") to challenge sanctions imposed on it in the sphere of foreign economic activity, which comprised temporary suspension of its activities.

The imposition of sanctions was initiated by the SSS of Ukraine. From the SSS of Ukraine's standpoint, the Institute exported the "dual-use goods" without the permission of the State Service for Export Control of Ukraine (the "**SSEC of Ukraine**"). The SSS of Ukraine's position was based on an expert opinion classifying the Institute's goods as the "dual-use goods".

At the same time, the Institute initiated additional examinations, whereby opposite results were received. In particular, according to the results of additional examinations, it was established that the relevant goods do not belong to the "dual-use goods".

The Council drew attention to the fact that the criminal proceedings launched in connection with this issue (pursuant to Part 1 of Article 333 of the Criminal Code of Ukraine "Violations of the procedure for international transfer of goods subject to state export control") were closed in less than a month upon the Institute's appeal to the Council. At the same time, respective regional department of the SSS of Ukraine refused to initiate lifting of sanctions on the ground that they are not related to criminal proceedings.

In the course of thorough consideration of the complaint, the Council concluded that imposition of sanctions in the field of foreign economic activity was apparently a disproportionate measure, whose negative consequences for the Institute were dramatically burdensome. Thus, although the SSS of Ukraine closed the criminal proceedings, within administrative relations (concerning sanctions applied in the foreign economic activity field) it did not recognize absence of violation, despite several available expert opinions supporting the Institute's position.

Taking into account almost entire absence of the statutory framework governing the procedure for appealing position of the SSS of Ukraine as sanctions initiator's, – the Council, pursuant to Memorandum of Cooperation with the SSS of Ukraine, arranged several open hearings with all the parties involved (SSS of Ukraine, Institute, SSEC of Ukraine, Ministry of Economic Development and Trade of Ukraine, and the Council).

In the course of such joint hearings, with reference to principles of proportionality and reasonableness, imposition of restrictions vis-à-vis the Institute was found to be groundless. The SSS of Ukraine's senior executives eventually accepted the Council's arguments on the merits of the complaint and proposed mechanism to acknowledge absence of violation, which depended on the SSEC of Ukraine's ultimate expert position. The SSEC of Ukraine, in its turn, after conducting the necessary studies, eventually confirmed that the Institute's products do not fall under the category of "dual-use goods".

The case was closed after sanctions had been dropped on the initiative the SSS of Ukraine.

### 3.5.2 Benchmark for Carrying Out Administrative Appeal Procedure

In the context of the requirements for the administrative appeal procedure organization, the principle of proportionality bears particular importance when no clear appeal procedure is established and/or grounds for cancellation, modification or revocation of an act are not determined.

It means, in particular, that the principle of proportionality shall be taken into account while issuing decision on:

- i)** the scope of the administrative appeal procedure (full, shortened, with/without hearings, etc.);
- ii)** the need for an appeal authority to involve resources (own and the appellant's) for checking and/or establishing circumstances of the appeal;
- iii)** the use of certain tools of redress (cancellation of the contested decision with/without performing an additional check, initiating internal investigation based on the administrative appeal outcomes, etc.).

As the administrative appeal mechanism can embrace a wide range of issues different in their scope and substance, – it appears that the use of proportionality principle should be as flexible as possible. Hence, it is unreasonable to apply a formally identical approach to all cases that may be the subject of an administrative appeal.

Therefore, in the Council's opinion, when considering administrative appeals, one should take into account complexity of circumstances subject to clarification and specific legal regulation of the respective area.

For example, in case of existence of the established administrative practice and/or the Supreme Court's conclusions regarding the application of the relevant legal norm or an insignificant material value of the contested decision, – the appeal's consideration should be

aimed at the procedure being less burdensome for parties (of course, except for cases where the appellant insists on a full consideration).

Vice versa, when there is obvious complexity of the case, a large number of people involved, different enforcement practices available, or absence of relevant case-law, etc., the procedure should be quite comprehensive, if necessary, by engaging experts, witnesses, interpreters and/or by holding hearings, etc.

Hence, at the case preparation stage, it is desirable to draft an action plan (sequence of actions) and to take into account positions of all procedural parties to be done in a both reasonable and fair manner. It is unacceptable to apply a formal approach to the procedure for carrying out procedural actions; for example, when it is possible from the outset to predict that certain parties to the proceedings would not be able to participate in procedural actions at a certain time.

Overall, the administrative appeal procedure should be carried out in the minimum form sufficient to ensure the requirements of fairness. For example, if the question of making a positive decision for a person (regarding satisfaction of an appeal) is obvious for the public authority and it is reasonable to consider that such a decision does not violate other persons' rights, it is appropriate (subject to consent of other parties to the proceedings) to carry out a shortened procedure.

The approaches to notification on procedural aspects of an appeal's consideration shall also be proportional (admission, hearings appointment date, breaks announcement, etc.). For example, in case of group complaints (where appropriate), the administrative authority should propose the appellants to appoint a common representative in charge of communication.

As for the redress (appeal consideration outcomes), it has to be proportionate with the effect (a negative impact) of appealed decisions, actions or inactions on the appellant. For example, in case of flagrant errors of the

contested decisions, actions or inactions and their negative influence on the appellant's reputation, – it seems appropriate for formal apologies to be given by a government agency in addition to the actual cancellation or recognition of decisions, actions or inactions being unlawful.

In certain cases, it might be appropriate to initiate official inspections or to impose disciplinary sanctions on officials who have made a decision, conducted action or admitted inaction or to send them for additional training.

If a public authority sees a systemic (reiterative) nature of challenged violations, depending on their meaning for individuals, it has to take proportional measures to remedy them in relations with such individuals.

The appellant should also be informed of such consequences of the appeal consideration, as this will facilitate a proper understanding of effectiveness of its rights' protection.

## COUNCIL'S RECOMMENDATIONS:

In order to ensure practical implementation of **proportionality principle** in the administrative appeal procedure, the Council recommends as follows:

**9. The Cabinet of Ministers of Ukraine** – to prepare and lodge with the Verkhovna Rada of Ukraine Draft Law of Ukraine "On the Administrative Procedure" (in replacement of the Draft Law No. 9456 of December 28, 2018) and, within its competence, to facilitate its adoption in order:

**9.1** To further specify general provisions which were set forth in the Draft Law No. 9456, by establishing an obligation to issue the decisions in the administrative appeal procedure based on effect of the principle of proportionality with regard to the following:

**9.1.1** The scope of the administrative appeal procedure (full, shortened, with/without parties, etc.);

**9.1.2** The need for an appeal authority to involve resources (own and the appellant's) for checking and/or establishing circumstances of the appeal;

**9.1.3** The use of certain tools of redress in the result of administrative appeal consideration.

**9.2** To incorporate new provisions, which would foresee:

**9.2.1** Application of the principle of proportionality, taking into account the case-law of the Ukrainian courts, the European Court of Human Rights, and the European Court of Justice;

**9.2.2** Possibility to carry out administrative appeal procedure in a simplified (shortened) form without hearings, in cases where, given obvious nature of circumstances of the case, the administrative authority intends to rule in favor of the appellant and the parties do not insist on a full consideration;

**9.2.3** Possibility for the appeal body to give a public apology when challenged actions are found to be unlawful.



## 3.6 Timeliness and Reasonable Term

**Timeliness and compliance with reasonable time frames** is an important prerequisite for the effectiveness of any administrative procedure. This issue is unquestionably important for administrative appeal procedure as well. A quasi-judicial nature of this procedure makes it appropriate to draw an analogy with the observance of reasonable time frames during judicial consideration, which is reflected in a comprehensive ECHR case-law<sup>109</sup>.

One of the elements of the good governance principle is responsiveness – i.e., meaning that institutions and processes should focus on servicing individuals concerned to be done within a reasonable term<sup>110</sup>. In Ukraine, the corresponding principle has already been incorporated in the law as one of the principles for provision of administrative services<sup>111</sup>. The importance of adherence to this principle is also recognized by authors of the Draft Law No. 9456 aimed at regulating administrative procedure in Ukraine<sup>112</sup>.

Thus, the following section will focus on such issues as: (i) general nuances of procedural terms' calculation; (ii) term for filing an appeal; (iii) renewal (prolongation) of missed term for filing an appeal; (iv) term for consideration of an appeal; (v) extension of term for consideration of an appeal; and (vi) consequences of failure to observe the terms.

