EU4PAR comments to the Opinion of the Chief Scientific-Expert Division of the Verkhovna Rada on the draft Law on Administrative procedure

19 April 2019

I.

The Chief Scientific Expert Division (from hereinafter: »CSED«) of the Verkhovna Rada issued an opinion on the draft Law on Administrative Procedure (from hereinafter: »LAP« or »Law«). The opinion provides many valuable comments deserving to be taken into account. However, the general conclusion is overly negative; legal experts conclude with a recommendation that »it would be advisable to send the draft law back to the initiating entity (i.e. Cabinet of Ministers of Ukraine) for revision«.

Initially, we would like to reiterate that on 7 December 2018 ***OECD/SIGMA*** (from hereinafter: SIGMA) drafted an ***Assessment Report on the draft LAP*** for the EU Delegation to Ukraine. The Assessment Report related to the then available last version of the draft Law as of 1 December 2018, which did not change significantly in the government approval procedure.

The assessment criteria of the report derived from the concept of Good Administration as it had emerged within the European Union and its Member States as a system of values stemming from the principles of rule of law, democracy and human rights.

The conclusions of the Report were, inter alia:

»Measured against these criteria the ***Draft LAP of Ukraine has significantly developed during the working phase of the working group. It now presents a piece of draft legislation that is, on the whole, consistent with basic principles and standards of Good Administration, as they are proclaimed by or derived from the Charter of Fundamental Rights of the European Union***.«

(...)

»So, it can be said that the ***Draft LAP already forms an adequate point of departure for the imminent legislative process*** in the Government including the public consultation procedure and, finally, for the parliamentary deliberation and adoption.«

The Assessment Report provided a number of specific comments and suggestions how to address them; many of these comments coincide with the comments of the CSED. However, as stated above, ***SIGMA supported adoption of the draft Law in the first reading with recommendations how to improve the text later in the parliamentary procedure***. We are still of the opinion that the ***draft Law is an adequant point of departure and that it would be meaningful to approve it in the first reading and then invest efforts to prepare amendments which would improve the text in line with the comments of the experts*** (besides eventual amendments that woud reflect political considerations of the deputies).

II.

In this document, we are anaylizing the opinion of the CSED, both regarding the general conceptual comments and more specific comments. Our conclusion is

1. that the ***general comments that led the CSED to the conclusion that the draft Law should be returned to the initiator for revision, are not justified***, and
2. than ***numerous specific comments of the CSED are valid, worth considering and incorporating into the draft Law*** in the continuation of the legislative procedure through amendments.

III.

The CSED begins its opinion with a historical overview of legislation on general administrative procedure. It also points out that »the necessity of legal regulation of relations between public administration bodies and private (natural and legal) persons is underlined in the EU-Ukraine Association Agreement (Article 471 – Access to courts and administrative organs)«. In conclusion, the ***CSED agrees with »the existence of necessity to adopt acts of legislation aimed to (...) modernize relations between authorities and citizens (...)«.*** The CSED also welcomes certain novelties of the draft Law.

IV.

In continuation of its opinion, the CSED points out certain ***general criticisms to the draft Law which lead to the negative conclusion on »sending the draft Law back for revision«.*** We are of the opinion that ***these general criticisms are not justified and might be a result of misunderstanding***.

1. Questioning the ***scope of the draft Law***. The SCES criticizes the fact that the draft Law applies to very different bodies of public administration, from central executive bodies to bodies of local self-government. Doubt is voiced whether the same rules can apply for bodies so different in the way of functioning.

   In our opinion, ***the aim of the initiator of the draft Law to encompass all cases in which public administration bodies decide on rights or obligations of natural and legal persons in concrete cases, regardless of which body makes the decision, has to be supported***. The common denominator which calls for a common legislative approach is the essential feature of such cases: a body of public administration decides in a concrete case, under authority of the law, on right or obligations of a natural or legal person. There is no reason to exclude some of the cases with this feature just because a specific type of body makes the decision. Essentially similar legal relations require essentially similar legal regulation. The same principles and rules should apply in all situations where public administration at any level decides on right or obligations of natural and legal persons. This is the very essence of existence of a law on general administrative procedure. If particularities of a certain type of administrative procedures require modalities in some elements of the procedure, the legislatior can regulate it in special laws, without the need to repeat all the principles and rules in every single law regulating administrative procedure.

   We would like to draw attention to the fact that specific provision have been incorporated in the draft on cases where the administrative act is issued by a ***collegial body*** (e.g. a local council) - see paragraph 2, Article 23:

   »A collegial administrative body may assign one of its members or authorize an official within the apparatus (secretariat) of such collegial body to perform all procedural actions. In such a case, the authorized official shall inform the collegial administrative body about the results of administrative proceeding, after which this administrative authority shall adopt a decision in a case within the time limits defined by this Law.«

However, we would like to emphasize that it would be highly recommendable to ***avoid situations when a local council, which is a political body, decides in concrete administrative cases***. The division of responsibilities at the level of local self-government should follow the principle that policy, including regulation, is formulated by the council, and implementation, including in administrative prcedures, is carried out by an executive / administrative structure of local self-government. This recommendation applies mainly to future legislation on local self-government

2. General questioning of the ***need of a legislative framework for general administrative procedure instead of regulation in special (sector) laws***. The SCES claims that the possibility evisaged by the draft Law to establish special modalities of administrative procedure for certain types of cases, raises the question of rationality and justification of adoption of a general law. This is a *non sequitur*. There are many examples in legal systems of the dualism general law - special law (*lex generalis - lex specialis*) and in a vast majority of legal systems of the EU member states this approach exists also in the area of administrative procedure.

