UKRAINE

National report

Alternative dispute resolution in administrative matters

I. The goals and the scope of administrative procedures

An administrative appeal is the main alternative dispute resolution procedure that presently is at the disposal of the parties of administrative disputes in Ukraine. The institution of administrative appeal in Ukraine is based on the article 40 of the Constitution of Ukraine provided that *«Everyone has the right to file individual or collective petitions, or to personally appeal to bodies of state power, bodies of local self-government, and to the officials and officers of these bodies, that are obliged to consider the petitions and to provide a substantiated reply within the term established by law»*.

There are no obligatory procedures conducted before the administration, prior to referral to the court in Ukraine. Moreover the Constitutional Court of Ukraine has time and again adhered to the position that the right for court protection can not depend on the pre-trial procedures. The administrative appeal is an alternative towards the judicial appeal.

General rules for consideration of administrative complaints take an effect on all spheres of state governance except the protection of business competition as well as labor rights. These rules are provided by the Law of Ukraine «On citizens' complaints» of 2nd October 1996. According to the Law the citizens of Ukraine have a right to apply to the public and local authorities, enterprises, institutions, organizations regardless of their form of ownership, public associations or officials with appeals on the implementation of their social and economic, political and personal rights and legal interests and a complaint about violation thereof. Depending on the context appeals from citizens are divided into some categories: solicitations (an appeal with a request to promote the implementation of civic rights and interests enforced be the Constitution and the current legislation of Ukraine), complaints (an appeal with a request to restore rights and protect legal interests violated by actions or decisions of officials) and proposals (appeal which provides advice or recommendations for activities of bodies of state power and bodies of local self-government).

Special rules for consideration of administrative complaints of persons and rules for consideration of administrative complaints of legal entities are provided by specific laws such as Tax Code, Customs Code, Laws of Ukraine «On Public Procurement » and «On Protection of Economic Competition».

In some cases a person is allowed to choose legal remedy, e.g. according to the article 56 of the Tax Code of Ukraine decisions of the supervisory body can be challenged before administration or before court. Still appeal to administrative court is an impediment for administrative appeal. As a general rule, acceptance of a claim by administrative court stops administrative appeal procedures before administration.

Filing of an administrative appeal before administration affects the term for judicial recourse. As a general rule, in order to bring before an administrative court an action concerning protection of the person's rights, freedoms and interests, the established term is six months, which, if nothing provides for otherwise, is counted from the day when such person became aware or was supposed to become aware of violation of such person's rights, freedoms or interests.

If the law provides for an opportunity of extra-judicial procedure of dispute settlement and the claimant has used such procedure, then the term of one month is established to bring an action before an administrative court; such term is counted from the day when the claimant became aware of the power entity's decision concerning results of consideration of such person's complaint against decisions, actions or omissions of the public authority (part four of article 99 of the Code of Administrative Justice of Ukraine).

Besides, the Code of Administrative Justice of Ukraine gives the opportunity for the parties to settle the dispute in part or in full on the basis of mutual concessions (Article 113). Reconciliation of the parties may apply only to the rights and obligations of the parties and subject matter of the administrative dispute. In case of the reconciliation, the court makes a ruling on closure of proceeding in the case, which determines conditions of the reconciliation. If one of the parties fails to comply with the conditions of the reconciliation, the court, by the motion of the other party, renews the proceeding in the case.

It should be said that the drafting of special legislation on Administrative Procedures have being started in Ukraine more than ten years ago (before administrative courts were established in Ukraine). Finally 2014 Law "On Administrative Procedures" was drafted. This Law should determine the rules of procedure for executive authorities, bodies of local self-government, their officials and other entities entitled to exercise state power on providing of impartial and opportune consideration of administrative cases. The Law has not been adopted yet.

II. The stakeholders in administrative procedures

The administrative appeal procedure may be used by all categories of natural and legal persons.

III. The procedures of alternative procedures

General rules for consideration of administrative complaints

According to the Law of Ukraine "On citizens' complaints" (part one of Article 16) the complaint against the acts or decisions of public authority and official is filed to the superior authority or official.

In some areas of state governance complaints are filed to special appellate bodies, created by chiefs of public authorities which acts are being challenged. Such special appellate bodies consist of officials of these public authorities and staff members of other public legal entities. Such bodies are Appellate Chamber of State Intellectual Property Service of Ukraine, Appellate commission of Ukrainian Centre for Assessment of Knowledge Quality, Expert and Appellate Council under State

Committee of Ukraine of Regulatory Policy Issues and Entrepreneurship. Some appellate bodies include representatives of social organizations by their consent.