### 3.6.1 General Nuances of Terms' Calculation

At first glance, it is appropriate to start analyzing the topic with minor issues, which – due to lack of their systemic and unified regulation – might cause certain troubles even for professional lawyers.

Thus, in the legislation of Ukraine there are two different approaches to a starting point of the time period calculation: "*from the day of an event*" and "*from the day following the day of an event*". Sometimes these two approaches can be used in the same sphere while calculating different terms<sup>113</sup>. According to the Council's observations, such inconsistency causes confusion while calculating the terms and sometimes provokes their accidental missing. It seems that only one of these two approaches should be chosen and consistently applied<sup>114</sup>.

It appears reasonable, though not critical, for the legislator to choose a unified unit to calculate terms for filing an appeal and other procedural terms in the appeal procedure (a calendar or a business day). At present, both these units are used in various legal acts or different provisions of the same legal act without any distinctive consistency<sup>115</sup>.

While calculating terms, it is also considered fair to apply consistently and without exceptions a commonly accepted rule in Ukraine regarding

<sup>109</sup> Article 6 of the Convention states that while ascertaining his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Violation of the "reasonable term" is the most common issue faced by the ECHR – almost 27% (5 778 out of 21 651) of all decisions on the merits adopted by the ECHR during 1959-2018 related to this issue (link: [https://www.echr.coe.int/Documents/Stats\\_violation\\_1959\\_2018\\_ENG.pdf](https://www.echr.coe.int/Documents/Stats_violation_1959_2018_ENG.pdf)).

<sup>110</sup> See link: <http://www.unescap.org/sites/default/files/good-governance.pdf>.

<sup>111</sup> See clause 5 of Part 1 of Article 4 of the Law of Ukraine "On Administrative Services" of September 6, 2012 No. 5203-VI.

<sup>112</sup> See Article 14 of the Draft Law No. 9456.

<sup>113</sup> For example, in the Tax Code of Ukraine of December 2, 2010 No. 2755-VI, when determining terms for certain actions to be performed by the taxpayers and/or tax authorities, the wording "from the day following the day [of an event]" occurs in clauses 44.7, 56.9, 56.23 .4, 73.3, 78.1, 86.7, 86.8, etc., while the wording "from the day [of an event]" in clauses 16.1.10, 20.1.24, 39.4.4, 39.5.1.2, 39.5.2.20, 42.4, 43.5, 44.5, 49.6, 49.11, 56.23.3, 60.3, 60.4, etc.

<sup>114</sup> Such unification is proposed in Part 2 of Art. 42 of the Draft Law No. 9456.

<sup>115</sup> For example, in the Tax Code of Ukraine, the time limit for filing an appeal against a TND is calculated as 10 working days (clause 56.3 of the Tax Code of Ukraine of December 2, 2010 No. 2755-VI), while the term for paying monetary obligation based on a TND is 10 calendar days (clause 57.3 of the Tax Code of Ukraine of December 2, 2010 No. 2755-VI), although these two terms are actually interrelated.



shifting the last day of the term falling on the weekend, a holiday or a day-off, to the first working day following it<sup>116</sup>.

### 3.6.2 Term for Filing an Appeal

It is important to ensure that legislation establishes clear and substantiated period for filing appeals in the administrative appeal procedure.

The duration of the appeal filing term should generally be reasonable and sufficient to prepare the appeal as well as the evidence accompanying it.

From the Council's standpoint, a comprehensive unification of time limits for appeal at the legislative level is unlikely to be appropriate: it is enough for minimum guarantees to be incorporated into the law, while leaving the opportunity in certain areas (where appropriate) to set a longer period for filing appeals, taking into account complexity of issues usually being the subject matter of an appeal in these areas<sup>117</sup>.

Speaking of appeals against decisions of public authorities, it is important to point out that the starting point for calculating the term of an appeal should generally depend not on the date when disputable decision was adopted, but on the date of its receipt by the appellant. If the decision contemplates imposition of sanction, – then the term of execution of such a decision (payment of penalties) should, in the Council's view, be synchronized with the term for lodging an appeal, and, at least, be calculated according to the same rules (i.e., from the day

the decision was received, but not adopted). Examples of the opposite approach is the current legal framework on this issue in such fields as urban development<sup>118</sup> and labor<sup>119</sup>. Examples of practical cases illustrating negative consequences of such regulation for business have already been considered in Section 3.1 of this Report.

Exception to this rule is appropriate when the appellant, acting in bad faith, evades from receipt of the contested decision or does not receive it due to its own negligence. In this case, it is considered reasonable to link the beginning of calculation of the term for lodging appeal to the day when the appellant, acting in good faith and with caution, should have obtained a decision. For instance, when the appellant failed to receive a postal item containing the disputable decision – a starting point of the time period for lodging appeal may be linked to the day of delivery of a postal item to the post office at the appellant's address.

As regards filing appeals against actions or inactions of public authorities, it appears to be reasonable to preserve the appellant's right to challenge continuing actions or inactions at any point of time while such actions or inactions exist. As for actions or inactions that are completed (finished), – it is appropriate to provide for the possibility of challenging them within a clearly defined time frame, to be calculated from the day following the day of completion (the end) of such actions or inactions (a day when the appellant found out or should have found out about their completion)<sup>120</sup>.

<sup>116</sup> This idea is proposed to be implemented in paragraph 1 of Part 4 of Article 42 of the Draft Law No. 9456.

<sup>117</sup> The Council generally agrees on this issue with the authors of the Draft Law No. 9456 (see Part 2 of Article 82 of the Draft Law No. 9456).

<sup>118</sup> See clause 28 of the Procedure for Imposition of Fines for Offenses in the Field of Urban Development, approved by the CMU Resolution of April 6, 1995 No. 244 (as amended by the CMU Resolution of October 2, 2013 No. 735).

<sup>119</sup> See clause 9 of the Procedure for Imposition of Fines for Violation of Labor and Employment Legislation, approved by the CMU Resolution of July 17, 2013 No. 509.

<sup>120</sup> The respective approaches can be implemented on the basis of Article 82 of the Draft Law No. 9456.

### **3.6.3 Renewal (Prolongation) of Missed Term for Filing an Appeal**

In the Council's view, it is necessary to stipulate a single, well-balanced and reasonable approach to the issue of renewal (extension) of the period for appeal.

It is important to ensure the possibility to renew the deadline missed by the appellant for valid reasons. At the same time, it is necessary to prevent abuse in this area.

When assessing which reasons for missing a deadline should be recognized as reasonable excuses, it is unlikely possible to completely eliminate an influence of human factor. It appears extremely problematic to determine an exhaustive list of reasonable excuses (and documents supporting them) at the legislative level, based on which a term for appeal will be renewed (extended) automatically. Such attempts have already been made and sometimes led to opposite results.

## **Case No. 15: Failure to renew the administrative appeal deadline missed by valid reason**

In March 2019 the Council was approached by a small trading company from Odesa city (the "Complainant"). The Complainant disagreed with the TND issued by the MD SFS in Odesa region, and, within the period prescribed by law (10 business days), lodged an appeal with the SFS of Ukraine by post.

After a while, the postal item returned to the Complainant because of the addressee's wrong postal code. As it turned out later, the Complainant indicated the postal code correctly – a mistake occurred on the part of the post office's employee.

The Complainant found itself in a situation where it had to lodge an appeal again. However, at the time of such re-lodging, the statutory period for lodging an appeal had already expired. The Complainant had arguments and evidence supporting the fact that the reason for missing the deadline was valid. However, the corresponding legislative act in the field of taxation (clause 102.6 of the Tax Code of Ukraine) established an exhaustive list of grounds for extending the time period for an appeal. The Complainant's reason (even though it was quite material) was not listed.

As a result, the only option for the Complainant was a court claim. The possibility of an administrative appeal was lost, although it was not the Complainant's fault.

If legislation norms provided for the right of an appeal authority to renew the period for an appeal missed by a valid reason, and would not set forth an exhaustive list of such reasons, the Complainant would have a chance to take advantage of the administrative appeal procedure.

Thus, the only reasonable solution is to enable appellants to apply to the appeal authority with a motion for renewal of a term and let the right to satisfy or dismiss such a motion (depending on whether the reasons were found valid or not) rest with an appeal authority – similarly to the judicial proceeding.

Meanwhile, the unlimited appeal authority's discretion in this matter may create an environment inducing discrimination of individual appellants and give rise to a corruption component. Therefore, it is advisable to limit this discretion by specifying tentative, non-exhaustive list of valid reasons for missing the deadline<sup>121</sup>.