   The general law in principle applies to all administrative procedures in all areas. Only in cases where the legislator finds it justified to introduce special modalities for some elements of the procedure, is the possibility of specific legislative modalities applied. For example, there might be reasons to apply modified deadlines, establish a rule that appeal does not have suspensive effect on execution of the administrative act etc. ***The fact that there is a possibility of specific regulation of certain issues in special laws does not contradict the fact that a general legislative framework for administrative procedure is needed***.

   One of the standards established in the Principles of Public Administration (elaborated by OECD SIGMA) reads: »A ***coherent and complete legal framework on administrative procedures exists, limiting special regulations to a minimum, preferably in the form of a law on general administrative procedures***.« (see chapter on Administrative Service Delivery, Principle n. 2).

   As SIGMA pointed out in the Assessment Report: »A good system of administrative procedures is first and foremost ***general and standardised***. Its basic principles are valid for every action of the executive and its rules shall apply to the large majority of administrative actions. The existence of a general and standardised procedural system is critical for an effectively and efficiently acting public administration and hence for the quality of services provided to citizens.«

The risk that special laws will disintegrate the general scheme always exists. We would suggest mitigating it by ***including a provision that special modalities shall only be introduced if justified reasons are in place***. (We are of course aware of the fact that such provision would only have declaratory, political meaning, and would not legally prevent the legislator to introduce excessive amount of special modalities. It s more an issue of policy than a legal one.)

3. Criticims of alleged ***excessive similarity of procedural arrangements with judicial procedures***. The SCES claims that »introduction of procedural rules similar to judiciary proceeding in the activities of administrative authorities, (...), appears unjustified and can lead to significant complication of (...) functioning.«

   The nature of decision making in administrative procedures (decision making in concrete cases of administrative law) to a certain degree indeed differs from judicial decision making. In administrative procedure public administration bodies decide in public interest on rights an obligations of parties (natural and legal persons) who are not in dispute, whereas the main aim of court procedures on the other hand is in principle to adjudicate on disputes between parties.

   However, this should not lead us to the conclusion that the need for due process of law is lesser in procedures performed by public administration bodies. ***In administrative procedure, just like in judicial procedures, a body with authority vested in it by the law, decides unilaterally on rights and obligations of the parties and for the sake of protection of parties' rights and legal interests, clear procedural rules must be established.***

   Historically, legislation on administrative procedure developed with the aim to protect citizens' rights in situations when public administration decides unilaterally on their rights or obligations. Protection of citizens' rights demands introduction of due process which by definition imposes constraints on public administration. In many cases the rules of due process naturally ressemble judicial procedures. Should we assume that public administration bodies must establish the true facts of the case with certainty before applying the law to a concrete situation, it is logical that the means of fact-finding will reseble those established for judicial procedures. Should we assume that impartiality must be ensured when public administration decides on rights or obligations of citizens, it is logical that the law establishes a framework for exclusion of the official person similar to the one existing in judicial procedures. Similarity between legal procedures, regardless whehre they are performed by courts or by administrative bodies, is logical and natural and exists in all legal systems of the EU member states.

   The SCED enumerates ***certain procedural elements which, in their opinion, are too similar to judicial procedure: provisions on evidence, objections, hearing, requests, exclusion of official,***

examination of place and objects, questioning of specialists, experts, witnesses. ***All these procedural elements exist in all modern laws on administrative procedure and they are inevitable in a country pursuing the principles of good administration.*** For example: rules on exclusion of the official person can only be considered problematic if we assume that impartiality of public administration doesn't matter. Rules on evidence would only be obsolete if we assumed that public administration should be entitled to make decision on rights and obligations of natural and legal persons based on probability or guessing.

The SCED ***puts under question even the right of the party to be heard which is in the very heart of the principles of good administration.*** In the EU member states this right goes without saying; it even applies for institutions of the EU according to Article 41 of the Charter of Fundamental Rights of the European Union.

The concern of the SCED on the ***risk of overly complicating administrative procedures*** is valid; however, in our opinion, it was sufficiently considered and taken into account in the draft Law. The draft Law enables very simple procedure in low-complexity cases. In cases such as business registration, issuing personal documents and similar, and under assumption that the outcome is beneficial for the party, the decision can be taken on the basis of the party's application and insight in official data registries, without the need to examine additional evidence, hear the party and even without issuing a written administrative act. However, in more complex cases also more complex means of fact-finding will be used, the parties will be heard and a written administrative act with full reasoning will be issued. The complexity of administrative cases varies from very simple ones (issuing a passport or driver's licence) to very complex ones (environmental or building permit for a chemical factory). In our opinion ***the draft Law strikes a proper balance between ensuring protection of rights and due process on one hand and ensuring simple and smooth proceeding on the other hand.***

The SCED claims that similarity of administrative procedure with judicial procedures may »lead to relocation of handling of disputes about law from courts to administrative authorities«. This assumption is wrong. The LAP does not change the scope of competences of public administration; public administration will deal with the same scope of cases, only procedural rules for handling these cases will be upgraded. In administrative procedures, no disputes will be handled; public administration will still only decide on administrative law cases (whereas civil and criminal cases will of course still be within the responsibility of courts), but it will have to comply with the upgraded rules of due process. The fact that the parties have the right to be heard (state their case, propose evidence etc.) does not lead to change of the nature of an administrative law case to a court case. Licences, permits, decisions on social benefits, taxes, customs etc. will still be taken by public administration, nothing will change in this respect.

However, public administration will be bound by additional rules when handling the cases within its competence. Just like presently, the courts will only interevene if judicial review is sought by the party in administrative procedure. Introduction of the right to appeal to a higher administrative instance will even reduce the workload of the courts in the sphere of administrative law.

The opinion of the SCED is particularly critical on the introduction of the possibility to examine witnesses in administrative procedure. Examining witnesses is a means of fact-finding in all laws on administrative procedure in the EU member states and it is fully logical that such possibility exists. This does not mean that witnesses will be examined in all or in most of the cases; however, the possibility must be envisaged for the cases where examination of witnesses is the most appropriate way of establishing the true facts of the case.

