

Administrative Justice Monitoring in Ukraine

Report (draft)

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ABBREVIATIONS

ADR	Alternative Dispute Resolution
AJM	Administrative Justice Monitoring
CAJ	The Code of Administrative Justice
MoJ	Ministry of Justice

I. INTRODUCTION TO THE MONITORING MECHANISM.

Administrative law covers a very wide range of issues of citizens, administrative authorities that are a relevant interface between private persons and the state, the determination of their rights is mainly in their hands. Even the more administrative judiciary is a pillar for a society governed by the rule of law.

Thus, the Administrative Justice Monitoring (AJM) mission (as part of the EU Project Pravo–Justice) was aimed to design and implement a monitoring mechanism of substantive and procedural administrative law in line with structural setting of administrative judiciary, its embedding in the Ukrainian justice system. Such monitoring is extremely important to ensure that the information needed for primary and secondary legislation and judicial decision-making is collected, reviewed by way of evidence-based approach, and thereby contributes to a better balance between efficiency and fairness, in line with European standards and best comparative practices. Moreover, it will provide *reliable tools for evaluation of the legislation as well as proposals for amendments*.

New Code of Administrative Justice (CAJ, Code) became effective in December 2017. Now, after two years of its implementation it is important to know if the legislator's aim to improve the efficiency of proceedings as well as to ensure the equality of arms is met in reality. In addition, a key question remains outstanding – that is the definition of the scope and extent of executive discretion in various administrative disputes – namely, to what extent the executive authorities should be subjected only to limited judicial control in order to conduct their work effectively, but also to what extent the courts should provide a check on the reasonableness in the exercise of that discretion. This question also goes to the core of the principle of separation of powers, which is not always well understood in the sense that it is a two-way street that also implies that administrative courts are not in the place to replace public administration. The executive and especially the democratically elected legislative authorities should have a degree of independence from judicial review. It is also relevant to know whether the courts possess the necessary expert capacity to adjudicate highly technical questions – in such areas, for instance, as building permits in the context of central planning, architectural and heritage protection rules, and how to enable best and efficient judicial control in these areas. A related unresolved issue in the Ukrainian administrative jurisdiction is the lack of enforceability of specific performance and other court orders against administrative authorities.

Considering the above, international and national experts have developed a specific multiple-choice Questionnaire (Annex 1) to study the opinions and positions of Judges, Advocates, Public administration and Academia **on substantive and procedural administrative law, the structural setting of the administrative judiciary in Ukraine**.

The Questionnaire was developed based on the observations of the experts obtained through discussion with stakeholders, individually and at roundtables/conferences (fact-finding stage, November 2018-April 2019). Experts aimed at initial identification of those aspects of the implementation of the CAJ that need specific attention, taking into consideration the issues that were brought to their attention by the various stakeholders as well as a thorough examination of the code itself. The resulting Questionnaire contained four main sections devoted to the key topics that were identified (1. Discretion of public administration and effectiveness of administrative proceedings; 2. Access to administrative justice, fairness of proceedings; 3. Settlement. Mediation; 4. Enforcement), plus an introductory and background information parts. The data obtained from the Questionnaire was processed via excel-sheet, allowing the experts to extract information according to various criteria.

Statistic data was collected over a seven-month period, from May to November 2019. The method of data collection was an individual fill-in of the Questionnaire at events devoted to current problems of administrative justice (see Annex 3). The Questionnaire was also filled in online through EU Project Pravo-Justice website. The Questionnaire was conducted by EU Project Pravo-Justice with the support of Ukrainian Bar Association, local and appeal administrative courts, Cassation Administrative Court within the Supreme Court.



In total, 333 people from different fields of law (judges, advocates, civil servants, and academia) participated in the survey.

In addition to initial interviews at the fact finding stage, also in-depth interviews (open-ended questions) were conducted with stakeholders of the above-identified groups of relevant stakeholders at the stage of data collection (May-November 2019).

The described above monitoring methodology is not only meant for monitoring the present situation as regards the implementation of the CAJ and the structural setting of administrative judiciary, but also for similar monitoring exercises in the future. The suggested methodology allows the identification of problematic areas of procedure and structures, the collection of data on the implementation of the rules as well as the statistical elaboration of these data, and the identification of measures to improve court practice and structural setting.

The results from the Questionnaire as well as interviews have been analyzed by the EU Project experts/team.

The basis for the current report have been:

- Code for the Administrative Justice (CAJ)
- Results of the Questionnaire
- Wide ranged in-depth interviews and round-table discussions in different regions of Ukraine

When developing the current report, experts have also considered:

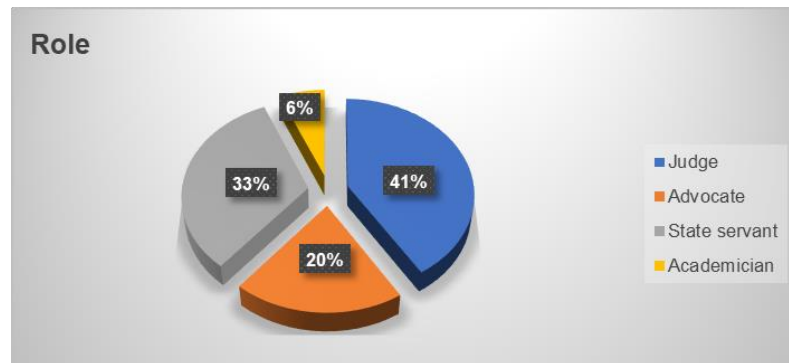
- [Systemic Report on Administrative Appeal: Current State and Recommendations, produced by the Business Ombudsman Council](#)
- [Expert opinion on discretion, control of discretion and discretionary power of public administration in Ukraine of the Ukraine Supreme Court, April 2018](#)
- Monitoring Report of the Ukraine Ministry of Justice of Ukraine on analysis of implementation and effectiveness of adopted legal acts, October 2019

STATISTIC DATA

The survey conducted under the Questionnaire is not representative but clearly reflects the problems of the legislation in the field of administrative justice and some trends for its improvement. For an overview of all data results, see Annex 2.

Among of 333 respondents who participated in the survey:

- 41% are judges, 20% are advocates, 33% are civil servants of the authorities or municipalities, and 6% are scholars.



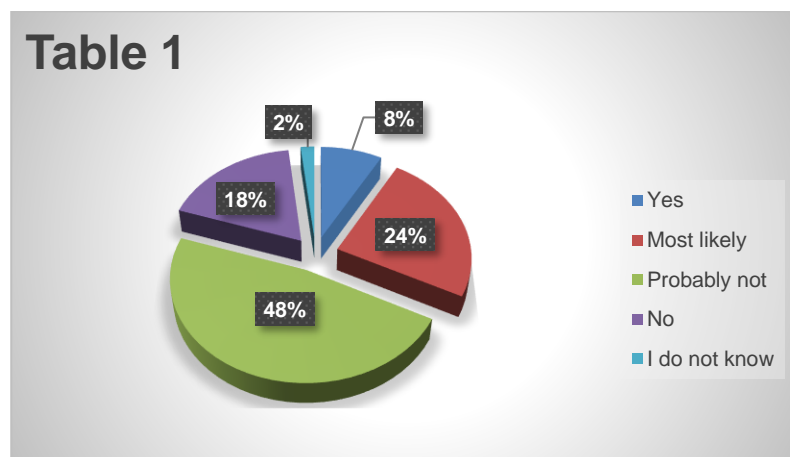
Section 1: Discretion of public authorities and efficiency of administrative procedures in Ukraine

Question 1:

Does the national legislation provide clear rules on the use of discretion by state authorities?

It should be noted that the issue of discretion of the authorities was perhaps the most important issue in the research conducted within the Project. The positions and views as to the concepts and content of discretion still differ, even among experienced experts, for whom this field is a particular subject of study, so it was important to understand how this legal phenomenon is regulated at the level of legislation and enforcement practice in Ukraine.

More than half of all respondents answered the questions "Rather No" and "No" (almost 70%) - there are no clear rules that, according to experts, are completely true. Only 8% of survey respondents said yes, and the vast majority are civil servants, who may indicate that the rules exist but they are not obvious but understood by those who apply them daily in their work.



Questions 2 and 8:

Is there a difference between discretion of elected and non-elected authorities?

Do judges have more powers of discretion in reviewing decisions of individual state officials than collective authorities?

As identified by the Project experts, there is no distinction between the discretionary powers of elected and non-elected authorities, and no distinction is made between the scope of the court's powers when reviewing individual and collegial decisions (in the context of review of the legality of the decisions).

Despite this, for example, when answering the question of the difference between the discretionary powers of elected and non-elected authorities, the majority of respondents - albeit a small one - answered "Rather yes" (32%). At the same time, it is noteworthy that the equal number of survey participants gave almost opposite answers: "Yes" and "Rather no" (23% each), which indicates the need to clarify the nature and peculiarities of discretion of authorities (about trainings – see further).

Question 3:

Are there clear rules on the division of competences of different state authorities?

It should be noted that approximately 63% of the respondents believe that there are rules for differentiation of competences between administrative bodies in Ukraine: 30% think they are clearly defined, another 33% agree that rules are clear, but with some reservations. The number of categorically negative answers is very small - 8%, which may indicate that the overwhelming majority of respondents do not encounter difficulties as to this question.

Questions 5 and 6:

Does the Ukrainian legislation foresee the limits of judicial interference in the discretionary power of state authority?

Should a court – through its judgments – interfere with the competence of state authorities and come up with the immediate solution of any dispute?

The scope of judicial control is a rather sensitive issue not only in Ukraine but also in Europe, since the court has no right to take on the powers of a public authority or local self-government, but it must effectively control the legality of their decisions.

The analysis of answers to question No. 5 (level of regulation) does not allow us to reach unambiguous conclusions. First of all, because many of the respondents in the framework of individual meetings noted that the level of legal regulation of court procedures in the Code of Administrative Justice is acceptable. However, it is noteworthy that more than a quarter of all respondents (35%), probably, having complaints as to the quality of legal regulation, still did not give a categorically negative answer.

Interestingly, in answering the question related to it, the same tendencies were observed that the survey participants did not give a clear answer as to whether the court should interfere with the powers of public authorities. A slightly more answers "Rather yes" was given and, in fact, the same number of respondents gave opposite answers: "Yes" and "No" (25% each). In general, this issue is evaluative, but nonetheless, such variability can also be an indicator of a low level of trust to public authorities.

Questions 4, 7, 10:

Does Code of Administrative Justice provide procedural safeguards against possible unfettered discretion of state authorities?