Additional steps to minimize abuses in this area should be:

- i)** imposing obligation to indicate the fact of renewal of a term of appeal, the reasons for its renewal and documents confirming these reasons in the decision made upon appeal consideration or in a separate procedural decision on renewal of a term<sup>122</sup>; coupled with
- ii)** publicity of decisions taken within the framework of the administrative appeal procedure<sup>123</sup> – these two elements together will make it clear for everyone based on what reasons and documents the period of appeal for other appellants was prolonged – such transparency would help to reduce space for abuse;

- iii)** streamlining practice (by issuing overviews and explanatory documents, where the appeal authority's leadership team analyzes and generalizes the practice, including the practice of renewal of missed terms<sup>124</sup>).

### 3.6.4 Term for Appeal Consideration

Overall, the Council supports the approach proposed in the Draft Law No. 9456 concerning establishment of a clear standard time-limit for an appeal consideration<sup>125</sup>.

At the same time, taking into account potential application of "tacit consent" principle in the administrative (internal) appeal procedure<sup>126</sup>, and given that the suspension of proceedings (along with suspension of procedural time limits) is not descriptive to the administrative appeal procedure (unlike in administrative justice)<sup>127</sup>, – it is important for other (longer) time limits to be established by area-specific laws. Such time limits shall be sufficient to perform the scope of procedural actions (including, if necessary, hearings, examinations, etc.) and reflecting peculiarities of appeal consideration in the respective sphere.

In the Council's view, it might be appropriate to separate the period when the appeal is verified in terms of its formal compliance with requirements of the law from the time of its consideration on the merits<sup>128</sup>. The period of formal review should be as short as possible (so that in certain areas reviewing appeals in terms of their compliance with formal requirements could be instantaneous and fully automated)<sup>129</sup>.

<sup>121</sup> The Council generally agrees on this issue with the authors of the Draft Law No. 9456 (see Part 2 of Article 82 of the Draft Law No. 9456).

<sup>122</sup> See also Section 3.7. "Substantiality, Consistency and Systemic Nature of Appeal".

<sup>123</sup> See also Section 3.3. "Openness and Transparency".

<sup>124</sup> See also Section 3.7. "Substantiality, Consistency and Systemic Nature of Appeal".

<sup>125</sup> See Part 3 of Article 43 of the Draft Law No. 9456.

<sup>126</sup> See also Section 3.6.6. "Consequences of Breaching of Terms".

<sup>127</sup> See Article 236 of the Code of Administrative Proceedings of Ukraine of July 6, 2005 No. 2747-IV.

<sup>128</sup> This idea is implemented, in particular, in the field of administrative appeal of public procurements' results (see Part 3 of Article 18 of the Law of Ukraine "On Public Procurements" of December 25, 2015 No. 922-VIII).

<sup>129</sup> In the Draft Law No. 9456 (in its Article 52, in particular), the notion of "applications (complaints) that are not subject to review" was introduced, but the procedure and terms for dismissing appeals without a hearing on the merits, in the Council's view, should be resolved in a somewhat more detailed way.

In case of detection of formal defects preventing the appeal consideration from being started, in the Council's view, the appellant shall be given a term for their elimination, during which the appeal is neither considered nor rejected<sup>130</sup>. It is, in fact, about borrowing from the field of judicial consideration of the long-known notion of "*deferring consideration of a claim (appeal, cassation) and granting time for remedying technical defects*".

### 3.6.5 Extension of Appeal's Period of Consideration

At present, in many areas the law provides for the right of the appeal authority to extend the time limit for appeal consideration. A common example is the taxation area, where a standard 20-day period can be extended for up to 60 calendar days<sup>131</sup>.

In theory, such an approach is quite reasonable and rational, since it allows the appeal authority to vary appeal consideration terms depending on their complexity, volume of materials and other objective factors. However, in practice the phrase "may be extended" raises some skepticism in the minds of people having experienced participation in the relevant procedure. Indeed, it is a common knowledge that the period might be extended in almost 100% of cases and the appeal authority almost never meets a "standard" deadline.

Not critical, but still a downside of this approach is raising unjustified expectations among appellants who are not yet well acquainted with the appeal authority practice that their appeals (if they are not complicated) would, most likely, be considered within a "standard" term of consideration.

In the Council's view, this practice may be eliminated by concurrently taking the following steps:

- 1) setting a reasonable, realistic (taking into account a typical appeal authority's workload) "standard" period of appeal consideration;
- 2) determining an indicative list of grounds for extending the time limit for appeal consideration (referring to the complexity of appeals, a significant volume of materials and other factors which objectively affect duration of consideration)<sup>132</sup>, as well as setting a maximum term of possible extension and maximum number of extensions;
- 3) introducing an indicator "*a portion of appeals whose consideration period has been extended*", whose status of execution should be a part of the official public statistics of the appeal authority and be applied, among other indicators, for assessing its effectiveness (effectiveness of its individual officers), with appropriate disciplinary and career implications.

It also appears advisable to conduct surveys among appellants on quality of appeals' consideration to ascertain, *inter alia*, the level of satisfaction of appellants with a time of consideration of appeals<sup>133</sup>. Such surveys are in line with best international practices when it comes to appeals handling<sup>134</sup>.

### 3.6.6 Consequences of Breaching the Terms

In the Council's view, consistent application of "tacit consent" principle is an extremely important guarantee of ensuring compliance with the time limits in the framework of the administrative appeal procedure. This principle has to "work" whenever appeal authority failed to consider the appeal within the period established by law (neither issued nor sent a decision on results of consideration of the appeal).

<sup>130</sup> This approach is suggested by authors of the Draft Law №9456 (See art 50 of the Draft Law №9456)

<sup>131</sup> See clause 56.9 of the Tax Code of Ukraine of December 2, 2010 No. 2755-VI.

<sup>132</sup> Outside of the scope of the administrative appeal, it may be concluded that it is rather not a very successful, but at least an attempt to determine the reasons for extending the terms of pre-trial investigation of criminal proceedings (see Part 4 of Article 294 of the Criminal Procedure Code of Ukraine of April 13, 2012 No. 4651-VI, which, when setting deadlines, for which the term of pre-trial investigation of a crime may be extended, operates with such three notions: "the complexity of the proceedings", "the special complexity of the proceedings" and "the exceptional complexity of the proceedings").

<sup>133</sup> See also Section 3.8. "Effectiveness".

<sup>134</sup> See link: <http://www.ombudsmanassociation.org/docs/BIOAGoodComplaintHandling.pdf>.

This principle proved to be effective in the taxation sphere<sup>135</sup>, and, in view of the Council, should cover other areas. It might, of course, be necessary to use it with some caution when appealing actions or inactions. Unlike consequences of cancellation of a decision, consequences of recognizing actions (and especially inactions) unlawful are more complicated. It is sometimes impossible to ascertain them without imposing obligation on the challenged authority (or its officials) to take certain particular actions (or to refrain therefrom) – with such an obligation to be clearly specified in the resolutive part of the decision of the appeal authority.

Meanwhile, based on its practice, the Council notes that – while appealing decisions of public authorities – the "tacit consent" principle should not only be declared in a legal act but also be secured by effective mechanisms for its

enforcement. Otherwise, the appellant may find itself in a situation where its appeal appears to be satisfied but the authority that issued the disputable decision and the appeal authority do not actually recognize this fact in their behavior and do not restore the infringed rights of the appellant, and, as a result, it still has to seek judicial protection.

Of course, under such a scenario, the appellant receives an additional "strong" argument for trial (the scope of adjudication, at least in theory, becomes narrower – i.e., from proving unlawfulness of the appealed decision on its merits to simply proving that the decision in question has already been found illicit under the framework of administrative appeal procedure). However, even in such a case the administrative appeal procedure does not attain its main objective, which is resolution of the matter in a pre-trial manner.

## Case No. 16: Delay with registration of a suspended tax invoice, where respective appeal deemed satisfied in lieu of "tacit consent" principle

On August 8, 2017, a company from Kyiv city trading by air conditioning equipment (the "**Complainant**") received a decision on refusal to register its tax invoice with the Unified Register of Tax Invoices. Disagreeing with this decision, the Complainant lodged an appeal with the SFS of Ukraine on August 18, 2017, which was received on August 21, 2017.

Although 10-day period for reviewing the appeal expired on August 31, 2017, the respective decision was not issued. That, according to the law, should result in satisfaction of the appeal based on the "tacit consent" principle and gave rise to an obligation of the SFS of Ukraine to register a tax invoice with the Unified Register of Tax Invoices on the following day (September 1, 2017).