V.

The above explained ***conceptual concerns*** led the SCED to the conclusion that the draft Law should be »returned to the initiator for revision. In our opinion these conceptual concerns of are ***not relevant and are result of misunderstanding***.

VI.

On the other hand, there are ***several comments of the CSED which deserve careful consideration and should be taken into account*** in the later readings through amendments to the draft Law:

1. ***Unclear distinction between "administrative procedure" and "administrative proceeding".*** We believe that these two terms should be unified and that the LAP should only operate wih the term »administrative procedure«.

2. Lack of clarity as regards the ***application of the Law to »administrative action«***. In its assessment of the draft Law SIGMA has drawn attention to this issue as well.

   The issue is whether the LAP should apply only to cases when public administration bodies take decisions on rights and obligations of natural and legal persons in the for of administrative acts or also to situations when rights and freedoms of natural and physical

persons are affected through actions and omissions of public administration. Both solutions are possible and legitimate; recently adopted laws on administrative procedure tend to encompass all administrative activity, but there are also laws in the EU member states which apply only to the classical administrative decision making.

Whatever the decision, it must be clear and unambiguous. We agree with the CSED that this is not the case in the current text of the draft. We recommend careful consideration of this issue, a clear and unambiguous decision and then consistent incorporation of the decision in the draft Law.

3. The need to ***align provisions of the Law on Administrative Services with the LAP***. In general, the draft LAP envisaged alignment of sector legislation within a certain period of time. However, we agree with the CSED that in the case of the Law on Administrative Services it would be recommendable to ***align its provisions with the LAP via transitional provisions of the LAP***, as Law on Administrative Services is not just one of the sector laws regulationg administrative procedure but covers a very large scope of administrative procedures, initiated at the request of a natural or legal person.

4. ***Ovelapping (duplication) between Articles 6 (legality) and 8*** (exercise of powers for their intended purpose). We agree that Article 8 is ***redundant and could be deleted.***

5. ***Unclarity of the provision of Article 6, paragraph 5*** (restoration of violated rights of parties). We agree that the provision should be either deleted or additionally elaborated.

6. ***Limitation of legal subjectivity in administrative procedure to persons who have come of age.*** We fully agree with the CSED's opinion that ***legal subjectivity should not be restricted in this way as natural persons are legal subjects from birth***. To be precise, the wording of the provision of Article 27 suggests that legal subjectivity can also apply to younger persons but only »in cases related to relations under public law in which they can take part on their own according to legislation«; however, this wording is not adequat, as legal subjectivity (the possibility to be holder of rights) and legal capacity (the possibility to act on one's own in legal relations) are two distinct legal categories. ***Legal subjectivity in administrative procedure should be granted to every natural person from birth to death***. Of course, whether a person is entitled to file a request in a specific matter, is an issue of substantive legislation. For example, there might be age limits concerning employment, marriage and consequently administrative law rights connected with it.

7. ***On-site investigation related to homes of citizens*** (Article 41, paragraph 3). While we disagree with the opinion that such on-site inspection should not be allowed at all in administrative procedure, we agree with the need to introduce criteria for approval of such on-site inspection by the court. We are of the opinion that in certain cases, particularly in inspection (control) procedures such mechanism is needed to establish the true facts of the case (for example, if an illegal activity is being carried out in an apartment or house) before issuing an administrative decision. On-site investigation of home is particularly needed when a person's home is also the place of performing an economi activity. However, since infringement with the inviolability of domicile is in stake, such investigation can only be performed if approved by the court. There is ***indeed lack of any rules on such request by administrative bodies and on criteria according to which the court would take decision on approval of on-site investigation in a home.*** This should be addreesed through an amendment to the draft Law.

8. Suggestion to define the ***minimum deadline for the party to correct flaws in the application*** (Article 50). We agree with the CSED that it would make sense to define a minumum deadline and open some room for discretion of the administrative organ to establish a longer deadline if appropriate.

9. Unclear provision on the ***possibility of issuing an administrative act in electronic form*** (Article 72, paragraph 1). The curent draft reads as if electronic form was default in all cases except of the law explicitely stipulates otherwise (»An administrative act shall be issued electronically, unless otherwise stipulated by the law.«) We don't believe that such provision is realistic for the time being. The Law should simply stipulate that ***electronic administrative act complying with the rules of legislation in the area of digital trust services is legally equalized with the one in physical (paper) form and can be issued if the party filed an application in electronic for or if the party agreed with issuing the act in electronic form***.

10. The need to review the provisions on ***revocation and repeal of administrative act***. The CSED questions these provisions from the perspective of ***legal certainty***. When regulating the possibility of unilateral revocation or repeal of an administrative act (particularly of an unlawful one), the legislator must strike a balance between two values: legality on the one hand and legal certainty on the other hand. We are of the opinion that compared to the first versions of the draft Law ***much progress has been made in balancing these two values***. Inter alia, the right of the party in good faith to receive compensation for damages was introduced. However, we believe that ***additional discussions in respect of conditions and deadlines for unilateral revocation or repeal of an administrative act would be welcome.***

A possible solution would be to restict the possibility of revocation and repeal to the most serious and obvious violations of susbstantive or procedural law.

11. We also agree with the CSED that ***further work on technical improvements*** of the text with the aim to make it fully coherent and as easy to understand is possible, would be welcome.

VII.

There are also some comments on of the CSED on specific provisions of the draft Law with which we cannot agree:

1. The CSED suggests to introduce ***differentiation between two types of principles of administrative procedure: substantive*** (e.g. legality) and ***procedural*** (e.g. right to be heard). While this distinction is theoretically justified, we do not see any practical added value in introducing it into the text of the Law.