Is judicial control over the discretion of state authorities exercised in the same amount/in the same density by all judicial instances?

Which of the following aspects of the legislative/executive decisions are subject to the limits of judicial review under the Code of Administrative Justice (multiple answers are possible)?

The overwhelming majority of survey participants answered "Rather yes" to the question of the existence in the CAJ of procedural safeguards against abuse of rights (39%), most of them judges. Judges are also among those who give a negative or rather a negative answer, but we can assume that such a response may be due to the fact that such judges have not yet had to use in practice the appropriate levers of counteracting abuse.

Approximately 38% of survey respondents have doubts that all courts exert equal control over the exercise of discretion by the authorities. Oddly enough, among the 38 percent, it is the judges from different instances who are the majority who gave such an answer. Therefore, it is advisable further to pay particular attention to it by differentiating it into several aspects with detailed information on each of them.

Diagram – on judges (per cent)

Questions 9, 11, 12 i 14:

Administrative courts have the necessary expert and operational capacity to rule on highly technical issues dealt with by the executive authorities (for example, in disputes with State Building Inspection).

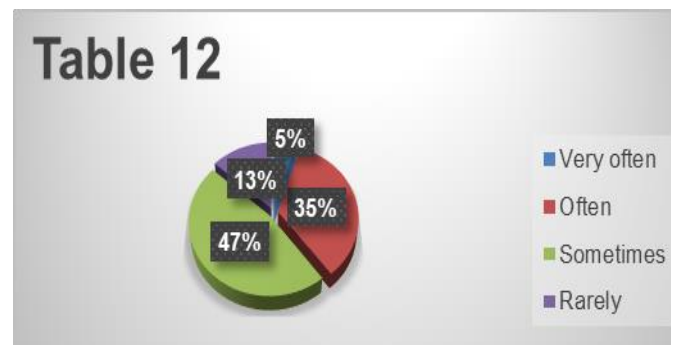
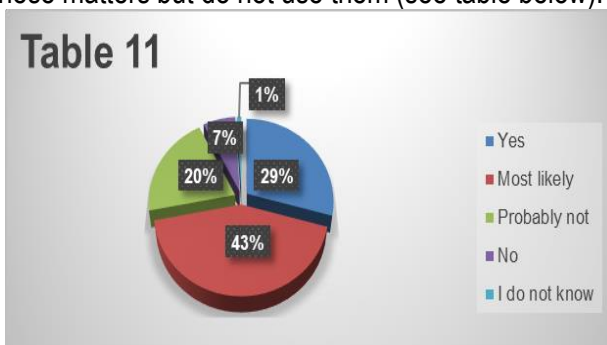
Does judicial discretion extend to the interpretation of vague legal concepts or general clauses?

In practice, do administrative judges exercise their above said judicial discretion?

Is there training needed for administrative organs on the interpretation of laws and exercise of discretionary powers?

The issue of knowledge and opportunities in the administrative procedure is also a separate topic of research: it is linked not only to legislative support but also to trust in the court as an institution. More than half (55%) of the respondents indicated that courts still lack sufficient knowledge to adopt decisions on issues requiring special technical knowledge. However, this is not an unsolvable problem, since on the one hand, the proper functioning of forensic analysis eliminates to some extent the need for judges to have in-depth knowledge in the technical field, and on the other hand, it may be possible to consider the introduction of relevant specialization (for example, in matters related with construction).

More serious, in our view, is the question of the freedom of judges to interpret general legal provisions and ambiguous legal terms. The statistics indicate a somewhat paradoxical situation: judges have discretion in these matters but do not use them (see table below).



That is, more than 70% believe that judges are given the opportunity to interpret certain concepts and general provisions of the law at their discretion, but at the same time, about the same number (60%) believe that judges do not always use them. In doing so, the judges themselves acknowledge that the appropriate tools are not always used.

This situation can be caused by a number of reasons, one of which may be insufficient training of all parties concerned before or immediately after the introduction of new provisions of the legislation, especially those previously unknown in the legal order of Ukraine.

Diagram – on judges (per cent)

In support of this statement, almost 93% of respondents said that, in particular, training on specific issues is necessary for the authorities, which obviously indicates an urgent problem that needs to be addressed.

Question 13:

In cases where a state authority was found at fault by an administrative court, the Code of Administrative Justice/ Ukrainian legislation provides for individual liability of a person in the form of damages or criminal prosecution?

The vast majority (80%) said that the CAJ does not provide for the individual responsibility of a certain public servant if a court ruled on unlawfulness of its decisions, actions or omissions. Unfortunately, it is not possible to conclude on whether the respondents consider it necessary to impose such responsibility - it was stated that the responsibility may be disciplinary - but in-depth interviews indicated that such institute should be treated with special attention because of the number of significant risks it entails.

Section II. Accessibility and fairness of administrative proceedings

Questions 15 and 16:

The new Code of Administrative Justice of Ukraine clearly differentiates jurisdiction of administrative courts from the jurisdiction of civil and commercial proceedings.

What categories of jurisdictions more intersect with administrative jurisdiction?

Issues of jurisdiction are very important, as it is always advisable to have a competent court consider the case from the very beginning. According to the results of the analysis of the answers, this is still a problem for Ukraine. About 81% of respondents: 47% - "Rather agree", 34% - "Rather disagree" with the fact that the jurisdiction of administrative courts is clearly differentiated from the jurisdiction of commercial courts and courts of general jurisdiction. Such doubts seem to indicate that there is no clear distribution. Moreover, 63% of respondents are convinced that conflicts of jurisdiction take place both as to commercial and civil matters.

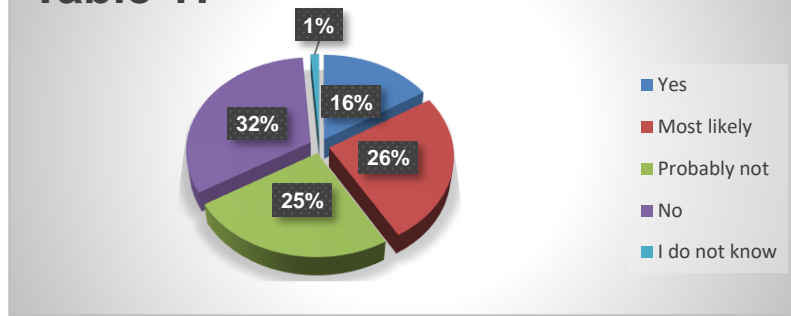
An extremely negative phenomenon is that parties to the proceedings often learn that the case was heard by an incompetent court, at the stage of cassation proceedings, that is, several years after start of case consideration. This situation, of course, needs to be addressed as soon as possible.

Question 17:

Do you think that filing appeals by state authorities in each case (even with no clear legal basis) is an abuse of law and should be limited?

Interestingly, the closed-ended and open-ended interviews showed slightly different results. Firstly, the respondents do not see the problem that the authorities challenge court decisions in all cases (even groundless) and do not see any abuse in this. While a *tete-a-tete* communication, including with civil servants revealed that they were often forced to challenge court decisions only in order to protect themselves from the potential risks of criminal prosecution in the future. At the same time, as noted, even the need to incur unnecessary (often-significant) expenditures from the state budget is not always an argument not to challenge obviously legal and well-founded court decisions. According to the experts of the Project, groundless challenges of court decisions does not contribute in any way to increasing the efficiency of the proceedings and is a completely negative phenomenon, which should be eliminated in the near future.

Table 17



Questions 18 and 19: Advocates' monopoly

Mandatory legal representation strengthens access to court.

Mandatory representation increases the quality of proceedings.

Project experts know that, according to the latest information, mandatory representation by lawyers ('advocates monopoly') can be canceled as early as in 2020. These questions were answered when such information was not available in the information space.

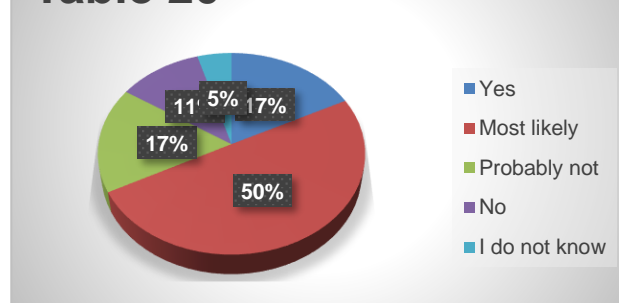
The positive fact is that the overwhelming majority (about 77%) acknowledged that mandatory representation by an advocate in court improves the quality of the trial, although there is no correlation between advocate's monopoly and access to justice. The latter may be explained by the fact that an advocate's participation entails a higher cost of hearing the case. It is possible to look at the results of the survey (question No. 18) from a different angle. Of those who believe (categorically or with reservations) that advocates' monopoly facilitates greater access to justice, the vast majority are judges, and this suggests that it is the judges who understand the role and importance of professional and trained persons at the stage of filing a case to court.

Question 20: Legal aid

Does the legal aid system guarantee sufficient access to court for parties with very low income?

Overall, the survey showed that the free legal aid system helps parties with low income to have access to justice. Therefore, it is necessary to improve not only its level and efficiency, but also its financial component, such as reasonableness of costs. This may be related, in particular, to how to strike a balance between a groundless challenging of court decisions (which would lead to unjustified budgetary expenditures) and the protection of the client's rights and legitimate interests.

Table 20



Questions 21, 22: Court fees

The number of court fees as provided for by current legislation limit access to justice.

Do courts duly justify in their decisions the amounts of court fees awarded for legal representation?

There was no clear answer to the question of whether current court fees restrict access to justice. Approximately 53% agree fully or partially and 47% disagree fully or partially. Of course, this question depends

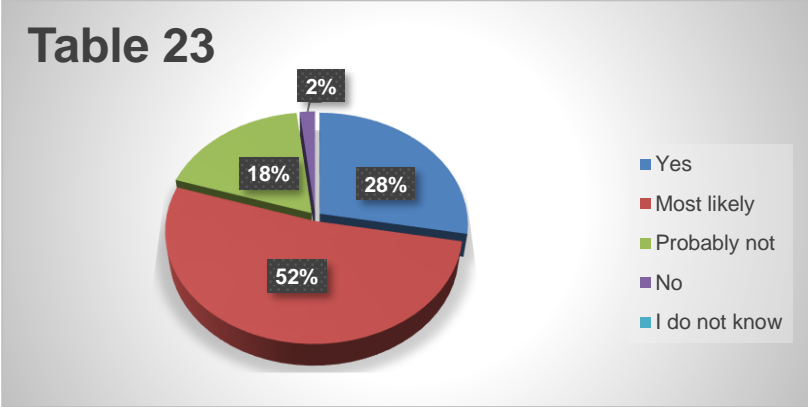
on the financial status of the persons applying to bear the costs of the court proceedings. In the context of this issue, it should be noted that, first and foremost, restrictions on access to justice through court fees are claimed by civil servants and advocates. Although, in some ways, high rates of court fees, such as for appeal or cassation applications, have a direct effect on reducing the number of unsubstantiated appeals, thereby relieving the courts from unnecessary and useless work (Question No. 17).