Meanwhile, only after two inquiries made by the Council, on October 9, 2017, the Complainant confirmed that the tax invoice had been finally registered with the Unified Register of Tax Invoices.

This case (*being a typical example of the whole category of similar cases considered by the Council mainly in the second half of 2017 and numbering in dozens*) shows that even incorporating in law might sometimes not be sufficient for "tacit consent" principle to constitute an effective remedy for restoring appellant's infringed rights – i.e., an effective mechanism of strict implementation of this principle is also essential.

<sup>135</sup> See paragraphs 2 and 3 of clause 56.9 of the Tax Code of Ukraine of December 2, 2010 No. 2755-VI.

## COUNCIL'S RECOMMENDATIONS:

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In order to ensure practical implementation of the principles of **timeliness and reasonable term** in the administrative appeal procedure, the Council recommends as follows:

**10. The Cabinet of Ministers of Ukraine** – to prepare and lodge with the Verkhovna Rada of Ukraine Draft Law of Ukraine "On the Administrative Procedure" (in replacement of the Draft Law No. 9456 of December 28, 2018) and, within its competence, to facilitate its adoption in order:

**10.1** To retain provisions which were set forth in the Draft Law No. 9456 and which foresaw:

**10.1.1** Unification of approaches to calculation of procedural time limits in the administrative appeal procedure (particularly as regards starting point of their elapsing; their calculation by calendar or business days; shifting the last day of the term falling on the weekend, a holiday or a day-off);

**10.1.2** Establishing deadline for lodging an appeal against a decision (an administrative act) to be calculated based on the day it was received by the appellant rather than the day of its adoption (with the exception of cases of failure to receive a duly sent decision due to appellant's bad faith or negligence);

**10.1.3** Setting a clear standard term for the appeal's consideration (with the possibility of setting another term by special laws in certain areas).

**10.2** To further specify general provisions which were set forth in the Draft Law No. 9456 regarding:

**10.2.1** Establishing deadline for lodging an appeal challenging actions or inactions, which would enable lodging an appeal:

**10.2.1.1** On continuous actions or inactions – at any time when actions or inactions are occurring;

**10.2.1.2** On completed (finished) actions or inactions – within a clearly defined period of time to be calculated from the date of completion (the end) of such actions or inaction (the day when the appellant found out or should have found out about their completion);

**10.2.2** Determining the appeal authority's right to renew the missed deadline for lodging an appeal at the appellant's request subject to existence of valid reasons, with an indicative non-exhaustive list of such valid reasons to be set forth in the legislation to be achieved by:

**10.2.2.1** Extending non-exhaustive list of such valid reasons originally specified in the Draft Law No. 9456;

**10.2.2.2** Determining obligation of the appeal authority to state the fact of renewal of the missed term for appeal, grounds for its renewal and evidence supporting these grounds – to be done in the decision on results of appeal consideration or in a separate procedural decision on time limits renewal;

**10.2.3** Determining the appeal authority's right to extend the term for appeal's consideration – by:

**10.2.3.1** Creating an indicative list of grounds for extending the term for appeal's consideration (depending on complexity of appeal, a significant amount of materials and other factors objectively affecting length of consideration) as well as establishing maximum term of extension and a maximum number of extensions;

**10.2.3.2** Appeal authority's obligation to disclose the number and ratio of appeals for which the period of consideration has been extended in public statistics related to the administrative appeal procedure;

**10.2.4** The norms which regulate enforcement of the decisions taken after the appeal's consideration – by clearly securing the appeal authority's obligation in case of satisfaction of the appeal (including satisfaction based on "tacit consent" principle) to promptly take actions aimed at restoring the infringed rights and legitimate interests of the appellant (or to assign another authority with the task to perform such actions, including follow-up on implementation thereof).

**10.3** To incorporate new provisions, which would establish:

**10.3.1** A clear, short period during which an appeal is scrutinized by an appeal authority for formal defects preventing its acceptance into consideration;

**10.3.2** The obligation of an appeal authority, which detected formal defects of the appeal preventing its consideration, to defer consideration of an appeal by granting the appellant reasonable term for their remedying, so that the appeal could be left without consideration only upon expiration of such a term and failure to eliminate such defects;

**10.3.3** The rule contemplating satisfaction of appeals lodged to challenge decisions (administrative acts) based on the "tacit consent" principle in the event of an appeal authority's failure to issue any decision or send it to the appellant within the term prescribed by law.

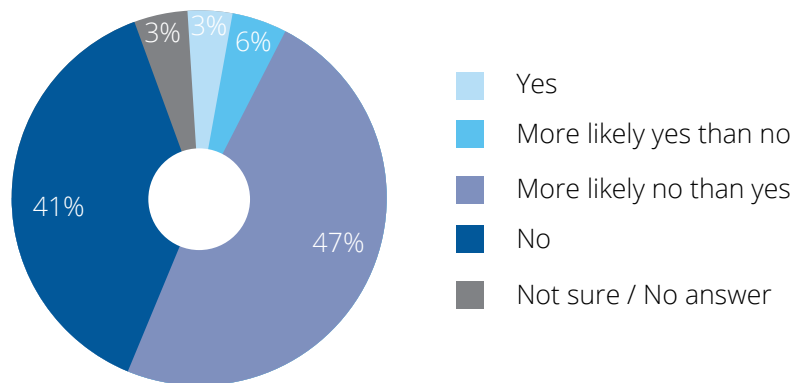
### 3.7 Substantiality, Consistency and Systemic Nature of Appeal

In the course of the administrative and judicial appeal procedure not only legality but also substantiality of public authorities' decisions (actions or inactions) is subject to thorough examination.

It is noteworthy that according to the Council's survey conducted among 344 business

representatives, over 90% of those who have an affirmative position do not expect (42.04% or 140 respondents) or hardly expect (48.04% or 160 respondents) an impartial, comprehensive and fair consideration of an appeal within the framework of the administrative appeal procedure.

**Do you expect an impartial, comprehensive and fair consideration of an appeal submitted within the framework of the administrative appeal procedure?**



**Chart No. 2.** Responses to the question No. 2 of the Survey on Employing Administrative (Internal) Appeal Mechanism.

However, if there is a possibility to challenge the disputed decision (action, inaction) either administratively or directly in the court, 73.3% of respondents would file an administrative appeal first, and only 26.7% would go straight to court.

At the same time, 52.9% believe that in case of an unfavorable decision, its substantiality (i.e. providing clear answers to all the arguments employed in the appeal) is the most important aspect of an administrative appeal handling.

In the Council's view, the foregoing results demonstrate that nowadays appellants mostly expect to get clear substantiated rejections based on appeals consideration results, rather than having them satisfied.

The following comprises analysis of the issues related to substantiality of the appeal authorities' decisions, as well as consistency and systemic nature of the administrative appeals consideration practices.



### 3.7.1 Substantiality

In the Council's view, a decision is to be considered **well-grounded** when the appeal authority, having comprehensively, unambiguously and impartially evaluated all the relevant and important arguments of the parties (as well as other circumstances relevant to the case), reached a balanced conclusion on the analysis results, by duly describing and explaining thereof.

The importance of well-grounded decisions made by appeal authorities after handling the appeals against the public authorities' decisions (actions, inactions) comprises, *inter alia*:

- *for a public authority* – in overall reduction of court cases where the appellant decided to finally agree with the disputed decision (a committed action or inaction);
- *for an appellant* – in obtaining qualitative counterarguments regarding proposals contained in its appeal to further check its subject matter for feasibility of challenging in the court afterwards;
- *for the court* – in the opportunity to fully understand an authority's position regarding application of certain legal provisions in a particular case and ensuring the qualitative review of the decision (action or inaction);
- *for the third parties* – in the analysis of similar legal relationships and risk assessment with regard to possible negative consequences.

The ECHR points out that the dispute resolution authorities' decisions should state the grounds on which they are based. Meanwhile, the duty for the appeal authorities to give reasons for their judgments cannot be understood as requiring a detailed answer to each and

every argument: the extent to which this duty applies may vary according to the nature of the decision<sup>136</sup>.

The Draft Law No. 9456 stipulates that reasoning (substantiation) of an administrative act in the written form should enable the person to properly understand its substance and exercise the right to appeal. Thus, the reasoning part shall include, *inter alia*: (i) the content of the documents and information taken into account during proceedings; (ii) outcomes of review of materials and evidence constituting grounds for conclusions reached by an administrative body; (iii) grounds and references to legal norms the decision is based on<sup>137</sup>. Insufficient, ambiguous or unclear substantiation is deemed to be missing<sup>138</sup>.