According to the general rule natural person may challenge a decision to public authority or official of higher level (Article 17 of the Law of Ukraine "On citizens' complaints") within one year of the date this decision was maid. Complaints filed with the infringement of this term should not be considered. There is no general deadline for filing a complaint by legal entities in Ukrainian legislation.

Public authority or official that considers a complaint can revive limitation period missed by private individual for legitimate excuses.

Complainant has the right to, in particular: personally present a case to person that considers a complaint and take part in its examination; become familiar with all materials of complaint consideration; exhibit additional materials or insist on requesting them by public authority that considers a complaint; be present during the hearing; obtain a lawyer; receive written response about the results of complaint consideration.

A public authority or official considering a complaint is obliged to, in particular: invite individual person to hearing after his/her demand; cancel or modify challenged decisions, as provided by the legislation of Ukraine, if they do not comply with the law or other regulations; immediately take measures to stop unlawful actions, search out and eliminate causes and conditions conductive to violations; ensure the renewal of violated rights, real executing of decision on the merits of complaint; advise the citizen in writing about the results of complaint consideration and effect of carried decision; expound the procedure for appeal against decision on the merits of complaint if this complaint was recognized unwarranted.

The complaint must be considered and resolved within one month after its reception date; those that do not need additional examination must be considered and resolved immediately or for the period of no more than fifteen days. If it is not possible to resolve complaint during one month the chief of competent public authority sets the necessary period for its consideration with complainant notifying. In addition total time limit for resolution of the merits of complaint should be no more than forty-five days. The time limit can be reduced upon written reasonable demand of individual person.

As a general rule, public authorities and officials consider the complaints of individual persons without taking payments.

Special rules for consideration of administrative complaints in public procurement and tax area

Under Article 18 of the Law of Ukraine "On Public Procurement" individual persons and legal entities have the right to file a complaint against decisions, acts or omissions of procuring entity or general procuring entity that contradict public procurement law and violate the rights or legitimate interests of complainants. Such decisions, acts or omissions can be challenged to Anti-monopoly Committee of Ukraine in order to defend rights and interests of individual persons and legal entities secured by the law. Such complaints are filed by paper form and must be signed by complainants.

Complaints must be filed within ten days from the date when the complainant became aware or should become aware of violation of his rights or legitimate interests by decision, act or omission of procuring entity, general procuring entity, but before signing a purchase contract.

Complaints about competitive procurement documentation (qualifying documentation, price offers inquiry) can be filed for any period from its advertising date but no more than four days before the offering of competitive procurement (qualifying offers) and no more than three days before filing of price offers.

Complaints against decisions, acts or omissions of procuring entity, general procuring entity made before expiring of limitation period for competitive procurement offering (qualifying documentation, price offers) are filed for the period of no more than four days before the offering of competitive procurement (qualifying offers) and no more than three days before filing of price offers.

Instead, complaints against signed purchase contracts are considered by judicial means only.

When filing a complaint, complainant sends copy of complaint to procuring entity, general procuring entity, whose decision, act or omission is challenged. They have a right to take part in complaint hearing. Complaint hearing is open.

When filing a complaint to appellate body a complainant has to pay a fee. The amount of the fee is put to the State budget of Ukraine.

Complainant, procuring entity can challenged the decision of appeal body within thirty days of the date this decision came to their knowledge.

Under Article 56 of the Tax Code of Ukraine a complaint should be filed in writing to oversight authority (if appropriate – with duty-certified copies of documents, settlements and evidence) within ten days after the date when taxpayer receipted tax assessment notice or other decision carried by oversight authority that is being challenged.

In administrative appeal procedure the burden of proof lies on the oversight authority.

The oversight authority that considers complaint of taxpayer is obliged to make the reasoned decision and send it within twenty calendar days.

The decisions on complaints of taxpayers maid by central executive authority responsible for national tax and customs policy and its implementation are final; these decisions can not be challenged within further administrative procedure but they still can be contested in the courts.

Mediation

The use of mediation with participation of judge is not regulated by Ukrainian legislation. However, Ukrainian courts have experience of using this procedure. In particular, during 2007-2010 a series of activities on implementation of judiciary mediation concept in Ukrainian courts, more specifically in administrative courts, was organized throughout cooperation of HACU with the Council of Europe.

Since 2013 the system of pre-trial dispute resolution by professional judge has been experimentally establishing in four pilot courts of Ukraine (two of which are

regional administrative courts[1]) within other project of international technical assistance. This system was adopted from Canada.

Each of these four courts established a procedure of pre-trial dispute resolution. Under this procedure the right to perform pre-trial dispute resolution belongs to professional judge of respective jurisdiction. Such judges were chosen by assemblies of judges of each pilot court. These judges formed a special group for conducting negotiations by professional judge.