The positive point is that the parties use the procedural opportunity given to them to reimburse the client's expenses for legal aid at the expense of the losing party. Studies have shown that the court as a whole justifies its decisions on the amount of expenses of professional legal aid. At the same time, approximately 37% of the respondents disagree with this statement, the majority of whom are advocates and civil servants. This question requires further study, as maybe such answers are not so much related to the justification as such but rather to the sometimes-unjustified reduction/satisfaction of clearly overstated legal aid costs (depending on which party is to bear or reimburse its own costs).

Question 23 and 24:

The Code of Administrative Justice sets clear rules on the participation of third parties in the proceedings. Do prosecutors in administrative proceedings justify grounds for representing the interests of the state in court?

According to the table, all survey participants admitted that the legislation does not contain any particular problems with regulating the participation of third parties in administrative proceedings.



However, it is necessary to consider the role of prosecutors in cases where the state's interests are represented in court by prosecutors. We are aware that this is a certain atavism, the roots of which are still in the Soviet Union, in which the prosecutor played a key role in the rule of law and had even greater powers than the court. Sometimes prosecuting a case could be seen as emphasizing its importance to the state, which could not but exert pressure on the court. However, the question is now somewhat different: is such representation in principle effective?

Following the in-depth interviews, we have determined that the foregoing ceases to be a problem, since the grounds for prosecutors to participate in the case provided for by procedural law are now limited.

Question 25:

Is the independence and impartiality of administrative judges influenced in practice by state authorities, whose decisions they examine?

Although almost 40% of respondents explicitly denied that the independence and impartiality of administrative court judges were not correlated with the decisions of which state bodies they were reviewing, there were 35% of survey respondents who believed that there was still dependency (11% - Yes, 24% - "Rather yes"), already indicates that there is a huge problem that must be urgently resolved, because the independence and

impartiality of the court are fundamental principles of its functioning, in the absence of which one can forget about a fair trial and effective justice.

Question 26:

The information exchange of administrative judiciary with the Constitutional Court of Ukraine (CCU) is timely and efficient, resulting in a good application by courts of CCU decisions on the constitutionality of legal norms.

The lack of a clear answer to this question is rather an indication that the interaction at the level of the Constitutional Court of Ukraine and the administrative courts is either absent or non-transparent, and therefore not entirely understandable to survey respondents. Probably, the problem is that the Constitutional Court of Ukraine does not ensure the formation and adherence of unified approaches when considering cases on determining the constitutionality of legal norms, and therefore is not able to monitor the unified case law. The fact that, among only 13% of the respondents who answered yes to this question, most are judges, it is likely that many other participants in the judicial process simply do not know about co-operation.

Questions 27, 28, 29 and 32:

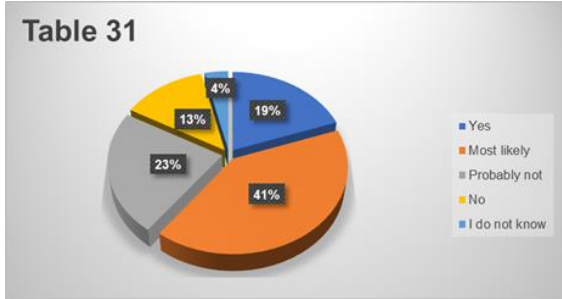
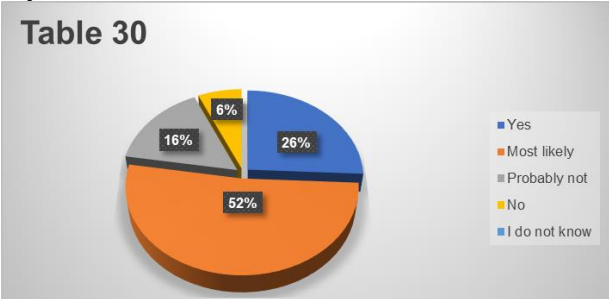
- Do you consider an institute of summary proceedings to be effective?*
- Should the court, on a motivated motion of a party in a case, decide on the withdrawal from the simplified proceedings?*
- Do the administrative courts, when considering cases within a simplified procedure, comply with the relevant terms/deadlines?*
- Is the institute of prioritization of cases within the simplified proceedings efficient on practice (part 2 Art.12 of the Code on Administrative Justice)?*

According to the results of the survey, the respondents overwhelmingly consider the institution of summary proceedings to be effective (76%). Almost all respondents (90%) agree that the court on the substantiated motion of the party in the case should make a decision to withdraw from summary proceedings. Regarding the issue of the administrative courts' meeting the deadlines of cases in summary proceedings, the majority of respondents (67%) believe that the courts adhere to them. At the same time, about 27% of respondents believe that such deadlines are not met.

Evaluating the effectiveness of the institute for prioritization of cases in summary proceedings, the opinions of Respondents were divided: 56% of the respondents consider the institute to be effective, 31% disagree, 13% are unsure.

Questions 30 and 31:

- An institute of minor cases facilitates consideration of cases within reasonable time.*
- Do you consider the list of minor cases to be sufficient?*



Respondents welcomed the introduction of the institute of minor cases. 78% of the respondents agree that it facilitates case processing within reasonable time. With regard to the list of minor cases, 67% of the respondents consider this list to be sufficient. However, 36% of respondents do not agree with this.

Questions 33 and 34:

Are judicial decisions in administrative cases usually well-reasoned?

Is reference to the case-law of the European Court of Human Rights in judgments of administrative courts usually correct and relevant?

Absolute majority of respondents (82%) agree that administrative court decisions are usually well-grounded. As for the reference of the administrative courts in the judgments to the case law of the European Court of Human Rights, 67% of survey participants consider such a reference to be correct and appropriate. However, 33% report problems in this direction and do not agree with it.

Question 35:

Should judges be allowed a certain degree of freedom to organize court proceedings as they see fit?

Respondents' views on the issue of giving judges some freedom in the organizing the court proceedings as they see fit: 52% (18% yes, 33% rather yes) of respondents agree to such discretion, with 47% of respondents opposed to giving such discretion to judges in the process.

Questions 36, 37:

How frequent are the cases where an expert opinion is needed, but neither applicant nor respondent requests it?

Who shall carry the expenses for expert opinions if neither applicant nor respondent requests it?

80% of respondents say that only occasionally situations arise where expertise is needed (regardless of their field), but neither the plaintiff nor the defendant require its appointment. Opinions of the respondents were completely divided as to who should bear the costs of examination, if neither the plaintiff nor the defendant require it: 34% of respondents believe that it should be the losing party, 23% - that the parties are in equal parts, 28 % - that the state, 12% - that under such conditions the examination should not be conducted, 4% - do not know the answer to this question.

Questions 38 and 39:

Do all parties to the proceedings and the court understand how the mechanism of examination of evidence at their location works?

Have you experienced difficulties with submitting electronic evidence to the court?

Respondents' views split on understanding by trial participants and the court of the mechanism of examination of evidence at their location: 11% - fully and 39% - rather agree that all participants of court proceedings and the court understand how exactly the mechanism of examination of evidence at their location works. However, about 43% of survey respondents noted a problem with this understanding (6% - no, 37% - rather no).

There is no unanimity among respondents as to the issue of submitting electronic evidence to court: 34% of respondents believe that in practice there are difficulties in submitting electronic evidence, 44% of respondents do not see such a problem, 22.46% do not know, apparently without experience in filing electronic evidence in court.

Question 40:

Do the parties use in practice such a novelty of the Code of Administrative Justice as a counterclaim?

Regarding such an amendment to the Code of Administrative Justice as a counter-claim, it is not possible to note its active use in practice at present: only 39% of the respondents said that the parties were submitting a counter-claim, and half of the respondents (51%) said that such a novelty of the Code was not used.

Question 41:

Do you think that each case can be appealed to the court of appeal (both on facts and on law)?

The opinion that each case should be able to be challenged in court of appeal (both on facts and on issues of law) is fully supported by 58%, rather by 28%. Approximately 14% of respondents are against such possibility of appeal.

Question 42:

Do you think that the court decisions are substantiated?

The absolute majority of respondents agree that the judgments are substantiated (84%) and only about 14% disagree.

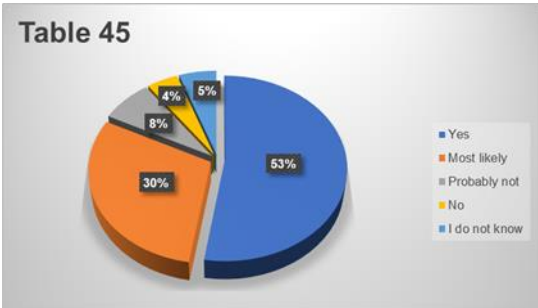
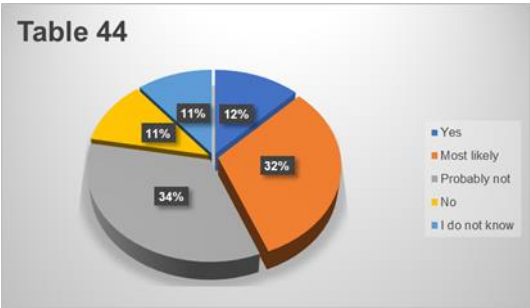
Section III: Settlement of disputes, mediation

Questions 43, 44, 45 and 46:

How often settlement of disputes with the participation of a judge take place in practice?

Do judges understand the new institute of reconciliation of a dispute with the participation of a judge?

Should administrative courts be permitted to settle administrative cases on a substantive basis (order specific settlement conditions to be reached by parties)?



As the results of the survey confirm, settlement of disputes with participation of a judge in practice is rare (58%). In addition, almost half of the respondents 45% believe that the judges do not understand the procedure for settling disputes with the participation of a judge, while the other part of the respondents believe that such understanding is in place (44%), 11% of the respondents could not give their opinion on this issue.