2. Criticism of ***internal delegation of administrative decision making.*** The draft Law envisages that the head of each administrative body should issue an internal act establishing an internal scheme of responsibilities for decision making in administrative procedures. The CSED is of opinion that »these functions are generally performed by the head of authority and may not be delegated by them to anyone«.

   Lack of delegation is one of the weaknesses of Ukrainian public administration, identified also in SIGMA's Baseline Measurement Report (see page 93; delegation is scored one point out of four). ***Administrative procedure is in the EU member states a typical sphere of administrative activity where delegation is very much emphasized***. Usually administrative acts are issued by official at different levels, which of course does not exclude the possibility that the head of an institution retains the power to decide on the cases with the highest importance, impact or public echo. Delegation does not contradict the principle that competence in administrative law should be determined by the law. Namely, ***delegation does not change competence of an administrative body to review certain case, it is merely a method of division of responsibilities within the body.*** Concentrating all decision-making power in the person of the head of institution would lead to inefficient functioning or even paralysis.

In our opinion ***the provisions on internal delegation of decision making (Article 23) constitute a positive step both in terms of better legislative framework for administrative procedure and in terms of more efficient functioning of public administration in general***. They are is fully in line with SIGMA's findings and recommendations. The provisions are flexible enough to enable heads of institutions to establish rules of delegation adjusted to the type and size of administrtative bodies and to the characteristics and frequency od administrative cases.

3. ***Suggestion to define failure of the administrative body to meet procedural term (time limit) as gross breach of administrative procedure entailing legal consequences for respective officials*** (in Article 42). The draft Law already envisages the right of the party to file an appeal in case of breach of the time limit to issue an administrative act (»appeal against silence of administrative body«, Article 80, paragraph 4). ***Specific sanctioning of individual officials for breaching the time limits envisaged by the LAP would be inappropriate***. Such attempts have been made in some transition countries but failed to produce positive effects. Delays in decision making are usually a systemic problem for which individual officials cannot be blamed. If the fault can be attributed to an individual, ***disciplinary sanctions*** exist in the legislation on civil servants.

4. ***Criticism of the provision on rejection of an application identical to one already decided on the merit*** (except in case of changed circumstances - Article 52). We disagree with the criticism. If an application has been decided on the merit, it is logical that it shall be rejected for procedural reasons and not reviewed again, unless factual or legal circumstances have changed. This rule is usually referred to in theory as »**ne bis in idem**«.

5. Criticsm of the provisions of Article 63 stipulating that »***the case can be resolved immediately in the presence of a person«***. This criticism ***contradicts the previously voiced concerns that the new rules of administrative procedure might overly complicate the procedure***. The provision in stake is a good example of how ***the draft law tends to simplify the procedure whenever this is possible***. We are of the opinion that the criteria for applying the option from Article 63 are clear and adequat (»When satisfaction of an application filed in person does not require additional documents and information, engagement of other participants of administrative proceeding or persons assisting in review of a case...«). Such simplfication can be applied for example in customs procedures and issuing of some personal documents.

6. Allegation that »***the relation between provision of the draft law and provisions of the Law on Citizen's Petition is not clear with regard to obligation of the head and other officials of public authorities and local self-governments to receive citizens in person***«. The draft LAP clearly

regulates the ways of filing an application (in person, via regular mail or electronically) and the right of the person to be heard - not necessarily by the head of an institution but by the official responsible for carrying out the procedure. The Law on Petitions covers much larger scope of citizen communication with public institutions. Interactions connected with cases in which public administration bodies decide on right or obligations of natural and legal persons should be subject of the LAP and not of the Law in Petitions. To the extent they currently apply to applications in administrative procedure, provisions of the Law on Petitions will have to be aligned with the LAP.

7. Allegation that ***monetary penalties for administrative offences cannot be established by the LAP.*** It is ***usual in all legal systems that numerous laws establish administrative offences and corresponding sanctions in respective areas***.

8. Criticism of provisions on ***enforcement of administrative acts***. ***Enforcement is an essential part of administrative procedure and LAP without provisions on enforcement would be imperfect***. Such provisions can be found in majority of laws on general administrative procedure. We support the solution according to which primary responsibility for enforcement is on the organ that issued the first-instance administrative act. We also support provisions of Article 102 stipulating that monetary claims shall be enforced in line with general legislation on enforcement proceeding. We also disagree with the allegation that enforcement by coercion in administrative procedure is not acceptable. In certain, although rare, cases coercion is the only way of enforcing a decision. There is no reason why such powers could not be versted in public administration bodies.

VIII.

In conclusion, we are of the opinion that the draft LAP reached ***sufficient maturity and quality level to be approved by the Verkhovna Rada in the first reading. Specific comments of the CSDE on certain provisions (as well as specific comments by SIGMA) should be carefully considered in the working group and on the basis of such discussions amendments should be drafted and introduced in the continuation of the legislative process.***

We would like to reiterate at this occasion that by enacting this Law, Ukraine will make an important step in the process of adjusting to the European standards in the framework of implementing the Association Agreement. By enactment of the LAP, the legal framework for administrative procedures

will be brought in line with the Principles of Public Administraton, a set of standards guiding EU accession and partnership countries in their reforms of public governance.

Laws on administrative procedure are in place in all European Union member states as an essential part of the »right to good administration«, proclaimed by the Charter of Fundamental Rights of the European Union.

The draft Law on Administrative Procedure reflects the principle that public administration is there to implement democratically enacted laws in an unbiased, predictable and effective way and to serve the citizens. The Law will increase the legal protection of citizens and enforce legallity, certainty and predictability of decisions of public administration that affect rights and freedoms of citizens. It will empower the citizens in their interaction with the state. By enforcing legality, predictability and legal certainty, it also has potential to be an effective remedy against corruption.