Consequently, when carrying out the administrative appeal, the appeal authority should review the case in full – i.e., not being bound only by evidence filed by the parties, but acting proactively, and, if necessary, independently requesting necessary documents or information from third parties<sup>139</sup>.

Hence, to ensure that the decision adopted upon completion of appeal consideration meets substantiality criterion, an appeal authority shall check whether the main requirements of substantive and procedural law were met at the time when disputed decision was adopted, namely: (i) whether all relevant facts have been established; (ii) whether they are supported by proper evidence; and (iii) whether the law is correctly applied. An appeal body leaves the controversial (disputed) decision in force only when a public authority was "persuasive enough" in its conclusions and, therefore, circumstances – that formed the basis for a decision-making – could be stated "at the level of certainty".

<sup>136</sup> See the ECHR Judgment in the case "Seryavin and Others v. Ukraine", application No. 4909/04, paragraph 58 (link: [https://zakon.rada.gov.ua/laws/show/974\\_672](https://zakon.rada.gov.ua/laws/show/974_672)); the ECHR Judgment in the case "Ruiz Torija v. Spain", application No. 18390/91, paragraph 29 (link: <http://hudoc.echr.coe.int/eng?i=001-112961>).

<sup>137</sup> See Part 1 of Article 73 of the Draft Law No. 9456.

<sup>138</sup> See Part 2 of Article 73 of the Draft Law No. 9456.

<sup>139</sup> See also Section 3.4. "Officiality (ex officio)".

By the way, in the administrative cases where unlawfulness of decisions, actions or inactions of a public authority is adjudicated, – the obligation to prove lawfulness of its decision, action or inaction lies with the defendant (public authority). In such cases, a public authority cannot rely on evidence not constituting ground for the contested decision, unless it proves it has taken all possible measures to obtain it before the contested decision was adopted but was not obtained for reasons beyond its control<sup>140</sup>.

Currently, the legislation does not systematically and in sufficient detail regulate issues related to proof in the administrative appeal procedure. It is true even for those areas where the procedure is regulated in a relatively detailed way<sup>141</sup>.

At the same time, according to the Draft Law No. 9456, evidence in the administrative proceedings may be any factual data, based on which the presence or absence of circumstances relevant to the case and the decision is established<sup>142</sup>. These may be, in particular, explanations of the parties or witnesses, documents, things, expert explanations or reports, specialist advice,

etc.<sup>143</sup>. The appeal authority may independently request documents, question witnesses, hear parties in proceedings, or require from another administrative authority to make these actions and send back any relevant additional materials<sup>144</sup>.

The Council welcomes the attempt to create a list of admissible means of proof at the legislative level. Thus, it will become easier to confirm presence or absence of certain facts parties refer to. Hence, plain citation of a number of legal provisions – even if preceded by a phrase like *"the authority cannot accept the appellant's position in view of the following"* – will no longer be considered a valid justification.

Consequently, proper substantiation of decisions made within the framework of the administrative appeal procedure, shall include not only references to legislative norms, but also an adequate assessment of the evidence presented by the parties and reasoned conclusions regarding documents, materials and information collected by the appeal authority.

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<sup>140</sup> See Part 2 of Article 77 of the Code of Administrative Proceedings of Ukraine of July 6, 2005 No. 2747-IV.

<sup>141</sup> See, for example, the Procedure for Formalizing and Submitting Appeals by Taxpayers and Their Review by Supervisory Authorities, approved by the Order of the Ministry of Finance of Ukraine of October 21, 2015 No. 916.

<sup>142</sup> See Part 1 of Article 41 of the Draft Law No. 9456.

<sup>143</sup> See Part 2 of Article 41 of the Draft Law No. 9456.

<sup>144</sup> See Part 2 of Article 86 of the Draft Law No. 9456.

## Case No. 17: Absence of a substantiated reply to the entrepreneur's appeals

In November 2017, the Council received a complaint from a PE (the "**Complainant**") against the actions of the officials of the Department for the State Architectural and Construction Control of the Executive Committee at Kryvyi Rih City Council. In particular, it referred to the enforcement proceedings initiated against the Complainant based on the decision to impose a fine, which, however, at that time had already been cancelled by the court of the first instance and was being reviewed by the appellate court.

Accordingly, the Complainant immediately approached the authorities of a higher level – the SACI of Ukraine and the SACI of Ukraine's Department in Dnipropetrovsk region, – with the appeals challenging allegedly unlawful actions of the Department's officials comprising premature sending of the disputed decision on imposition of fine for enforcement purposes.

### However, having handled the Complainant's appeals:

- the SACI of Ukraine's Department in Dnipropetrovsk region "flushed" the appeal down, i.e. to the authority, whose officials' actions legitimacy was contested as questionable;
- the SACI of Ukraine provided a formal response to the Complainant's appeal, where the general circumstances of adopting the decision to impose a fine were described, and informed the Complainant on its right to contest the respective actions in the court.

Thus, following the administrative appeal submission to the higher-level authorities, the Complainant not only failed to resolve its issue on the merits, but also did not receive any reasoned arguments in support of the legitimacy of actions at the part of the officials of the Department for the State Architectural and Construction Control of the Executive Committee at Kryvyi Rih City Council.

Unfortunately, in line with the foregoing situation, it is a common phenomenon of the Ukrainian practice of administrative appeal, whereby appellate bodies are not thorough in reviewing and considering administrative appeals. Hence, it is not only difficult for individuals to defend their own position, but they are often unable to ascertain the real motives of a decision made not in their favor. This, in turn, deprives the appellants of the opportunity to protect their interests by providing additional explanations on controversial circumstances or by changing the way their own business is being run.

### 3.7.2 Consistency

Since filing an administrative appeal involves the need to accumulate relevant resources (albeit insignificant if compared to judicial appeal), it is usually important for business to pre-assess the chances for success<sup>145</sup>. The opportunity to get familiar with the practice of considering similar cases in detail (along with adherence to the consistency principle) would be quite helpful.

The Council has already mentioned that one of the important elements of the administrative appeal openness principle is the possibility for

<sup>145</sup> For instance, assessment of chances for a successful outcome of the case within the administrative appeal procedure occurs in tax matters, because the period of appeal is directly included to the calculation of a total period of the corresponding tax liability's understatement a penalty is charged for (clause 129.1.1 of the Tax Code of Ukraine of December 2, 2010 No. 2755-VI).

the third parties to get familiarized with the decisions made by the appeal authorities. For this purpose the Council recommends, inter alia, to publish decisions of the appeal authorities in an impersonal form<sup>146</sup>. It is, however, critical to ensure that users are able not only to review the register/archive of the appellate body's decisions, but also search them by the keywords, requisites, legal norms, etc. In such a way it will be much easier and more efficient to find the necessary cases.

The foregoing approach will contribute to the implementation of the administrative appeal **consistency** principle, when any deviation from the legal positions used by the appellate authority while considering similar cases, can occur only in exceptional cases and must be duly substantiated. However, under normal circumstances, an appellate authority should follow its established administrative practice to meet the appellants' legitimate expectations.

It is worth noting that the Draft Law No. 9456 also obliges public authorities to properly substantiate changing the assessment and conclusions in similar cases<sup>147</sup>.

### 3.7.3 Systemic Nature of Appeal

Nowadays ensuring **unity** while enforcing laws and regulations both at the level of courts and among government agencies as well as bodies of sub-national governance is the Supreme Court's responsibility. Thus, conclusions on

application of legal provisions set forth in the Supreme Court's rulings, are binding vis-à-vis public authorities, which employ legal act containing respective legal norm in their activities<sup>148</sup>.

Consequently, the greatest value of the Supreme Court's rulings in this regard lies in its conclusions setting forth results of consideration in the cassation stage, constituting mandatory part of the reasoning section of each ruling<sup>149</sup>. However, public authorities, as well as other users of the Unified State Register of Court Decisions, may find it difficult to understand what exactly falls under category of the *Supreme Court conclusion*, where to find it in the text of a specific ruling and how it correlates with *the Supreme Court's opinion*, which is often underlined in the text of the latter's decisions.