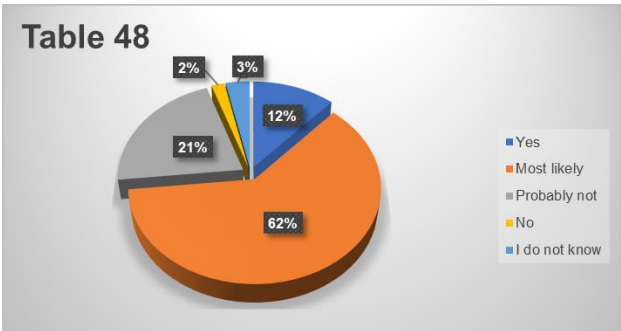
However, respondents are unanimous in the fact that judges need additional training to gain a better understanding of the dispute settlement institution with the participation of a judge (82%). In addition, the overwhelming majority (86%) are of the opinion that administrative courts should be allowed to ensure a settlement of administrative cases (to approve specific terms of the agreements reached by the parties).

Section IV: Enforcement

Questions 47 and 48:

Do you consider judgments of administrative courts to be clear and understandable in their resolute parts?

Are judgments of administrative court enforceable in practice?



Almost the absolute majority of respondents (86%) believe that the resolute parts of administrative court decisions are clear and understandable. Fewer respondents (74%) believe that administrative court decisions

are enforced. At the same time, about a quarter of respondents (23%) believe that there are problems with the enforcement of court decisions of administrative courts.

Questions 49, 50 and 51:

An obligation of public authority to submit a report on the execution of a judgment rendered against it enhances the enforcement procedure.

Does the system of interim relief give an effective provisional legal protection?

Do difficulties arise in practice with the enforcement of a court decision on interim relief in the administrative process?

According to the survey, the majority of 82% of respondents agree with the statement that the obligation of a governmental authority to submit a report on the enforcement of a court decision, which can be imposed on it by a court, increases the efficiency of enforcement proceedings. Also, more than half of the respondents (71%) believe that the system of measures to enforce a lawsuit to terminate unlawful actions and to evade the defendant from executing a court decision in the future. However, a quarter of survey respondents (25%) disagree.

45% of respondents noted that in practice there are difficulties with the enforcement of a court decision on providing evidence in the administrative proceedings. At the same time, 43% of the respondents do not see any problems with the enforcement of the court decision on providing evidence in administrative proceedings.

Question 52:

In accordance with the Code of Administrative Justice, is it possible to apply judicial control over the enforcement of a court decision with regard to (multiple answers are possible): individual act, individual normative legal act, inaction of an authority, decision of authorities with regard to interim relieve measures, interim relieve measures

According to the results of the survey, the respondents believe that the use of judicial control over the enforcement of the decision is possible in relation to inaction of an authority (33%), individual act (24%), decision of authorities with regard to interim relieve measures (15%), individual normative legal act (14%) and interim relieve measures (14%)



OBSERVATIONS

Observations have been grouped under the following headings:

- A. Current situation in Ukraine: general observations
- B. Discretion of state authorities and effectiveness of administrative proceedings
- C. Access to administrative justice, fairness of proceedings
- D. Burden of proof/evidence
- E. Interim relief
- F. Simplified proceedings
- G. Scope of review and decisions in the merits of the case or decisions by first/second instance administrative courts to quash an administrative decision
- H. Mediation
- I. Alternative dispute resolution
- J. Court decisions

The description type of all observations hereinafter is structured (where possible) as follows:

- A) Background
- B) Objectives
- C) Recommendations

A. Current situation in Ukraine: general observations

- A) Background
 - Assessing the structure and system of the Ukrainian administrative justice system must be seen against the background that society still lacks **trust** into Ukrainian state institutions, including courts. Administrative courts play a particularly important role in establishing a democratic constitutional state. Only the guarantee of effective administrative legal protection, i.e. a high quality and timely control of the administration by independent judges, is the “keystone in the vault of the rule of law”¹.
 - Current report on administrative justice can not only be confined to the activities of the courts but **must also take account of the work of the authorities controlled by the administrative courts** because of the close link in between of them (due to their interlinked operations) and because of their role as interface. Only when the managing authorities fulfil the tasks assigned to them, also the administrative courts can comply with the rules of law assigned to them.

Based on these two considerations the following observations concerning public administration can be made:

Every citizen should have the right to an effective public administration. Compliance with this principle (the obligation of the administration to give reasons for its decisions) can arguably only be understood as meaning that public administration, in an orderly manner, are duly and transparently motivated by administrative acts, and that each administrative act can be challenged before an administrative court or an independent authority.

The quality of administrative decisions is essential for the effectiveness of legal protection by administrative courts.

- Based on these considerations, it is immediately visible that one of the major structural deficiencies on **the level of public administration** is the **lack of a unified procedural legislative act, adopted by the Parliament**. Such procedural provisions or laws on

¹ See in more details the statistics presented in Expert recommendation “The new Supreme Court of Ukraine”, EU Twinning project UA 12 ENPI JH 02 16 of June 2019, page 8 et seq.

administrative procedures only exist in the area of taxation and customs legislation. However, it is relevant to have a common procedural basis in all areas of administrative law. This is even more relevant due to the fragmentation of the state and municipal administration and to a large number of authorities. Naturally, these circumstances lead to a lack of uniform application of existing general legal principles and/or formally and partly existing procedural frameworks. A uniform law on administrative procedure for public authorities serves to make the administrative procedure more transparent. A uniform procedure for the enforcement phase could also help to increase the percentage of enforcement.

Concerning the procedures between public administration and courts (timely spoken):

- In some restricted areas of administrative law an **internal appeal procedure** exists. Reportedly, it works well in these areas. In some other areas, optional appeal procedures exist and in another part of administrative law areas no internal appeal procedures are foreseen. Should the areas of law, in which internal appeal procedures are possible (obligatory), be increased, even the more there is a need for a formalized procedure. Such a procedure must be transparent and also easily discoverable and applicable (bringing with it the need to be similar or identical for all areas of law; it must neither be an intellectual exercise nor a quiz to find out about the relevant legal situation in a certain administrative dispute). This contributes to facilitation of access to justice hereinafter (based on transparency and that the citizen knows how to challenge an administrative decision). In general, too many internal instances within the administration might lead to a certain frustration of court users and lack of sufficient “access to justice”. Internal appeal procedures might function well; however, the areas of law and the general attitude towards it must be well balanced and profoundly be embedded in well-functioning procedural and structural settings.
- In any case, an administrative decision which is properly reasoned and of a high quality after having established and investigated all relevant facts might avoid too many (costly) court proceedings, provides legal certainty and solves conflicts.

Mandatory representation of public administration should no longer be an issue since January 2020, as on 18 December 2019 the Parliament expanded the concept of self-representation that was especially important for public authorities and local self-government bodies².

B) Objectives

There is a need to unify the procedure before public administration. There must still be place for specific needs (e.g. taxation, customs etc.); however, the basis should be uniformed. It is also an objective to achieve greater legal certainty and predictability of administrative procedures, limiting by this also the number of possible court disputes hereinafter.

Communication between authorities and courts should be promoted. Only by a coordinated approach rights of the citizens can be enforced; a certain degree of communication is necessary in order to make enforceable decisions and in order to enforce court decisions.

C) Recommended measures

- Legislative measures are necessary.
- In addition, or for the time being: precedent decisions of the Supreme Court in certain disputes can also be an important step towards supporting a functioning and transparent public administration in Ukraine.
- More training including also multilateral training is needed and any legislative changes must go hand in hand with respective training of the representatives of the public administration.

² Law of Ukraine of 18 December 2019 On Amendments to Some Legislative Acts of Ukraine on Expanding the Possibilities of Self-Representation in the Court of State Bodies, Authorities of the Autonomous Republic of Crimea, Local Self-Government Bodies, Other Legal Entities, Irrespective of the Procedure for their Establishment.

- Annual general reports of the Supreme Administrative Jurisdiction, focusing on the main case law increases legal predictability and legal certainty. Based on this communication between public administration and administrative courts could take place.

B. Discretion of public administration and effectiveness of administrative proceedings

A) Background

Discretionary authority is a conscious construct through which a legislator grants the discretion to select a legal consequence to a public administration body, which applies law externally, i.e. to organizationally non-subordinated entities. In this context, the notion of discretionary authority brings to the final stage of applying law, namely determining legal consequences. This happens when the norm does not clearly determine these consequences but explicitly leaves the choice to be made by an administrative authority. Therefore, even if the interpretation of notions used can also refer to determining legal consequences, we do differentiate the hypothesis interpretation from discretionary authority, which provides for the choice of a resolution. Discretionary authority is a construct assuming the broadest possible capability of discretionary power and the margin of decision. The authority, which has already made a validation and interpretation choice, had discretion in terms of subsuming a particular factual state to a specific legal provision, is additionally granted permission to choose a resolution. We are dealing with administrative discretionary authority in the first instance, when the choice of the consequence is clearly left to an administrative organ. Administrative discretionary authority is based on statutory empowerment. Legal provisions formulate appropriate authorizations. The phrase most frequently used here is "may". The legislator may also formulate such authorization through indicating the duty to use one of two equivalent solutions, which are also of legal weight. In this way, one assumes the use of open criteria, clearly leaving the law-applying entity with the choice, which is perfectly deliberate and takes into account the circumstances of an individual case.

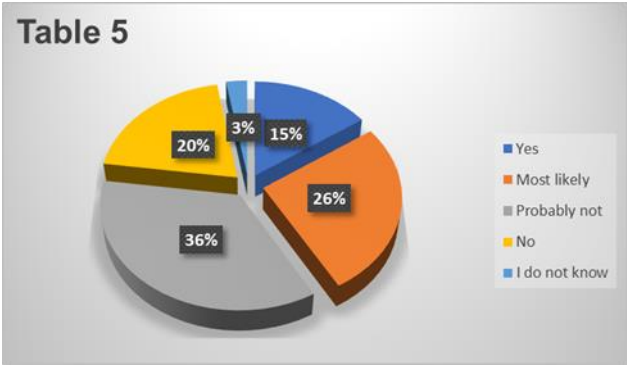
Making a resolution based on administrative discretionary authority is using the authority's permission to shape, in a particular case and in particular factual state, legal consequences within a degree of discretion set out by a provision of substantive law, or within binding procedural rules. This option must be included when reviewing decisions made by administrative bodies within such discretion. On the one hand, the legislator's choice should be respected, and in the case of judicial reviews, the principle of division of powers should also be taken into account. This issue is therefore connected with the limiting judicial review to the question of legality of an act, without any interference with the sphere of purposefulness. On the other hand, in a rule of law there is no unlimited discretionary authority, which is excluded from both internal review and a review before an independent external authority. Including these reasons causes the striving to refine the notion of discretionary authority, and to clearly set the scope of its review. This achieved by means of legislation, as in Polish law (art. 1(2) of an Act on the Organization of Administrative Courts of 25 July 2002, or in Art. 130 para. 3 and Art. 133 para. 3 of the Austrian Federal Constitution (and Article 28 para. 2 and 4 of the Austrian Federal Act on Proceedings of Administrative Courts), or through introducing the notion of discretionary authority mistakes into the provisions, in the form of exceeding or misusing discretionary authority (§ 114 of the German Verwaltungsgerichtsordnung).