Assessment Report
on the
Draft Law of Ukraine
on Administrative Procedure
(version of 01. December 2018)

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Introduction to the report

With this report SIGMA delivers an assessment of the „Draft Law of Ukraine on Administrative Procedure“ (hereinafter Draft LAP). The draft legal text was elaborated in 2018 by a ministerial drafting group (WG) headed by the Ministry of Justice of Ukraine. In November 2018, it was completed and forwarded to the Governmental legislative procedure for further processing. The object of the assessment is an English translation of the original Ukrainian text.

This assessment report prepared upon request of the EU Delegation to Ukraine and delivered for its internal use, is the final step in SIGMA's more recent engagement in the drafting process that started in March 2018 with a first statement on an interim version of the Draft LAP as it was at that time provided by the WG. Since then the SIGMA activities included participation in several meetings of the WG; provision of background papers on various subject matters; assessment of parts of the Draft LAP; and proposals for modification of the draft legal text.

The major topics addressed by SIGMA were:

- Relationship between the new LAP and the existing Law of Ukraine on Administrative Services,
- Scope of the Law,
- Definitions of terms,
- Jurisdiction of administrative authorities,
- Impartiality of acting public officials,
- Participants of administrative proceeding,
- Participants' access to case file and hearing of participants,
- Chapter on Administrative Act,
- Chapter on Notification,
- Chapter on Enforcement.

All SIGMA efforts were closely joined and co-ordinated with the work programme of the EU funded technical assistance project EU4PAR. The co-operative partnership with the EU4PAR colleagues has been proven as smooth, pleasant and very fruitful. It succeeded in substantially contributing to a final version of the Draft LAP that, once adopted, would constitute a suitable legal instrument for a better administrative practice in Ukraine.

Paris, 7 December 2018

Table of contents

ASSESSMENT CRITERIA

The assessment criteria of this report derive from the concept of Good Administration as it has emerged within the European Union and its Member States as a system of values stemming from the principles of rule of law, democracy and human rights.

The Charter of Fundamental Rights of the European Union proclaims that every person has the right to Good Administration[1]. Some key elements of this fundamental right are stated in the Charter itself, while other principles and standards of good administration derive from other EU legislation[2] and judicature as well as from good administrative practice of EU Member States. Long-time experiences of administrative practitioners, supported by scientific elaboration also provide important contributions.

These principles and standards have become part of modern administrative systems. Having evolved in the course of time, they present a dynamic character, integrating new developments in order to respond to changing social needs.

In the past, the main challenges for administrative actions were respect for the rule of law and predictability of those actions. Administrative decisions had to be based on a valid legal provision circumscribing competence and setting its limits. In this way, decisions could be reviewed and controlled by the hierarchy and the judiciary. So, predictability and accountability of administrative actions were ensured.

A more recent challenge for Good Administration is to respond to fundamental social, cultural and economic changes that have occurred during the last decades. These changes affect all countries and state systems.

To single out a core recent change, this can be described as a more equal relationship between state authorities and citizens. Historically, citizens were regarded as subordinated to public authorities. The top-down and unilateral behaviour of public authorities dominated legal patterns as well as everyday administrative practice. This type of relationship was thought to serve the principle of the rule of law, while it guaranteed – inter alia – the non-interference by the state unless specifically provided for by the law.

However, modern democratic governance transformed both the role of the state and the citizen. The citizen is not passive and a subject to the exercise of state authority but is seen as

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[1] Article 41 of the Charter of Fundamental Rights of the European Union (2000/C 364/01) *(http://www.europarl.europa.eu/charter/pdf/text_en.pdf)*;

[2] Of fundamental relevance for the public administration are:

Article 2 of the Treaty on European Union, according to which the "Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.".

Article 197 of the Treaty on the Functioning of the European Union, which refers to administrative capacity of the Member States as a matter of common interest.

European Code of Good Administrative Behaviour
(h*ttp://www.ombudsman.europa.eu/en/resources/code.faces#/page/1)*

an asset: the citizen is given space as an active member, a partner who can contribute to the general welfare. His/her input, co-operation and participation are encouraged and sought after as a necessary condition for democratic and efficient governance, and for economic development. This involves a new place for values such as transparency, simplicity and clarity, participation, responsiveness and "citizen oriented" performance. They redefine the relationship to citizens as more "horizontal".

It follows from this that according to EU standards both legality and citizen-orientation of public administration constitute the two all overriding objectives of any administrative legislation, be it dealing with structure and organisation of the administrative system, the rights and obligation of its personnel, or the system of judicial control of administrative actions. This, however, is in particular true for the legal framework guiding the administrative decision-making process and the direct relationships between citizen and state, in other words for a Law on Administrative Procedures, which in EU Member States is often referred to as the "Constitution of Public Administration". The major elements of a good legal framework for administrative procedures can be listed as follows:

1. A good system of administrative procedures is first and foremost general and standardised. Its basic principles are valid for every action of the executive and its rules shall apply to the large majority of administrative actions. The existence of a general and standardised procedural system is critical for an effectively and efficiently acting public administration and hence for the quality of services provided to citizens.
2. The scope of the law on administrative procedures shall comprise not only formalised administrative decisions - in other words: the traditional "administrative acts" - but ensures full application of the principles legality and citizen-orientation to any other form of administrative actions or behaviour as they are characteristic of a modern, service-oriented public administration, when those "other administrative actions" affect individual rights and legitimate interests of the citizen.
3. A good system of procedures sets simple and clear guidelines for public administrative authorities and their civil servants in everyday activities. It is phrased in a simple, clear and understandable manner and can thus be accessible and commonly known to citizens.
4. Good procedures are citizen-oriented, taking into account citizens' expectations and providing guarantees for their procedural rights. It further defines the standards of ethical and practical conduct of civil servants, thus ensuring the proper functioning, the efficiency and quality of the services delivered to the public.
5. A standardised system of administrative procedures favours the transparency of the decision-making process and enhances the legitimacy of its product. Citizens and businesses directly involved in an individual administrative procedure are able to assess if the administrative authority acts within its legal boundaries, to follow the steps the authority has to take, and more generally to predict the course of the administrative process.