In order to raise awareness about the Supreme Court's legal positions, the latter periodically publishes the Supreme Court Grand Chamber Judicial Practice Digest and Overview of the Cassation Courts Case-Law<sup>150</sup>. In February 2018, the Supreme Court announced<sup>151</sup> it would inform authorities of its legal positions by sending them letters with relevant information; such letters will also be published on the Court's website<sup>152</sup>. Besides, the Supreme Court informed<sup>153</sup> the Council that the rulings of the Cassation Administrative Court in exemplary cases (which have not been appealed against) are sent to all public authorities in accordance with their fields of regulation.

<sup>146</sup> See also Section 3.3.2. "Procedural Openness".

<sup>147</sup> See Part 4 of Article 9 of the Draft Law No. 9456.

<sup>148</sup> See part 5 of Article 13 of the Law of Ukraine "On the Judiciary and Status of Judges" of June 2, 2016 No. 1402-VIII, as well as Part 4 of Article 6 of the Draft Law No. 9456.

<sup>149</sup> See subclause "b" of clause 3 of Part 1 of Article 356 of the Code of Administrative Proceedings of Ukraine of July 6, 2005 No. 2747-IV.

<sup>150</sup> See link: <https://supreme.court.gov.ua/supreme/pokazniki-diyalnosti/analiz/>.

<sup>151</sup> See link: <https://supreme.court.gov.ua/supreme/pres-centr/news/432564/>.

<sup>152</sup> In particular, pursuant to Part 5 of Article 13 of the Law of Ukraine "On the Judiciary and Status of Judges" of June 2, 2016 No. 1402-VIII in the Section "To the Attention of Public Authorities!" the Cassation Administrative Court within the Supreme Court shall publish rulings containing legal opinions mandatory for use in future work (link: [https://supreme.court.gov.ua/supreme/pro\\_sud/do-uvagy/](https://supreme.court.gov.ua/supreme/pro_sud/do-uvagy/)).

<sup>153</sup> The said statement was provided in the Supreme Court's letter of July 15, 2019 out. No. 2117/0/2-19, which was sent in response of the Council's request.

As for the legal position of the Supreme Court of Ukraine, which ceased to exist in December 2017, the current legislation does not directly regulate the issue of mandatory application of its conclusions. However, if the panel of judges or the Chamber (a Joint Chamber) of the Supreme Court considers it necessary to depart from any existing conclusion of the Supreme Court of Ukraine, then this case will be considered by the Grand Chamber of the

Supreme Court<sup>154</sup>. At the same time, according to legislation in force at the time of the Supreme Court of Ukraine, its conclusions were binding to the public authorities<sup>155</sup>. Consequently, it can be stated that the effective conclusions of the Supreme Court of Ukraine (which, by the way, are often referred to by the new Supreme Court in its rulings), remain binding vis-à-vis appeal authorities as well.

## Case No. 18: Ignoring the conclusion of the Supreme Court of Ukraine while rendering decision upon appeal consideration

In 2018, the Council received three similar complaints lodged by Rozivskiy Elevator PJSC (the "**Complainant**") challenging decisions of the state registrars of rights over immovable property. The situation was that three business entities, being constant land users for over 20 years, were reorganized in 2017 and joined the Complainant that became their sole successor. Hence, the Complainant turned to the state registrars with applications seeking re-registration of the right to permanent land use.

Having received three refusals, the Complainant challenged each of them under framework of administrative appeal procedure: firstly – within the Main Territorial Department of Justice in Zaporizhzhia region, and then – within the MinJust.

The Complainant's main argument was based on the legal position of the Supreme Court of Ukraine<sup>156</sup> supported by the Supreme Court<sup>157</sup> (collectively the "**SCU/SC**"), according to which termination of the right to use the land plot may occur only in the absence of the landlord's successor. Consequently, the Complainant, being the successor, had legitimate expectations on having its right to permanent land use being registered in its' name.

<sup>154</sup> See subclause 8 of clause 1 of Transitional Provisions of the Code of Administrative Proceedings of Ukraine of July 6, 2005 No. 2747-IV.

<sup>155</sup> See Part 1 of Art. 244-2 of the Code of Administrative Proceedings of Ukraine of July 6, 2005 No. 2747-IV (as amended and being effective until December 15, 2017).

<sup>156</sup> See the Ruling of the Supreme Court of Ukraine of February 21, 2011 in the case No. 21-3a-11 (link: <http://reyestr.court.gov.ua/Review/14405500>).

<sup>157</sup> See the Ruling of the Cassation Commercial Court within the Supreme Court of October 10, 2018 in the case No. 907/916/17 (link: <http://reyestr.court.gov.ua/Review/77294520>); the Ruling of the Cassation Commercial Court within the Supreme Court of July 19, 2018 in the case No. 914/2211/17 (link: <http://reyestr.court.gov.ua/Review/75454196>).

However, during the hearing of the Complainant's appeals, the Regional Commission for Handling Appeals in the Sphere of State Registration noted that the MinJust's legal position on a similar issue had already been clarified in its letter of explanation. According to it, the Land Code of Ukraine does not contain any norms on automatic transfer of the right to permanent land use in case of reorganization of a legal entity-land user. Consequently, despite the SCU/SC's legal position, the Complainant's appeals were rejected.

Even though the Complainant's issue was subsequently scrutinized by the MinJust Commission, – neither existing SCU/SC's legal positions were taken into account, nor the reasons for their failure to do so were provided. As a result, in March 2018 the Complainant obtained the decisions of the MinJust on rejection of its appeals.

Consequently, due to the exhaustion of the available means of administrative appeal, the Council had to dismiss investigation of the Complainant's complaints, and the latter decided to seek protection in court.

Special attention should be given to the application of the ECHR case-law by the domestic appeal authorities.

As it is known, when considering the cases, Ukrainian courts apply the Convention for the Protection of Human Rights (the "**Convention**") along with the ECHR case-law as a source of law<sup>158</sup>. Meanwhile, current legislation does not directly oblige public authorities to adhere to the ECHR case-law<sup>159</sup>. The likely cause for that is that application of the ECHR positions requires special legal training and deep understanding of not only the concepts of human rights enshrined in the Convention, but also the specifics of the ECHR work as a special Conventional body. Moreover, given that judges are obliged to know and apply the ECHR practice when adjudicating, the method of such application is rather improper: judges are often criticized for excessive or inappropriate citing of the ECHR judgements without paying due attention to the

context of the Convention itself, or the actual circumstances of the case<sup>160</sup>.

Consequently, the issue of systemic nature of the appeal should be resolved in Ukraine in the following way: Convention and the ECHR case-law shall be mandatory for Ukrainian courts, while sustainability and unity of their enforcement shall be ensured by the Supreme Court. In its turn, the Supreme Court's conclusions regarding application of the legal provisions must be directly taken into account by the public authorities in both their day-to-day activities while rendering decisions as well as while considering administrative appeals. Therefore, continuous monitoring of the Supreme Court's legal positions by the government agencies and municipalities would largely contribute to systemic nature of the administrative appeal in Ukraine.

<sup>158</sup> See Article 17 of the Law of Ukraine "On the Implementation of Judgements and Application of the Case-Law of the European Court of Human Rights" of February 23, 2006 No. 3477-IV.

<sup>159</sup> Although Part 5 of Article 19 of the Law of Ukraine "On the Implementation of Judgements and Application of the Case-Law of the European Court of Human Rights" of February 23, 2006 No. 3477-IV stipulates that the ministries, other CEBs shall ensure systematic control over observance – within the framework of departmental subordination – of administrative practices that comply with the Convention and the ECHR practice, in fact this provision is rather declarative and the Council is not aware of any cases of the relevant genuine control by public authorities.

<sup>160</sup> See link: [https://sud.ua/ru/news/blog/140972-do-pitannya-pro-ne-relevantne-zastosuvannya-praktiki-yevropeyskogo-sudu-z-prav-lyudini-praktichni-poradi?fbclid=IwAR0UMsGazqkz2GH6EO65ihAxGAWmKLG1\\_5XLoyeDzEaTqolaBIQr2VwmXfs](https://sud.ua/ru/news/blog/140972-do-pitannya-pro-ne-relevantne-zastosuvannya-praktiki-yevropeyskogo-sudu-z-prav-lyudini-praktichni-poradi?fbclid=IwAR0UMsGazqkz2GH6EO65ihAxGAWmKLG1_5XLoyeDzEaTqolaBIQr2VwmXfs).