As pre-trail dispute resolution is not regulated by Ukrainian legislation, use of this procedure during pilot approbation became possible through application of Article 156 of the Code of Administrative Justice of Ukraine "Suspending and renewing of proceeding". This article stipulates that if both parties move a motion for period for reconciliation, judge puts a stay on the proceeding pending before the end of this period. The court makes a ruling on suspension of the proceedings in the case. The court's ruling concerning suspension of the proceedings in the case may be appealed.

So the case passed on to the judge for conducting pre-trial negotiations is an administrative lawsuit (dispute) under which a proceeding was instituted and parties of which moved a motion for pre-trial dispute resolution by the judge. Dispute shall be deemed as solved if its resolution was realized with making a decision satisfying the parties to the best advantage (through the amicable agreement, agreement conclusion, rejection of the suit, recognition of the claims, and passing a judgement that suits both parties etc.).

Conducting of negotiations on pre-trial dispute resolution by the judge is performed with mandatory compliance with such principles as confidentiality, rule of law, legality, equality and voluntariness of negotiating parties).

The negotiations procedure has its specialties and advantages compared to usual litigation. Its specialties are: firstly, it is performed by third party with special expertise; secondly, the special structure of this procedure makes possible a consensual finding of mutually beneficial solution; thirdly, unlike the classic litigation this procedure is not limited with subject matter of the dispute.

Negotiations must be conducted in compliance with some rules. Firstly: parties must file a common (or separate) claim for negotiations on pre-trial settlement of dispute. If negotiations are ineffective the materials of pre-trial dispute resolution filed by parties (evidence bill, evidence, written explanations etc.), are returned to negotiators and other documents (agreement, hand receipt etc.) are destroyed by the court. None of these documents has legal force. In that case, proceeding is renewed and litigation is performed according to the procedure provided by the Code of Administrative Justice of Ukraine.

If one of the parties fails to comply with the conditions of the agreement reached through the negotiations, the other party has a right to take legal action in order to defend its violated rights.

It is unconditionally that parties have rights and obligations as in usual litigation procedure. Every negotiator has a right to refuse the negotiation at any time and to

[1] These courts are Odesa District Administrative Court and Ivano-Frankivsk District Administrative Court. Information on the use of mediation procedure given below is based on the experience of these pilot administrative courts.

continue case considering under litigation procedure provided by the Code of Administrative Justice of Ukraine.

It must be noticed that the draft Law of Ukraine "On Mediation" was brought before the Parliament in December 2015. This Draft Law defines mediation and mediator, provides main principles of mediation, legal basis of this procedure, conditions of gaining a mediator status, specialties of mediation application in the litigation or arbitration procedure, quality of mediation services control mechanisms.

IV. The efficacy of alternative procedures

Administrative courts are not aware of the statistic data on the efficiency of alternative dispute resolution in administrative matters by power entities.

The experience of the administrative courts of Ukraine as regards mediation shows that unfortunately not every dispute can be solved under reconciliation procedure for legitimate excuse. For example, proposing of pre-trial dispute resolution procedure is inadvisable for such categories of cases as: appealing against regulations of executive, legislative authorities, bodies of local self-government and other public entities, cases about election or referendum procedure, limitations of the right to peaceful assembly, decisions, acts or omission of executive authorities, termination of powers of people's deputies, cases about considering of customs or tax bodies acts, based on the inquiries of the Security Service of Ukraine; cases about expulsion of foreigners and stateless persons or about refugee status. Instead, the mediation procedure is unconditionally possible in cases regarding illegal dismissal from public service, registration of instruments of civil status, failure to provide information etc.

It shall be noticed that there are much more unilateral applications for such negotiations filed by individual persons and legal entities receipted by courts, but procedure is hardly used because public authorities refuse to take part in negotiations.

The major obstacles the pilot courts had faced were disinterestedness in procedure of parties, and in particular public authorities, straight prohibition for public authorities to solicit a truce, necessity for amendment of legislation in order to neatly regulate the reconciliation procedure.

The main reason of slow implementation of the mediation procedure in administrative justice is the public authorities themselves. Their representatives do not want to take a liability for decisions maid in the course of negotiations and as a result do not want to enter such negotiations. Realization of such mediation procedure principles as voluntariness and initiative by public authority is one of the most vexed problems. In spite of some discretionary powers of public authorities, possibility of their sole discretion is limited. Exercise of duties by public and local authorities does not allow any compromise because public authority can act only to the extent permitted by laws in force.

In the opinion of the High Administrative Court of Ukraine the meditation must be judiciary, and tax controversies must have the obligatory pre-trial adjustment procedure.