6. By prescribing the procedural rights to respect, a general system of administrative procedures sets the standards for a fair decision-making process. It ensures impartiality and equal treatment. It guarantees among others the right to be heard; the right to receive an answer by an administrative authority; the right to information and access to files; the right to legal advice; the right to protect personal data, the duty of the administration to give reasons for its decisions; the duty of the administration to indicate the possibilities for legal challenge to its decisions.
7. A standardised system ensures efficient operation by providing deadlines by which the administration has to respond or make a decision and by clearly defining responsibilities (who does what?). It makes sure that there are no unnecessary steps resulting in complexity and delay, nor costs involved. Exceptionally, when charged, the cost should be affordable and reasonable.
8. Nowadays, a system of administrative procedures must encourage the use of citizen-friendly forms of communication such as e-government. Thus, administrative procedures become easier and faster, for citizens and economic actors inside the country and from abroad.
9. The establishment of a general system provides the principles also for any special, new or complex procedure and allows possible gaps to be filled. In this way, existing procedures can be rationalised and streamlined while new ones will benefit from the existence of general framework rules.
10. Finally, a good regulatory system of administrative procedures provides a system of administrative legal remedies. Legal control of administrative actions belongs not only to the administrative courts. Internal control by administrative bodies is also needed, not to substitute administrative disputes but to provide an additional system of protection, proof and correction. The scope of both the administrative legal remedies and the judicial control has to correspond to the wider scope of the LAP, i.e. legal remedies are provided not only against administrative acts or omissions of administrative acts but also against any other administrative action.

SUMMARY OF THE ASSESSMENT

Measured against these criteria the Draft LAP of Ukraine has significantly developed during the working phase of the WG. It now presents a piece of draft legislation that is, on the whole, consistent with basic principles and standards of Good Administration, as they are proclaimed by or derived from the Charter of Fundamental Rights of the European Union.

The content of the draft text is, in principle, free of serious regulatory gaps, virtually none of the above listed 9 categories of criteria remains completely unconsidered. Most of the regulatory solutions found by the WG are appropriate or at least justifiable, i.e. they fall within the margin of legislative discretion the EU principles grant to a legislator.

The structure of the text arranged by 9 Chapters and subdivided into sections, subjections and articles, follows to a broader extent the rules of the common methodology of legal drafting; similar can be said with respect to the legal language, as far as the English translation allows conclusions on the original Ukrainian version.

So, it can be said that the Draft LAP already forms an adequate point of departure for the imminent legislative process in the Government including the public consultation procedure and, finally, for the parliamentary deliberation and adoption.

There are, however, a few crucial topics and provisions of the draft text, that would require some clarification respectively completion, in particular for the purpose of avoiding serious problems for implementing the law by administrative and judicial practice. These issues that could still be resolved in the course of the upcoming phases of the legislative procedure are shortly summarised in the following list. More detailed explanation including recommendations for solutions to the problems will be provided in the subsequent chapter of this report.

1. Relation between Draft LAP and the Law of Ukraine on Administrative Services

   In paragraph 2 of article 3 the Draft LAP addresses the problem of the relationship between the future LAP and the current version of the Law of Ukraine on Administrative Services (hereinafter LAS). The provision in the Draft LAP must be understood as reference to the "*lex specialis"* rule, with the result that when "administrative services" (in the words of the Draft LAP: to administrative actions) fall in the scope of both laws, the LAS as well as the LAP, the current LAS shall apply. On the other hand, according to paragraph 3 of article 3 the "principles" of the Draft LAP also apply to the services covered by the LAS. But does this mean that the principles of the Draft LAP overrule the LAS? If so, to what extent do they prevail?

   This problem will leave a sphere of uncertainty that could cause misinterpretation of both pieces of legislation and could barely be handled by administrative and judicial practice without clarification through the legislator.

2. Scope of the law

   The Draft LAP opens in the second sentence of paragraph 1 of article 1 the scope of the law to "other activity of administrative authorities". It determines that "the principles of administrative procedures" also apply to administrative actions that do not fall under the definition of the traditional administrative act. This is a remarkable contribution towards a modern, service-oriented understanding of administrative procedure law. However, in most of the procedural rules of the Draft LAP only the legal term administrative act is used, which means that this rule applies to other actions by exception only; and any exceptional application requires specific justification, which in turn leads to legal uncertainty.

   Clarification for the administrative and judicial practice could be reached by changing the rule-exception relationship.

3. Administrative act

   The administrative act is still the most characteristic instrument for the exercise of administrative functions in continental European administrative law. In the Draft LAP the term administrative act is defined in article 2 under number 3). This definition is very short and incomplete and thus leaves space for misinterpretation and uncertainty.

A completion of the definition that includes also the "collective administrative act" and the "administrative act directed to the status of a thing" would significantly facilitate the implementation of the rules on this core element of administrative practice.

4. Criteria for nullity and unlawfulness of administrative act

The consequences of nullity are that an administrative act does not come into existence due to its major and obvious defects. Nullity can cause serious legal disadvantages to the party and legal uncertainty in general. That is why this consequence is justified only in very exceptional cases. Other "normal" defects make the act (only) unlawful, i.e. the act comes into legal effect but can be challenged by a legal remedy.

The legal consequences of nullity are stipulated by article 79 of the Draft LAP. Concerning cases of other than major and obvious cases of minor unlawfulness, which should of course be the default rule, the Draft LAP uses the legal term unlawful but does not provide an article stipulating the preconditions of unlawfulness.