It was not visible that there would be different concept of discretion in the Ukrainian legal tradition as described above. In general, these concepts are sometimes indeed difficult to distinguish in certain, specific cases and are sometimes difficult to clearly keep them apart in practice. Thus it is understandable that perception differs and that there might be the perception that the judicial control oversteps the borders of discretionary freedoms granted to the executive power. Also the answers of the stakeholders in the questionnaire show that there is a problem to divide strictly and clearly between "discretion" and "interpretation" (see answers table 11).

These different perceptions became clearly visible during the in-depth interviews with the different stakeholders. Also, the answers of the questionnaire show that the concept of interpretation of laws and discretion is not well distinguished in all ramifications of the legal tradition.

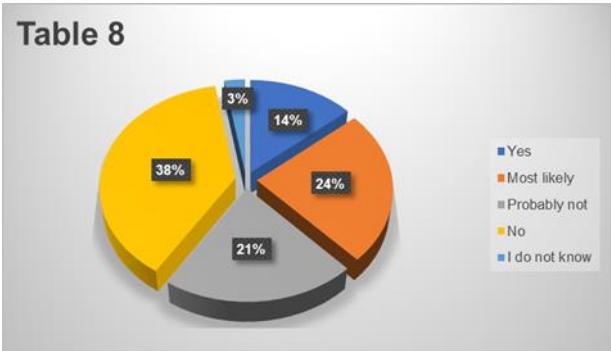
There were few questions about discretionary power of the public administration and its judicial control! The most important sounded: Does the national legislation provide clear rules on the use of discretion by state authorities?

As the results of the Questionnaire shows, more than half of all respondents (almost 70%) consider that there are no clear rules on the use of discretion by public administration in national legislation. According to opinion of the experts, this is completely true. Only 8% of survey respondents said yes, and the vast majority are civil servants, who may indicate that the rules exist but they are not obvious but understood by those who apply them daily in their work.



There is also strong support for the needs to have more trainings of administrative organs on the interpretation of laws and exercise of discretionary powers (see answers questionnaire Table 14).

Basically spoken stakeholders know about the existence of procedural safeguards to control discretion exercised by the administration (approximately 56% of the respondents answered affirmative), but neither the limits of judicial control of discretionary decisions are not well known (approximately 55% said so and see also the answers Table 8).



There are cases in which the judicial review interfered in discretionary powers (which was granted to the administration) and there are cases in which the administration believes that the borders were crossed but in fact, it was simply interpretation of a law. Finally, there are cases in which the administration is not well instructed by hierarchical orders how to use discretion in certain categories of cases.

As identified by the Project experts, there is no distinction between the discretionary powers of elected and non-elected authorities, and no distinction is made between the scope of the court's powers when reviewing individual and collegial decisions (in the context of review of the legality of the decisions).

Despite this, for example, when answering the question of the difference between the discretionary powers of elected and non-elected authorities, the majority of respondents - albeit a small one - answered "Rather yes" (32%). At the same time, it is noteworthy that the equal number of survey participants gave almost opposite answers: "Yes" and "Rather no" (23% each), which indicates the need to clarify the nature and peculiarities of discretion of authorities (about trainings – see further).

B) Objectives

- **Administrative discretion is always limited by law and the facts of the case.** The determination of facts of the case takes place in conjunction with the validation and interpretation reasoning, which allows the entity to specify the range of facts to proven in the case.
- In the autonomous legal order, the legitimization of legality as a kind of cultural value is carried out mainly by guaranteeing by law the protection of certain fundamental values. The autonomous values of law constitute specifically human rights and the democratic institutions of the rule of law."
- **The procedural discretion** of the judicial procedure of decision-making can be examined in different scopes of regulation by procedural law. The regulation of judicial procedural law leaves judges with a wide sphere of freedom in undertaking procedural activities. Such a margin of discretion is adopted by the regulation already with regard to the general principles and subsequently in the application of procedural institutions in the course of the proceedings. Therefore, provisions of procedural law leave public authorities with freedom in giving legal shape to the course of administrative proceedings in a case.
- Making decision based on discretion can't mean voluntarism or arbitrariness.

C) Recommendations

- Trainings (which include all stakeholders, i.e. judges, attorneys and clerks) on a methodological basis concerning interpretation of norms, both on the administration level as well as on the court level.
- Precedents and further clarification by court decisions might be of additional guidance for both, first instance and appeal court judges. The achievements of the previous case law and the doctrine, the judicial review of the discretionary decisions is limited to compliance with the procedural rules in making them. The judicial justification can't be regarded as consistent, as further on it contains the following observation: Only correctly identified for the administrative action allows the authority to consider all the relevant circumstances of the case, and this in turn determines taking the discretionary decision in accordance with the law.
- The fact that a decision is based on a norm authorizing the administrative discretionary, does not rule out such control, however, it entails the limitation of its scope. If such a norm grants the possibility to choose legal consequences to the entity then each choice within the limits of its discretion is legal and cannot be undermined by the court.
- The scope of discretionary power is always determined by the law; and discretion framework is defined by the competence provisions, the proceeding rules and the substantive law; the authority is bound with the provision, but also with the purpose of the provision and established ethical standards. Administrative discretion does not permit an authority's arbitrariness in dealing with the case, but at the same time does not oblige it to satisfy every demand of a citizen.

C. Access to administrative justice, fairness of proceedings

A) General observations

In general, the new procedural code seems to work and there is a wish of all stakeholders not to have too **many legislative changes** again. This approach must be confirmed, legislative changes themselves cannot change a procedural system at once. Furthermore, a steadily change of legislation has negative effects on legal security, transparency and the quality of the judicial procedure.

There is a need to clarify certain provisions of the CAJ; however, in general this can be done by jurisprudence, model cases and uniformed jurisprudence as such.

It is also still perceived that the **safeguards of independence** of judges are not yet adequately founded. Disciplinary complaints are used to put pressure on judges (from the outside of the judiciary). However, there is the perception that in general the High Council of Justice as disciplinary body for judges has adequately and

objectively decided on the basis of such complaints. Only those judges who are properly protected in their factual and personal independence can contribute adequately to increase trust into an independent judiciary.

These developments should be continued in order to find the right balance of necessary responsibilities (and liabilities) of judges for relevant misbehavior and on the other hand to protect judges against malicious allegations in order to put them under pressure from outside. The chilling effect within judiciary as well as the effect of pending disciplinary proceedings for the respective judge (even if finally, the judge will be acquitted) should not be underestimated. An absolute integrity of judges and high ethical standards are the cornerstone of a judiciary. However, criticism against judges (as persons) which is not objectively based and completely unfounded can end in a kind of witch-hunt and bring judges under undue pressure.

Furthermore, the vetting process of judges is still ongoing; its finalization as prompt as possible can also contribute to stabilize the judicial system from the inside.

A reported practical problem relates partly also to **notifications** as there is the lack of legal certainty as to whether notification can be presumed or are effectuated in reality and thus when certain procedural deadlines start or end (or they do not refer to the fact of notification so that sometimes court users do not have sufficient procedural deadlines to (re)act). This is relevant for procedural and other time limits for both, court users (parties to the case) and the court as well.

The **system of court fees** (judicial orders to bear the expenses of the other parties' representation) are not always feasible, as was reported by some of the stakeholders. In quite some cases the administration addresses the court (directly) for "response measures" but does not pay the court fee. Thus, procedures before courts start; however, finally the application is rejected due to formal grounds (for not having paid the court fees). It would disburden courts when applications are made only in those cases in which the public administration clearly wants to challenge a situation and that public administration are awarded with sufficient budgetary funds in order to be able to bring in lawsuits.

Reportedly, sometimes the proper course of proceedings in line with the procedural provisions is prevented or hampered because of difficulties to uphold public order outside and inside court buildings and oral hearing rooms. As options for **coercive measures** exist, judges should also use them and feel also empowered to use them (see above concerning independence) in order to properly ensure public order.

The **participation of third parties** in court proceedings is regulated in the CAJ and perceived as clearly regulated (see table 23 of the questionnaire), however the participation of **prosecutors** to defend "public interests" as such in the proceedings is perceived as not adequately justified (prosecutors do not justify adequately when they interfere in court proceedings (approximately 57% of the stakeholders thought so). This is in line with the impression expressed in some of the in-depth interviews.

The participation in some kind of proceedings (and here in some of the proceedings) of public prosecutors can be seen as problematic with regard to recent ECtHR case law (see ECtHR judgment Vermeulen vs. Belgium³). The general position of prosecutors in administrative court proceedings should be assessed in the administrative procedure, as it could be contrary to the principle of equality of arms — due to the excessive weight of government interests in the proceedings. An imbalance in the position of the public prosecutor in relation to the citizens could be considered. The problem in the appearance to grant equality of arms is a visible (see also answers to the Questionnaire, table 25).

B) Recommendations

- Training of judges to apply the new procedural code is relevant

³ Case Vermuelen vs. Belgium, Judgment of the ECHR Grand Chamber of Feb 20, 1996 <http://hudoc.echr.coe.int/rus?i=001-57985>

- Judgements of the Supreme Court to uniform the interpretation and application of the procedural code
- Clarification by law (and/or jurisprudence) by including certain legal presumptions for an effected notification and adequate provisions for electronic means of notification and presumption of receipt
- Since the public interest is already represented by the respondent authority, the role of the Public Prosecutor as further representative of the “public interest” is questionable. In particular, with regard to equality of arms, the current position of the Public Prosecutor is difficult to reconcile with Article 6 of the ECHR (see ECtHR judgment Vermeulen v. Belgium).

D. Burden of proof/Evidence

For any judicial control rules of evidence, what kind of burden of proof applies to which party and what standard of proof is applied are important questions also for the institutional setting of administrative judiciary. These questions are affected by the general concept of having either a more inquisitorial judicial structure or more an adversarial judicial structure. For a certain set of cases of minor complexity, judicial review is specifically regulated (Art. 263 CAJ).