## COUNCIL'S RECOMMENDATIONS:

In order to ensure practical implementation of the principles of **substantiality, consistency and systemic nature of appeal** in the administrative appeal procedure, the Council recommends as follows:

**11. The Cabinet of Ministers of Ukraine** – to prepare and lodge with the Verkhovna Rada of Ukraine the Draft Law of Ukraine "On the Administrative Procedure" (in replacement of the Draft Law No. 9456 of December 28, 2018) and, within its competence, to facilitate its adoption in order:

**11.1** To retain provisions which were set forth in the Draft Law No. 9456 and which foresaw:

**11.1.1** A list of admissible means of proof in the administrative appeal procedure, comprising, inter alia, explanations of the parties or witnesses, documents, things, expert explanations or reports, specialist advice;

**11.1.2** Obligation of appeal authorities to provide proper justification in case of a change of assessment and conclusions reached in similar cases.

**11.2** To further specify general provisions which were set forth in the Draft Law No. 9456 containing the list of issues due to be scrutinized by appeal authority in the framework of the administrative appeal, by referring to:

- compliance with requirements of material law;
- compliance with the procedure (including competence issues),
- correct and complete identification of circumstances of the case based on proper and admissible evidences.

**11.3** To incorporate a new provision, which would ensure making decisions of the appeal authorities public (subject to compliance with confidentiality requirements) in an easy to use, intellectually searchable format.

### 3.8 Effectiveness

Everyone will probably agree that the administrative appeal procedure should be **effective**. Yet, there are very different approaches to understanding the substance of the principle of effectiveness and, most importantly, key indicators against which its implementation should be measured.

In this section the essence of the effectiveness principle will be attended along with the problems faced while measuring effectiveness in the context of the administrative appeal procedure. After that, some suggestions on how to improve the methodology for assessing effectiveness will be given.



### 3.8.1 Adhering to Effectiveness Principle

Current legal framework on public service uses the term "effectiveness" in the narrow sense, defining it as a rational and effective use of resources to achieve public policy objectives<sup>161</sup>. Similar notion is used by authors of the Draft Law No. 9456 proposing to stipulate that the administrative authority organizes consideration and resolution of cases within its jurisdiction, with the least spending of funds and other resources in a simple and effective way. It is also proposed to establish that the administrative authority ensures consideration and resolution of the case by carrying out procedural actions being sufficient for proper resolution of the case<sup>162</sup>.

However, for the purposes of this Report, the Council proposes to use a broader understanding of the effectiveness principle, which is not limited to financial and procedural cost savings, and embraces general performance and quality of the administrative appeal procedure.

Effectiveness (in the broad sense of this term) is the quintessence of all principles of the administrative procedure, and an indicator of whether this procedure properly performs its function and brings the desired result.

The assessment of effectiveness of the administrative appeal procedure as well as evaluation of effectiveness of any processes in the public sector is quite a complex exercise. This area is in a state of constant competition between officials seeking at all times to report on their exceptional effectiveness and, on the other hand, external stakeholders (primarily society) attempting to ascertain a genuine picture of the state apparatus' activities.

Setting *Key Performance Indicators* (or "**KPIs**", for short), accurately measuring them and correctly displaying results in public reporting are key pre-conditions for the state apparatus to work properly (and, in case of flaws in its work – for the respective stakeholders to be able to identify them and timely initiate corrective actions).

It will hardly be an exaggeration to say that actions and way of thinking of an official depends, first of all, on the KPI brought to his/her attention. So, if a performance indicator of an official who is in charge of audit work is "the total amount of charged fines", there is no doubt that almost every inspection will end up with substantial fines imposed. If there is no "level of satisfaction of consumers with the quality of service" among performance indicators of the employee of administrative service center, there is no wonder that consumers rarely anticipate a smile, pleasant communication and willingness to help from such a person.

This problem is particularly acute in the administrative appeal sphere. It is due to the fact that understanding of the role and purpose of this procedure is often distorted. Essentially being a "zero" quasi-judicial institution, an appeal authority in its form is usually a typical element of the executive branch of authority, with an institutional mentality pertaining to it – i.e., administrative command and strict hierarchy.

As it was already mentioned in the Report, in Ukraine, in most areas of public administration, an appeal function is not clearly separated and organizationally divided from functions generating grounds for appeals. It is exactly what gives rise to consequences to be discussed further.

<sup>161</sup> See clause 6 of Part 1 of Article 4 of the Law of Ukraine "On Civil Service" of December 10, 2015 No. 889-VIII.

<sup>162</sup> See clause 11 of Part 1 of Article 4 and Article 15 of the Draft Law No. 9456.



## Example No. 2: Schematic representation of the consequences of excessive merge of administrative appeal function with other functions of government agency

Suppose an "A" authority is established to carry out state control in a certain area, and one of the key indicators of its effectiveness is the number of violations detected. An "A-1" department (conducting inspections and detecting violations) and an "A-2" department (dealing with appeals against inspection results) are created under the authority.

Let us imagine that 900 detected violations per year "N" is the target indicator, and, according to inspection results, the "A-1" department detected 1000 violations in total.

However, 200 administrative appeals challenging results of inspections were received by the "A-2" department. 150 of these appeals were substantiated and the "A-2" department should have satisfied them, thus reducing the number of confirmed violations to 850.

However, such a scenario will result in the fact that the "A" authority does not meet its KPI on the whole, and all its employees (both from the "A-1" and "A-2" departments) will expose themselves to negative consequences: changes in personnel, reassessment, internal investigations, etc.

However, these consequences could have been avoided provided that not 150, but only 100 appeals are satisfied. Fifty would be even better because in this case the "A" authority targets will be exceeded and everyone will receive his or her bonus.

Of course, it can be argued here (and quite to the point) that the number of detected violations or fines imposed should not be an indicator of effectiveness of any authority or official. However, it is a topic for a broader discussion. A rather simple moral for the administrative appeal purposes from the example above can be deduced: it is unlikely that this procedure will prove to be effective unless the function of the imaginary "A-2" department is clearly separated from the rest of the "A" authority's linear functions and absolutely different KPIs for an imaginary "A-2" department are set.

Any business owners or managers who introduced a quality control function should be well aware of the problem. The administrative appeal function in a government agency is indeed (to some extent) similar to quality control function in production. Its implementation paradigm is the same – the quality control function has a chance to be effective only if it ensures sufficient independence of controllers

from those being in charge of production. If, however, they all have the same production-oriented KPIs, it is quite likely for the quality control to become a formality.

### 3.8.2 The Most Suitable KPI

So how should the effectiveness of administrative appeal function be measured?

In order to answer this question, one should ascertain what this function is like first. It is, as can be concluded from the administrative appeal quasi-judicial nature, nearly the same, as the function of administrative courts – it lies in reviewing the challenged decisions (actions, inactions) in terms of their compliance with the law and cancellation (suspension) of those ones non-compliant with the law. An appeal authority should provide an impartial assessment of the contested decisions (actions, inaction) to confirm and justify their legality or, otherwise, reasonably dismiss it.

How to understand, whether the appeal authority assessed the lawfulness of the contested decision (action, inaction) correctly? In the Council's view, one of the most reasonable ways would be to ascertain how the legality of the same decision (action, inaction) was further assessed by the court.

This is how we find the target KPI – a ratio of decisions adopted within the framework of the administrative appeal procedure confirmed by courts. More precisely, it can be defined as *"a ratio of cases resolved in favor of the public authority, out of the total number of cases considered in courts after their consideration within the administrative appeal procedure"*.

The key to successful implementation of this KPI is a high-quality methodology for its calculating and preventing all kinds of statistical manipulations.

From the Council's standpoint, the appeal authority's openness and transparency – including regular publication of statistics in open sources as well as implementation of an effective public control over activities of the appeal authority – will contribute to achieving this goal.

### **Example No. 3: The gap between the administrative and judicial appeal results in the tax sphere**

The SFS of Ukraine is, perhaps, the most heavily-loaded administrative appeal authority in Ukraine. In 2017 it considered appeals of taxpayers against 15,152 TNDs in 2018 – against 23,366 TNDs, and only in Q1 2019 – 7,273 TNDs.

Public information published on the agency's website, allows calculating a per cent of TNDs cancelled (totally or partially) under this procedure: 11.35% in 2017; 16.01% in 2018; 18.5% in Q1 2019.

However, statistics on the website does not allow understanding what was exactly a part of TNDs upheld upon the administrative appeal procedure and subsequently canceled by courts (and, therefore, it is impossible to assess the real administrative appeal effectiveness).