As explained below in detail the doctrine of nullity is not of practical relevance, apart from the factual risks for the party and the legal uncertainty. Therefore, there is virtually no need for such a provision. Instead, it would be better to abolish article 79 or at least add to the existing version of article 79 an article on unlawfulness for the purpose of ensuring more clarity of the matter.

As a consequence of such amendment of the Draft LAP the article 80 could make a cross reference to the proposed new provision when determining the scope of the appeal by using the legal term "unlawful".

5. Decision on appeal according to Article 87[3]

Article 87 provides in paragraph 1 under number 3) the possibility that the reviewing appeal authority returns the administrative act obliging the first-instance administrative authority "to issue an appropriate act or review the case again". This solution should be avoided, because it allows the extremely unsatisfactory so called "ping-pong-system", with its negative impact not only on the individual rights and interests of the citizen but also on the public interest in effective and efficient procedure.

As a rule the appeal authority shall be obliged to conclude the administrative proceeding by taking the final decision, unless a final decision of the entity is precluded by law. However, instead of conducting the investigation of facts by itself, the entity reviewing an appeal should be entitled to mandate the administrative authority to carry out the investigations needed.

[3] In the English version of the Draft LAP the numbering of this article is wrong. The article numbers 83, 84 and 85 appear twice, the repeated numbers 83, 84, 85 must be 85, 86 and 8.7

6. Hearing

The right of hearing is a paramount element of citizens' fundamental rights, deriving directly from the fundamental principles of human dignity and the rule of law and the key stone of participation in administrative procedure. It is an essential precondition for a trustful relation between citizen and state as it is necessary in a democratic state.

The article 68, however, lists in its paragraph 3 only two cases, when the protection of the rights and interests of a participant does not require the conduct of a hearing. As a third exemption of the rule should be included in the article the situation when the administrative authority intends to issue a decision based on provided written facts and documents that will fully satisfy the application of the participant or be completely in line with his/her statements made in the course of the proceeding.

7. Notification

Notification is the umbrella legal term for the means by which the administrative authority communicates its administrative actions including procedural actions in the frame of an administrative proceeding. A set of rules on notification, be it provided in a chapter of the general administrative procedure law or even in a separate piece of legislation, is a central requirement of any legal framework for administrative procedure, because all legal consequences connected to an administrative proceeding depend on notification. Proper notification ensures legal protection of the citizen, transparency of public administration, effectiveness and efficiency of administrative behaviour.

The Draft LAP operates in some articles with the term "notice" without defining it, but some regulatory elements can be found in article 78 of the Draft LAP that is dealing with notifying an administrative act. This legislative solution, however, does not do justice to the importance of this matter.

A separate chapter providing rules on different ways of notification is recommended to fill this regulatory gap.

8. Implementation of the LAP

A programme to facilitate proper implementation of the new LAP to be carried out during a *vacatio legis* of 18 – 20 months (period between the promulgation of the new LGAP and the date when the law takes legal effect) is strongly recommended. Details for such programme will be explained below.

REASONING OF THE ASSESSMENT

I. Compliant with assessment criteria

1) General and standardised system

The Draft LAP provides a general legal framework for administrative procedures. It lays down constitutional principles that are valid for the exercise of executive power as a whole and sets procedural standards for the process of preparing and undertaking the large majority of administrative actions with external legal effects.

This does not have a priori conflict with the fact that according to paragraph 2 of article 1 of the Draft LAP some legal relationships within the public law sphere are subject to special procedural legislation. This is not unusual in continental European public administrations. It remains at the liberty of the legislator to exclude some areas of administrative tasks from a general law, as long as the special-law solutions are exceptional and justified by sensible reasons and – this is very crucial – in these areas the rule of law is also maintained, i.e. the exercise of public power is in any individual case subject to legal remedies and judicial control, so that effective protection of individual rights and legitimate interests of citizens is guaranteed.

Objective and sensible reasons for the exclusion of the areas under numbers 1 to 5 of paragraph 2 of the Draft LAP can be seen; in particular the exclusion of cases under number 1 and 4 already results from the nature of the subject matter. As to the special legislation's compliance with the rule of law, it is being understood that it ensures the required standard of legal protection of the citizen.

2) Wider scope including also other administrative actions

As a remarkable contribution towards a modern, service-oriented understanding of administrative procedure law the scope of the Draft LAP comprises not only formalised administrative decisions - in other words: the traditional "administrative acts" - but ensures full application of the principles legality and citizen-orientation to any other form of administrative actions or behaviour.

This follows from the second sentence of paragraph 1 of article 1, according to which the scope of the law includes "other activity of administrative authorities" and in this way stipulates that "the principles of administrative procedures" also apply to administrative actions that do not fall under the definition of the traditional administrative act. With the legal term "principles" the provision refers to the article 4 providing a catalogue of principles and the articles 5 to 20, which specify the regulatory content of these principles. In this way the legal basis is laid for the application of numerous procedural rules of the Draft LAP also the other administrative action, including the Chapter VI on Administrative Appeal.

With this legislative solution the Draft LAP responds to the fact that during the last 30 years the range of administrative activities has been expanded. Technological innovation, societal and cultural changes and economic trends have entailed new challenges of public administration and in response to them new forms of administrative actions have been developing, including the delivery of public services. A good LAP needs to cover all those

administrative actions as they are characteristic of a modern, service-oriented public administration.

However, the legislative approach how the scope is opened to other administrative actions would benefit from clarification. In most of the procedural rules of the Draft LAP it is still only administrative act, to which the provision refers. This means that this rule applies to other actions by exception and only by analogy; and any exceptional application requires specific justification, which in turn leads to legal uncertainty. Clarification for the administrative and judicial practice could be reached by changing the rule-exception relationship. Therefore, in the next chapter of this report a proposal will be made for such improving clarification.