In line with the adapted new CAJ generally the burden of proof lies with the public administration, evidence is provided by the parties to the case and the judicial system tends to be a more adversarial system.

Art. 9 of the CAJ reads as follows:

“The adversariality, dispositive principle and the official establishment of all the circumstances of the case

1. The consideration and resolution of cases in administrative courts shall be conducted on the basis of the parties' adversariality and freedom in presenting their evidence to the court and in proving their persuasiveness before the court.

2. The court shall consider administrative cases not less than within the claim submitted in accordance with this Code within its scope. The court may go beyond the scope of the claim, if it is necessary for the effective protection of the rights, freedoms, interests of the person and the citizen, other subjects in the field of public legal relations from violations by the public administration.

As Art. 9 para 1 and Art. 9 para 2 of the Code seem to be slightly contradictory by its wording - allowing the judge also to go beyond the parties' competences to bring evidence, whereas parties should present their evidence before the court - judicial practice is not unified yet. Jurisprudence of the Supreme Court on the extent and limits of the adversarial approach and collection of evidence *ex officio* does not clearly exist yet. It seems to be practiced differently by individual judges and the practice of criteria for the submission of evidence seems to be effectuated differently also by courts. Evidence is not always provided fully to the judge in the first hearing and also new evidence is accepted later on without restrictions, evidence is also taken *ex officio*.

The interplay between these legal provisions of Art. 9 of the CAJ is not clarified in all sets of cases: on the one hand side an adversarial approach will find certain limitations under certain circumstances and on the other hand side providing an effective protection of citizens' rights (with no further limits) needs *ex officio* investigations.

A related issue is how to appoint an expert, if needed by the judge. Not only the procedure of appointment, the pool of possible experts available and from which to take a possible expert, the question of who covers the costs of an expert and if an expert evidence at all is necessary are not uniformly answered questions and the court practice seems to differ. In general, the stakeholders are very uncertain on this issue (namely if the court has expert and operational capacity in highly technical issues (see answers table 9, table 36, table 37)), so these answers clearly support the results of in depth-interviews. In general, it seems that the mechanism of evidence examination is not clear (see answers to the questionnaire table 38).

One reason for it might be the changes of the CAJ, so that trainings and clarifying judgements of the Supreme Court would be of help.

E. Interim relief

Reportedly, judicial practice to grant interim relief measures differs sometimes. The procedure as such is an additional load on the court users and can pose timely problems. The criteria for decision are supposed not to be clear enough. The short deadline and the need to weigh public versus private interests is felt to be complicated.

However, on the one hand side generally this legal regime as such is perceived to work well. Due to the provisional character of such a decision (although it can have far reaching factual consequences) lies in the nature of it and seems to be legally well set. Similar systems of provisional measures exist also in other European countries. In addition, the answers to the questionnaire do not show a specific problem (see answers, table 50).

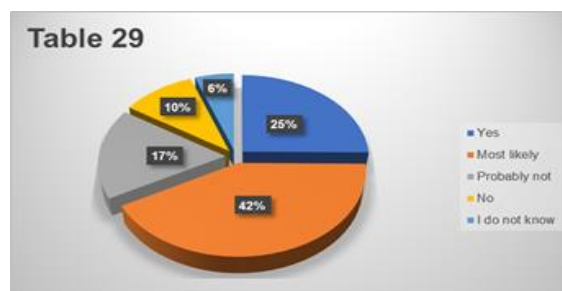
Administrative courts should carefully weigh the consequences of interim relief as well as the principle of proportionality. The Cassation Administrative Court (Supreme Court) should take an initiative of better communication among administrative courts in order to avoid situations where under similar or identical factual basis lower administrative courts take different decisions on interim relief.

F. Simplified proceedings

The facilitation lies in the purely written format of such proceedings. The CAJ gives indications when such proceedings must not be applied, and under which circumstances it can be applied. In general, the system is perceived to be effective (approximately 77% of the respondents answered affirmatively to this question see table 27 and table 30). “Low complexity” does not seem to be clear for some court users. The criteria for such cases of low complexity gives quite a range of judicial discretion, which case falls under this category (see Art. 12 para. 6 of the CAJ).

In order to avoid problems with legal certainty, guidelines by jurisprudence would be welcomed. In addition, Art. 328 para. 5 of the CAJ should be clearly defined so that cassation in such simplified proceedings for cases of minor complexity shall be impossible.⁴

Several stakeholders have reported in the in-depth interviews that such decisions are not made within reasonable time limits. However, this cannot be confirmed looking at the answers in the Questionnaire (see table 29).



On the other hand, the high level of workload of courts has not only been stressed by the judges themselves but also from other stakeholders.

⁴ See Monitoring Report of the Ukraine Ministry of Justice of Ukraine on analysis of implementation and effectiveness of adopted legal acts, October 2019 (abstract on Administrative Justice), page 83 of English version

Furthermore, a consideration of certain minor cases (“cases of minor complexity”) is regulated in Art. 263 of the CAJ. This is intended as a means of efficiency.

However, the fact that there is a claim and a response to a claim (which must be delivered within a certain time limit set by the judge) as the basis for the decision should be stressed in Art. 263 para. 3 of the CAJ⁵.

C) Recommendations

In order to avoid that such “simplified” proceedings (which are meant to increase efficiency of a judicial process) are abused in order to cope with the workload, at most existing shortcomings in the number of judges or other organizational deficiencies should be solved. Only then simplified proceedings fulfil their role.

G. Scope of review and decisions in the merits of the case or decisions by first/second instance administrative courts to quash an administrative decision

A) Background

In this context, it should be noted that, on the part of the administrative judges, there is still priority given to citizens’ ability to resist public decisions. In practice, there have been tendencies - regardless of the alleged infringement – to take the entire administrative act in appeal is always checked in all directions (having also the general principles of Art. 2 of the code in mind). While this extensive protection-friendly attitude towards authority action is a matter of legal policy, in particular in the light of the political past, it may in practice lead to onerous procedural procedures. Furthermore, the CAJ had been adapted and generally restricts the scope of judicial review to the arguments brought by the parties to the case (with specific further exceptions concerning judicial control of discretionary decisions) as well as limits the inquisitorial role of the judge. Although by law it is clear that the same scope of judicial review applies to all kind of public administration, in practice it seems that it is done in a more sensitive way concerning collegial administrative bodies (which exist on the municipal level, mainly being based to local election results).

Reportedly, the percentage of judgements quashing administrative decisions seems to be higher than decisions in the merits of the case by the court – in some regions. This can have different reasons.

A general problem lies in the fact that the administration is not bound on the reasons presented in a quashing judgement; there is a legal provision concerning Supreme Court only which is also very vaguely saying that the legal conclusions on the application of the legal norms set out in the judgments of the Supreme Court are binding on all public authorities that apply a legal act containing the relevant legal norms, but it is not working in practice as well as applies only to the Supreme Court.

This often leads to repeated illegal decisions of the administration and repeatedly cassations of these decisions by administrative courts. Conflict resolutions becomes more and more difficult and more and more lengthy.

The revised CAJ and the application of the new rules might not be applied yet fully in all extent in the daily work of some judges all over the country. Furthermore, the non-uniform practice might partly be based on possible different interpretation of different provisions of the procedural code some provisions should be clarified.

B) Objectives

- Administrative judiciary should not overstep the borders to control the executive power and not to administrate.

⁵ See Monitoring Report of the Ukraine Ministry of Justice of Ukraine on analysis of implementation and effectiveness of adopted legal acts, October 2019 (abstract on Administrative Justice), page 83 of English version

- Conflict resolution should be made possible by judgements which are of high quality and also at the same time as swift and efficient as possible. Repeated cascades of cassations, i.e. quashing administrative decisions, public administration decides in the same way again, followed by another court decision to quash the administrative decision again and again, must be avoided.
- C) Recommendations
 - Training of judges
 - Guiding and clarifying decisions of the Supreme Court
 - Public administration should be bound to the relevant and basic considerations and reasoning of the (quashing) judgement

H. Mediation

A) Background

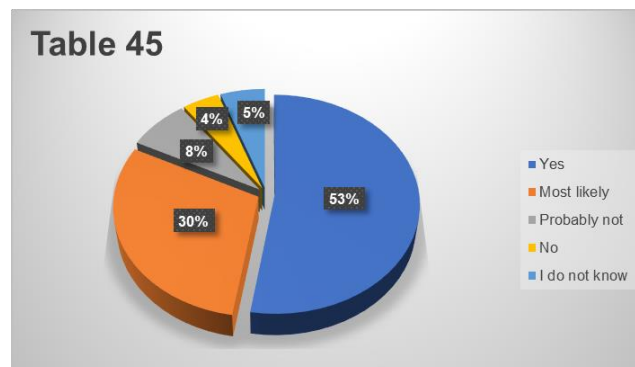
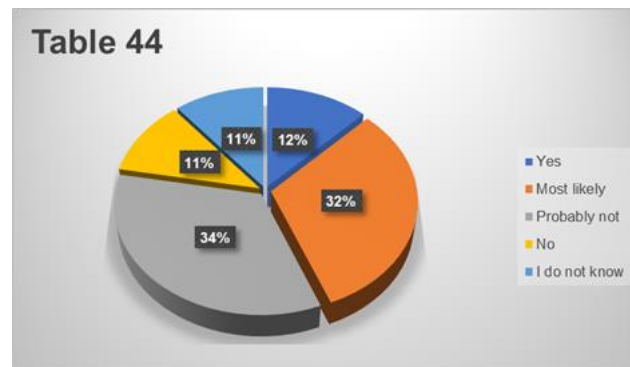
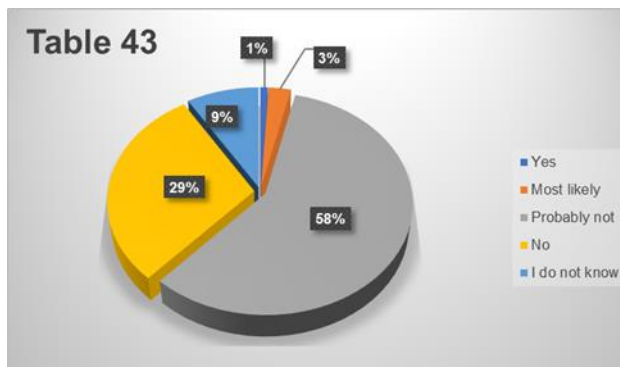
In the procedural code a new mechanism exists, namely dispute resolution with the participation of a judge. The judge can suspend the proceedings in order to enable a dispute resolution between the parties of the case.