At the same time, according to observations of the Council, which constantly monitors court proceedings related to 214 complaints considered within the administrative appeal procedure with its participation, in which the SFS of Ukraine dismissed appeals, and complainants subsequently lodged claims with the court – about 80% of such cases, considered by courts, were won by taxpayers, as of March 2019.

Back in 2017, an attempt was made to introduce the KPI "the ratio of confirmation by courts of decisions made under the administrative appeal procedure" in the SFS of Ukraine. However, the agency failed to report on status of its implementation due to absence of software, which could enable calculating it.

In March – April 2019, in the framework of Inter-Institutional Working Group on the Reform of a System of Authorities Implementing Tax and Customs Policy, the Council's proposals were taken into account and the request for setting up the respective KPI for the State Tax Service of Ukraine was included in the Draft Action Plan on the Implementation of Strategic Measures of Reforming the System of Authorities Implementing the State Tax and Customs Policy, approved by the CMU Order of December 27, 2018 No.1101-p.

From the Council's standpoint, while developing a qualitative methodology for calculating this KPI (not only for the fiscal authority but also for any other appeal authority) when it comes to developing a correct set of data, – it is appropriate to follow the following steps.

**Step 1.** Keeping a separate record of the ratio of appeals rejected by the appeal authority on formal grounds

When analyzing the total flow of appeals handled by the administrative appeal authority, one should single out a ratio of appeals rejected for procedural reasons because of their technical defects. In such cases administrative appeal procedure was incomplete and the appeal authority did not conclude on the legality of contested decisions (actions, inactions). Therefore, there is no point in comparing conclusions of the appeal authority with further conclusions made by the court. This indicator, however, has its independent statistical value. An extremely big part of rejected appeals eventually demonstrates that formal requirements for their submission are too complex and unclear.

**Step 2.** Keeping a separate record of the ratio of appeals where the appellants did not refer to courts after an administrative appeal procedure

Next, it is appropriate to single out category of cases not being considered in courts. This ratio should also be excluded from calculations keeping in mind that there are many reasons why appellants decided not to go to the court (starting from agreeing with the decision of the administrative appeal authority and finishing with the high cost of court procedures, minor importance of the case, the issue becoming irrelevant, etc.) or the court refused to launch proceedings (missing a limitation period, failure to pay court fees, etc.). It is unlikely that some fluctuations in this part of cases are indicative, unless it considerably and constantly increases. The latter – provided that external conditions (litigation cost, etc.) are constant – might demonstrate that appellants who were denied with satisfaction of their appeals were more likely to agree with such a decision and, therefore, decisions, in all likelihood, became more qualitative, motivated and clear.

**Step 3.** Calculation of the ratio of the State-won cases, which went through both administrative and judicial appeal procedures

The analysis should focus on cases that, after going through the administrative appeal procedure, came to court, and were resolved on the merits. It is the ratio of those cases that were resolved in favor of public authority which appears to be a really proper indicator of the overall effectiveness of the administrative appeal procedure, that, in view of the Council, can and should be applied in practice.

## Example No. 4: Correct calculation of the ratio of confirmation of decisions made within administrative appeal procedure by courts

During 2020 the appeal authority "A" considered 220 appeals, out of which 20 were rejected due to formal defects, and the remaining 200 were considered on the merits, including 50 of whom being satisfied and 150 unsatisfied.

Out of these 150 cases: appellants initiated a court claim in 120 cases, while the remaining 30 cases were not further appealed.

Out of 120 cases that came to courts, in 20 cases courts refused to initiate proceedings or returned claims for various reasons, and 100 were accepted for proceedings and considered on the merits.

Out of 100 court decisions that became effective, 75 were ruled in favor of claimants, 25 – in favor of a public authority. Consequently, the level of confirmation of appeal authorities' decisions by courts is 25%.

For decisions that can be monetary measured (for example, on imposition of fines), it is appropriate to further measure the level of their confirmation by courts in monetary terms.

For example, during 2020 courts considered on the merits cases attempting to challenge legality of decisions (that were left in force based on the administrative appeal results) totally being worth to UAH 100 mln., out of which the court ruled in favor of the public authority in cases for the total amount of UAH 30 mln.

Consequently, the level of confirmation of appeal authorities' decisions by courts in monetary terms is 30%<sup>163</sup>.

In the Council's view, while selecting the optimal reporting period for keeping record of the foregoing KPI depending on the load level of a particular appeal authority, – the one should be guided by the principle that "the more appeals are considered by the appeal authority, the shorter the reporting period should be".

The load level can be determined by the number of appeals considered by the appeal authority during the last calendar year. By determining the load, you can set the corresponding reporting

period (for example: up to 1000 appeals received – the annual reporting period; over 1000 appeals – a quarterly period).

It should be taken into account that correct calculation of this indicator requires a certain time, since going through the first and appellate court instances in Ukraine (especially in the capital) may last a year or more, not to mention the cassation one. Therefore, only in 2022 the appeal authority will have the opportunity to form more or less correct and useful statistics

<sup>163</sup> By the way, it will not be superfluous to also keep record of the amount of legal expenses incurred by a public authority in respect of won/lost cases. Indeed, recently, such authorities are not exempt from payment of court fees. Consequently – while assessing the performance of the respective authorities – it is appropriate to calculate court costs and take their amount into account.

on appeals considered during 2020. And in 2023, these statistics will have to be adjusted again, since during this time a certain number of cases will be reviewed in the cassation instance.

At first glance, such a long scrutiny cycle is likely to be perceived as rather burdensome factor not only for representatives of public authorities engaged in the administrative appeal mechanism but also for private sector interacting with this mechanism from the outside. After all, the former seek to report on their activities and close the reporting period as soon as possible, and the latter being dissatisfied with the administrative appeal procedure require urgent and decisive actions.

Meanwhile, by implementing various reforms Ukraine is supposed to gradually move closer to a stable, sustainable and systematic development. The proposed KPI corresponds exactly to this idea – i.e., every official must make decisions assuming that in 2-3 years the Supreme Court upholds its legitimacy, and only then he or she would be entitled to proudly report on his or her work and get an expected bonus.

The above KPI, of course, cannot be the only self-sufficient indicator of the administrative appeal procedure's effectiveness. It should be backed up by a set of other indicators that may vary depending on a particular sphere and may, inter alia, include:

- i)** indicators related to timeliness of appeals consideration (average time of consideration, the ratio of timely considered appeals, the ratio of appeals against which consideration term was prolonged, etc.);
- ii)** indicators related to the subjective satisfaction of participants with the administrative appeal procedure; the overall quality of the procedure and its particular aspects (according to the surveys, which should be conducted among all participants and provide an appropriate level of anonymity for survey participants), etc.

## COUNCIL'S RECOMMENDATIONS:

In order to ensure practical implementation of the **effectiveness principle** in the administrative appeal procedure, the Council recommends as follows:

**12. The Cabinet of Ministers of Ukraine** – to approve a legal act (regulations, procedure, methodology, etc.) determining the procedure for setting key performance indicators, effectiveness and quality of service activities (KPIs) of executive authorities (their structural divisions, officials) whose functions include consideration of appeals filed according to the administrative appeal procedure, which would envisage:

**12.1** Mandatory application of the "ratio of confirmation by the courts of decisions made according to the administrative appeal procedure" KPI (calculated as the ratio of cases resolved in favor of the public authority out of the total number of cases considered in courts after their going through the administrative appeal procedure; for decisions having monetary measurement – the ratio in monetary terms is additionally calculated);

**12.2** Setting an optimal reporting period for calculation of the indicator depending on the load of a certain appeal authority (the more the load, the shorter the reporting period), for instance:

- less than 1000 appeals per year – annual period,
- over 1000 appeals per year – quarterly period;

**12.3** Mandatory measurement and updating (with the foregoing frequency) of the status of measurement of the above KPI for at least 3 years after the end of the reporting period, metrics of which are measured;

**12.4** Mandatory publication of the latest results of the measurement of the foregoing KPI on the official public authority's website and/or in other public sources;

**12.5** Recommended use of other KPIs, depending on a specific features of a given sphere, which, among other things, may include:

**12.5.1** KPIs related to timeliness of appeals' handling (average time for handling appeals, the ratio of appeals considered in a timely manner, the ratio of appeals against which consideration period was extended, etc.),

**12.5.2** KPIs, related to subjective satisfaction of participants with the administrative appeal procedure, this process overall quality and its particular aspects (according to the surveys, which should be conducted among all participants and provide an appropriate level of anonymity for survey participants), etc.





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