Mediation (being different from the dispute resolution like amicable settlements) is a rising issue also in Ukraine. Mediation, including judicial one, as such gains predominantly importance in the area of civil and commercial jurisdiction. No provision exists in the procedural code concerning “mediation” as such, neither during court proceedings nor as obligatory mediation ahead of court proceedings.

The specificities of administrative law and administrative judicial branch must be stressed (namely the pillars that execution in general must be based on law anyway and that does not leave much space for negotiations – except in discretionary cases – as well as secondly that one of the negotiating parties generally has more information in many areas and is more powerful than the other negotiating party). Having these peculiarities of administrative jurisdiction in mind, in the Ukrainian context mediation could bring with it mistrust about possible corruption and non-transparency. The still existing and wide-reaching liability of public servants also constitutes a negative factor, as representatives of public administration tend to be afraid of allegations of corruption or bias or willfully wrong decision. The power of the administration to accept an amicable settlement and to have sufficient powers to negotiate in a certain case has been perceived differently and reluctantly.

Different stakeholders have a different view on this topic. Overall, it became visible that in principle court users would be interested to have to opportunity of a pre-trial mediation phase and also of mediation within a court procedure. They mainly miss the real preparedness of the public administration to do so as well as also of the judges who also often lack specific training for this.

Reasons for reluctance of both, administration and judges, mainly seem to lie in the lack of proper protection against allegations of being corrupt, non-correct or abusing powers (do negotiate such a mediation) as well as in a lack of specific training. The reluctance is also visible from the answers in the questionnaire (see table 43, table 44 and table 45). Therefore, for representatives of the administration it seemed to be more comfortable that mediation should be organized and done by a judge.



However, all in all it is well perceived that courts have this permission to settle disputes in this way (see answers to the Questionnaire, table 46).

European practice shows that mediation at the administrative court level is practiced only in few European countries for certain sets of administrative cases. In some countries pre-trial mediation is also appreciated to be of additional value for conflict resolution. It seems that mediation at the court level is specifically appreciated when there is sufficient trust into an independent judiciary and on this basis the additional functions of judges as mediator works well.

B) Objectives

For sure, it is relevant that society as such and court users specifically gain trust in judiciary. Judiciary can only work on a high qualitative level when it is not overloaded with too many cases. Conflict resolution as such (in a broader sense of meaning) is also the main feature of judiciary and its existence. Within the area of administrative laws certain limits exist, because the aim of administration executes and implements laws. Thus, this natural basis for any administration and administrative judiciary in a country at the same time also limits the possible use of mediation, because mediation involves some different aspects than alternative dispute resolution. Mediation could also imply a compromise between parties to a case not to execute a law in its strict sense.

For sure there are certain kinds of cases for which mediation might work. In the long-term aim mediation at court level has its values and it might be experienced in restricted cases and restricted areas of law already for the time being. But in general – against the historical background and the lack of trust into judiciary in the Ukraine – firstly there is need to increase the trust into an independent judiciary. Mediation is not so transparent and could have counter-effects in this respect for the time being. However, mediation at the administration level might be more feasible for the time being, if mediation is done properly and correctly. This could also be an alternative or an additional approach also instead of or complementary to a general second appeal level at the administrative level.

Furthermore, other ways to encourage friendly settlements of disputes or alternative dispute settlements should be encouraged and the application of the respective provisions in the new Code also used in the daily work of judges.

Having in mind some recent trends to encourage the judicial mediation in administrative affairs and that the judicial mediation received some interest among administrative judges the latter initiative could be tried in Ukraine as well. In order to avoid some side effects mentioned above the counterparts should be well prepared. The normative basis should be designed, the group of administrative judges pre-selected on the voluntary bases and well trained on the mediation technics. The pilot courts and few categories of administrative affairs could be pre-selected.

C) Recommendations

- Representatives (or certain representatives) of public administration should be authorized and have sufficient internal powers in order to be able to negotiate pre-trial amicable settlements and/or pre-trial mediation and be sufficiently protected against false accusations (being corrupt etc.).
- Normative basis should be adequately designed for judicial mediation. Certain categories of administrative affairs pre-selected. Awareness raising campaign have to be initiated.
- Pilot initiatives on judicial mediation in certain administrative courts would be appreciated. For this purpose, some judges voluntaries should be selected and trained.
- Sufficient and expert trainings are necessary for judges to encourage and negotiate dispute settlements during court proceedings.

I. Alternative Dispute Resolution

A) Background

See above. Alternative Dispute Resolution (ADR) includes different means of settling disputes outside of the courtroom. It includes mediation, arbitration or other means of conciliation. In general, pre-trial dispute settlement must be differentiated from alternative dispute settlement during court proceedings. The latter is applied in only some of the European Administrative Jurisdictions. For both, pre-trial as well as during court proceedings, the representatives of the administration are reluctant to make amicable settlement of disputes. All in all, it is well perceived that courts have this permission to settle disputes in this way (see answers to the Questionnaire, table 46).

B) Objectives

See above. Dispute resolution is a major aim, also of administrative jurisdiction. There are certain limitations in this branch of jurisdiction for an alternative settlement of disputes. However, within a certain frame and for certain type of disputes this could not only solve a dispute between two parties, but also avoid long lasting court proceedings and be more efficient.

C) Recommendation

- Specific trainings for judges (by experts) to support an amicable settlement (concerning the new provisions on dispute resolution with the participation of a judge) are necessary between parties of a case during court proceedings might be of help. A major aim of any jurisdiction is to solve conflicts. This brings with it the need to mediate between the different parties.
- Both, representatives of the public administration on the one hand side and also judges on the other hand side must be properly protected against abuse of easily lodged allegations of possible corruption. Only when their functions are properly protected by laws they can also actively contribute to amicable settlement negotiations; representatives of the administration must have sufficient powers to negotiate and also powers to sign such agreements.

J. Court decisions:

1. Interrelation with/application of ECHR and jurisprudence of ECtHR

International norms enjoy priority in their application before Ukrainian courts. This applies also (and mainly) to ECHR as well. Some stakeholders have reported that these mechanisms how to apply different law regimes and how to solve possible conflicts of conflicting norms is not practiced uniformly. Furthermore, knowledge and proper application of certain individual ECtHR decisions is not always understandable.

C) Recommendation:

Increase of knowledge of jurisprudence of ECtHR and correct application in certain individual cases is necessary in order to be able to apply them correctly (practical trainings).

Furthermore, properly translated versions of ECtHR judgements help to spread knowledge of this jurisprudence. Translated ECtHR judgements need to be available on all levels of administrative judiciary. The Supreme Court should farther take a leading role in strengthening the application of the case law of the ECtHR.

The doctrine and mechanism of application, in case of conflicts of the different law regimes should be clear and - if relevant - further clarified by jurisprudence of the Supreme Court and, if necessary, of the Constitutional Court.

Exchange with judges from other European countries is relevant to broaden the views and to better perceive such structural issues (by way of comparison).

2. Grand Chamber/Supreme Court

A) Background

Cautiously the new system is well received by the court users and by stakeholders involved. There was a positive feedback. Some have mentioned that the Grand Chamber should have a stricter filter.

The very recent developments to start a new a judicial reform process at the Supreme Court level with new applications needed could easily frustrate the achievements in order to strengthen and routinize a functioning judicial system on the Supreme Court level.

The system of “model cases–decisions” in order to make leading judgements in similar cases to come quicker and make the judicial process as such more efficient as smoothly started to be practically applied, whereas still several issues would need to be adapted.

B) Objectives

- The new Supreme Court should continue to see its role as Cassation Court and provide rulings on questions of law of fundamental importance and thus to contribute to a uniform application of law. For details see the expert recommendation “The new Supreme Court of Ukraine”, EU Twinning project UA 12 ENPI JH 02 16 of June 2019 as well as European standards comprised in CCJE opinion No. 20.
- Increased legal certainty through consistent decision-making practice
- Increased legal certainty through a more frequent and understandable interpretation
- Improving the image of the judiciary and the judges
- Tackling corruption caused by divergent decisions

C) Recommendations

The Supreme Court primary role should be to resolve conflicts in the case law and to ensure consistent and uniform application of laws as well as to pursue development of law through the case law.

3. Delimitation of the administrative jurisdiction of civil and criminal courts

A) Background

There are still, in a number of areas, non-systemic responsibilities or administrative trails.

Firstly, this concerns the administrative criminal procedures.

The CAJ provides that general courts are empowered to consider certain administrative cases (imposition of the administrative sanctions), and some of them go to the General Appeal Court for appeal, others – to Admin Appeal Court.

This means that in these administrative offences proceedings, the General District Court is the first instance court, but the appeal is then passed on to the administrative court. Here - functionally spoken - the administrative court is appeal court and — unlike the district courts — has recourse to the administrative procedures, i.e. the CAJ.

Secondly, there are cases in which it is not fully clarified, if civil or administrative jurisdiction is competent. Proceedings take for many years before the right court finally decides. A quick transfer of a case to the probably competent court (of the other branch of jurisdiction) is not foreseen in the procedural code nor is it possible for the deciding judge to quickly and immediately approach e.g. the Grand Chamber to decide on this conflict of competences. So far, some long lasting appeal proceedings to the Supreme Court (Grand Chamber) have been necessary so that the conflict of competence is solved.

B) Objectives

- Clear separation of administrative jurisdiction from administrative and criminal judicial branch and furthermore from civil/commercial and administrative judicial branch and clarification by law so that the connecting points (links) upon which the competence of one of the judicial branches relies on, must be clear. Clarification by law and jurisprudence would help.
- No intertwined judicial review instances and clarification of competences is necessary.

C) Recommended measures

Elimination of cross-system judicial review systems in administrative misdemeanor proceedings.

Clarification of conflicts of competences (which jurisdiction is competent) should not take place in the final end by the Grand Chamber, but it would be more efficient to find ways to quickly have a final clarification (e.g. direct application of the Supreme Court).

Possibly, to provide by law a possibility to simplify the proceedings in order to decide on conflicts of competences or in unclear situations which branch of jurisdiction is competent.

Clear legal provisions to which branch a certain set of cases belongs and what are the connecting factors.

4. Practice of administration to appeal against decisions of first and second instance administrative courts

A) Background

It was acknowledged and generally reported that representatives of the administration tend to appeal every judgement of an administrative court, even when the facts and laws are clear and there is no reason to appeal against it.

Background of this policy is to avoid allegations of being corrupt and of being accused of a violation of Art. 364, 365 of the Criminal Code (liability of state officials).

B) Objectives

It is necessary to have a correctly functioning court system. This cannot be the case when there are appeals in each and every case and workload is duplicated, making the whole court system (as well as the administration) ineffective and costly.

C) Recommendations

- The state representatives need more freedoms and discretion when to appeal against court decisions and
- They must be protected against false and easy accusations invoking possible criminal liabilities and criminal proceedings against them.
- Court fees on an equal level for all court users and under the same conditions might also have the effect that there is no “automatism” of appealing.

5. Court decisions within reasonable time

A) Background

What was reported and seems to be confirmed by the procedural code, is that here are time limits by law, which seem to be very short compared with a high number of pending cases, but judges do not argue with it. However, in order to avoid these time limits practice exists that hearings are conducted by the judge, request of all necessary documents within established term is made and afterwards the procedure is changed do a “written proceedings” where time-limits are not clearly stated. There is no proper remedy for court proceedings of the first/second instance, which would last too long. Reportedly, there seems to exist (at least in some regions) a problem with the number of over lengthy proceedings. Sometimes court users make pressure on judges by simply filing a disciplinary complaint against a judge, as no other means exist to speed up the proceedings.

B) Objectives

There is a need to have an effective remedy against over lengthy times of court proceedings, this is an obligation based on Art. 13 in combination with Art. 6 ECHR (see judgement ECtHR Sürmeli vs Germany, app. No. no. 75529/01⁶).

Adequate balancing of responsibilities of judges and protection against immediate disciplinary charges is needed.

To avoid such bypass solutions as to change the kind of procedure in order to be able to comply with legal decision deadlines.

Legal deadlines should be adapted or resources for judiciary increased.

C) Recommendations:

- Sufficient resources for the administrative courts
- Adequate legal provisions to have an effective remedy against overlengthy proceedings

⁶ Case Sürmeli vs. Germany, Judgment of the ECHR Grand Chamber of June 8, 2006 <http://hudoc.echr.coe.int/fre?i=001-75689>

6. Enforcement of court decisions

A) Background

The enforcement of final judicial acts is deeply rooted in Ukraine. Besides socio-political as well as economic and financial causes there are certain organizational deficiencies. State bailiffs traditionally are reluctant to execute administrative court judgements in particular in so called social cases as well as judgements against state run entities. Recently introduced private bailiffs are not allowed to enforce administrative court final acts.

In principle, the state should comply with the rulings of administrative courts without the need to have formal enforcement procedures. The enforcement rate of court decisions is quite low in the Ukraine; this applies as well to administrative law areas. It must be stressed that the enforcement phase is also part of the fair trial according to Art. 6 ECHR and to ignore final decisions of the judicial branch implies the destabilization basic principles on which a democracy is based on. It is a main issue also in a high percentage of complaints to ECtHR. Lack of enforcement (which shows that jurisdiction is accepted) by administration as part of the executive power will also lower trust of society into judiciary and deteriorate existing problems. Since recently, judges also control the enforcement of their decisions. Reportedly, there is not enough time to do so in depth and sometimes access to the necessary electronic registries seem to be a problem. However, stakeholders generally support this new procedure (see answers table 49).

Reportedly decisions of administrative courts which quash the administrative decision are bypassed by (collegial) public administration insofar as they make a new (negative) decision based on new grounds and do not enforce the first judicial decision. See also above under "Scope of review and decisions in the merits of the case or decisions by first/second instance administrative courts to quash an administrative decision".

Reportedly, this is a more serious problem with respect to decisions of collegial bodies (lack of collegial liability). In these cases it was uniformly reported that enforcement rate is low, after appeal or cassation these bodies do not follow the reasoning of the judgements and that several judicial proceedings are necessary ("cassation cascades") in order to solve the judicial conflict (see also above the observations under "discretion"). Generally spoken, stakeholders mainly think that a court should come with a solution of a dispute (approximately 59% answered affirmative to this question) and thus prefer decisions in the merits of a case.

Finally, there are cases in which administrative authority does not follow the decisions of courts at all, but simply ignore them. In other cases, the judiciary is directly addressed in enforcement matters, like to enforce certain categories of tax debts. However, generally speaking, this set of cases do not overload courts.

On the other hand, it was reported that enforcement has become impossible because the decision of the court was not clear or as such practically not enforceable. However, this cannot be affirmed from the answers to the questionnaire (see table 47 and 48), so that it does not seem to be a general problem.

Some problems seem to exist concerning the enforcement of interim relief decisions (see answers to the questionnaire, Table 51). However, this does not seem to be a general problem (see item "interim relief" above).

B) Objectives

- There is a need to improve options to use certain coercive measures in order to force the administration to follow and to enforce judgements
- It is not clear if the new system (where courts supervise the execution phase of the judgement) works effectively. There is a need of sufficient resources and adequate access to relevant information.
- Better and profound decisions, when interests of third parties are involved (e.g. Minister of Finance with respect to certain budgetary issues). They should get standing as party to the case

by specific laws if relevant (legislator's task). The administration as party to court proceedings should adequately also contribute during court proceedings and - if foreseeable – give input during pending court proceedings.

C) Recommendations

- There is a need to improve options to use certain coercive measures in order to force the administration to follow and to enforce judgements.
- Better and profound decisions, when interests of third parties are involved (e.g. Minister of Finance with respect to certain budgetary issues) are needed. They should get standing as party to the case by specific laws if relevant (legislator's task). The administration as party to court proceedings should adequately also contribute during court proceedings and - if foreseeable – give input during pending court proceedings.
- The decision by which the court quashes a decision and refers the case back to the administrative authority must be binding (also its reasoning see above under "Scope of review and decisions in the merits of the case or decisions by first/second instance administrative courts to quash an administrative decision").
- The mandate of state and private bailiffs should be made equal in order to ensure the fair competition and effectiveness in execution of administrative court decisions.

7. Quality of decisions

A) Background

Different stakeholders shared their views that low quality decision of courts content-wise, that decisions are not clear in their verdict or in the reasoning. However, this does not seem to be a general problem (see the answers to the questionnaire, table 33, table 42). Nevertheless, it is necessary to stress the needs of high qualitative decisions and therefore more efforts to ensure an overall high-quality level is necessary.

B) Objectives

To have a uniform, transparent, clear and understandable jurisprudence. This is the basis so that the civil society gets trust into judiciary. Confidence includes trust of professional community, trust of the parties to the case and trust of the society as such into an independent judiciary.

It is relevant to write a clear and understandable judgement for the parties to the case, to be precise and concise in the reasoning of the judgment. Only then, it is possible to lodge an appeal, which touches the main points of the judgment of the court of first/second instance, and only then, the society can understand the reasoning, see the transparency of judicial work and will gain trust in an independent judiciary.

This is also relevant as a safeguard (for the deciding judge and for judiciary as such) against unfounded criticism against single judgements and populist criticism and by this contributes to uphold the rule of law.

C) Recommendations:

- In-depth training (practical training)
- Transparent and comprehensive database of judgements and jurisprudence
- Internal mechanisms to uniform jurisprudence (personal exchange of judges and also exchange with European colleagues)
- Spokespersons of courts being in contact with media and the society and inform them about court activities, adequate training of spokespersons is needed and adequate budgetary resources for e.g. homepage etc.
- Sufficient resources for the courts



Key recommendations:

A. Structural

1. The qualitative work of public administration is the fundament for the high qualitative work of administrative judiciary: there is a need of a unified code of procedure for public administration;
2. In case the court sets aside the contested administrative decision, public administration should be obligated to establish, without delay and with the legal means available to them, the legal situation corresponding to the legal opinion of the Administrative Court in the relevant legal matter. This will contribute to avoid a chain of repetitive challenging of an administrative decision, quashing and referring back to the public administration;
3. Clear filters for the admissibility of appeals to the Supreme Court are necessary;
4. Public prosecutors participation as third parties should be removed;
5. Guarantees of independence with respect to disciplinary liabilities should be clarified;
6. The system of and obligation to reimburse court fees should be clarified;
7. Conflict of competences between civil – criminal - administrative jurisdiction should be Clarified and cross-systems of judicial review eliminated;
8. In the course of any legislative changes regarding procedures the interested stakeholders should be involved; Legislative changes shall be based on the evidence-based approach that involves monitoring for evaluation of the legislation as well as for developing proposals for any needed amendments;
9. Shortcomings in the number of judges or other insufficient resources should be solved, budgetary means for spokespersons (who are specifically trained) and other means to increase transparency of all court activities at all court levels are needed as well as on the other side effective remedies in case of over lengthy proceedings foreseen ;
10. Administrative authorities should have sufficient authority and be strengthened in their powers that there is no perceived need to appeal every (in particular clear and lawful) decisions of administrative courts as well as to be able to negotiate pre-trial amicable settlements and/or pre-trial mediation and be sufficiently protected against false accusations;
11. Legislative basis should be adequately designed for judicial mediation. Certain categories of administrative affaires shall be pre-selected for judicial mediation as a pilot initiative;
12. Options to use certain coercive measures in order to force the public administration to follow and to enforce court judgements must be improved;
13. Translations of ECtHR case law must be available to all court users.

B. Practical:

Trainings (not only of judges, but also involving other stakeholders, like attorneys and representatives of administrative authorities) should be developed:

1. On a methodological basis on interpretation of norms and discretion;
2. To clarify by way of practical examples limits and extent of scope of review and the limits of ex officio investigations of judges (also in comparison to simplified proceedings);

3. To improve the quality of judgements concerning their clearness, comprehensiveness and use of international principles/jurisprudence of ECtHR;
4. Expert trainings are necessary for judges to encourage and negotiate dispute settlements during court proceedings;
5. Expert trainings for judges to support an amicable settlement (concerning the new provisions on dispute resolution with the participation of a judge) and judicial mediation;
6. Exchange with judges from other European countries is relevant to broaden the views and to better perceive such structural issues (by way of comparison);

Clarification by jurisprudence of the Supreme Court is necessary:

7. About the limits and extent of discretion and the judicial control of exercised discretion by jurisprudence and by trainings of judges as well as of representatives of administrative authorities and other court users;
8. On the interplay and meaning of relevant provisions on the adversarial system, burden of proof and evidence;
9. On the extent and amount of simplified proceedings;
10. On the correct application of the case law of the ECtHR.

IV Annexes

1. Questionnaire
2. Results of the Questionnaire
3. List of Round Tables and Conferences in different regions of the Ukraine
4. Practical comparison of exemplified European practices on scope of judicial review
5. Monitoring Report of the Ukraine Ministry of Justice of Ukraine on analysis of implementation and effectiveness of adopted legal acts, October 2019 (abstract on Administrative Justice)