3) Simple and clear guidelines

The Draft LAP sets simple and clear guidelines for public administrative authorities and their civil servants in everyday activities. It is phrased in an understandable manner and can thus be accessible and commonly known not only to public officials but also to citizens. The procedural requirements are relative simple and clear, at least unnecessary excessive formalism is not the approach that could be seen in the Chapters II to IV of the Draft LAP that are dealing with the procedural steps in detail.

4) Citizen-orientation

Citizen-orientation of the Draft LAP can be seen particularly in article 17 providing the principle of officiality; article 29, paragraph 1 stipulating rights of the participant; article 51 obligating the administrative authority to forwarding application to an appropriate authority; article 56, paragraph 1 imposing the obligation related to additional documents on the administrative authority.

Good procedures are citizen-oriented, taking into account citizens' expectations and providing guarantees for their procedural rights. It further defines the standards of ethical and practical conduct of civil servants, thus ensuring the proper functioning, the efficiency and quality of the services delivered to the public.

5) Transparency and right to information and access to files

According to the key provision of article 13 "Openness" citizens and businesses directly involved in an individual administrative procedure have the opportunity to assess if the administrative authority acts within its legal boundaries, to follow the steps the authority has to take, and more generally to predict the course of the administrative process by familiarising itself with the case file. This is specified by some other provisions, in particular by article 29 "Rights and obligations of a person", article 39 "Records management in an administrative proceeding", and article 59 "Access to a case file.

6) Impartiality and equal treatment

Trust in impartiality of the public officials involved in an administrative case is of utmost relevance to implement the principle of the rule of law. Its *"ratio legis"* is to protect:

- the right of the participants of an administrative proceeding that the concrete administrative case is based on objectively determined facts and decided upon solely in accordance with the law;
- the trust of the public in general in the integrity of public administration;
- the administrative authorities concerned by avoiding of conflict between its interest in lawful administrative actions and the illegitimate interest of the acting official handling the case;
- the acting official against the appearance of misusing of his/her involvement in an administrative case or suspicion of abusing his/her position for personal benefit.

An effective legal prohibition on involvement of bias official operates on the basis of an abstract and an irrefutable assumption. In other words, an exclusion does not require the proof of the very existence of a personal interest in the outcome of an administrative proceeding. It is merely required that certain objective circumstances or facts exist, which on the basis of real-world experience indicate that a personal interest of the official in the outcome of the proceeding is (e.g. due to the official's close proximity to the participants of the proceeding) more probable than it is the case with other people where those circumstances or facts do not exist. So finally, it is not the proven fact of impartiality but a "bad" appearance that justifies and demands the legal consequence of exclusion of an official.

In the Draft LAP the articles 24 "Exclusion of official of the administrative authority" and 25 regulating the procedure for exclusion fully satisfy the regulatory requirements as they are the standard in continent European public administration systems. Along with numerous other provisions of the Draft LAP these articles belong to the frame of legal instruments suitable for combatting nepotism and corruption.

7) Right to be heard

The right of hearing is a paramount element of citizens' fundamental rights, deriving directly from the fundamental principles of human dignity and the rule of law and the key stone of participation in administrative procedure. It is an essential precondition for a trustful relationship between citizen and state as is necessary in a democratic state.

This right of hearing opens the opportunity to the participant of an administrative proceeding to explain its own way to see the facts and judicial problems the proceeding is dealing with before its conclusive decision is taken and – furthermore – the obligation of the administrative authority to take notice of the statement and to take it into consideration for the conclusive decision. The latter requires that the administrative authority documents this consideration in the reasoning of the decision.

The party's right of a fair hearing during the procedure corresponds to the obligation of the administrative authority to proactively inform the participant about this right and the related opportunities, so that he/she will be enabled to participate in the proceeding and defend his rights and legitimate interests by putting forward facts and arguments. In order to do that the participant must be properly notified with all the necessary elements he needs to be aware of in order to exercise his right of hearing in the proceeding.

However, the fair hearing is not only in the interest of the participant but also in the public interest. Public administration of today shall see the party see an active partner, whose input, co-operation and participation in the administrative proceeding shall be encouraged and sought after as a necessary condition for efficient administrative decision-making based on

the two pillars of legality and citizen-orientation. In this context the fair hearing is a procedural instrument to contribute to "right" administrative decisions, decisions that are lawful, expedient, and find acceptance on the part of the addressee, the latter even in cases when due to the legal situation the party's expectations or demands could not be fully satisfied. Moreover – more generally spoken - the hearing of the party is the procedural implementation of basic values and principles of public administration, such as legality, transparency, active assistance, fairness and impartiality, objectivity, simplicity and clarity. They redefine the relationship between citizens and public administration as more equal ("horizontal") than in former times of all national administrations in Europe when the citizen was regarded mainly as subordinated to administrative authorities.

The principle of the guarantee of a person's right to be heard is laid down in article 18 of the Draft LAP. It is implemented by various specific procedural rule, in particular by article 29 "Rights and obligations of a person", paragraph 1 of article 38 stipulating the obligation of the administrative authority to "engage" participants to take actively part in the proceeding, article 60 "Explanations and comments from participants of administrative proceeding", and the whole Section 4 of Chapter IV (articles 68 to 70) of the Draft LAP.

8) Clearly defined jurisdiction

According to the constitutional principle of the separation of powers, the public administration has its own, exclusive authority, which includes both making administrative decisions and their enforcement. A clear legal definition and delimitation of responsibilities or competences of administrative authorities is, besides objective administrative procedures that are stipulated in this Draft LAP, a basic requirement of the rule of law. This requirement is complied with by articles 21 "Competency of the administrative authority" and 22 "Responsibilities of administrative authority".

9) Efficient and expeditious proceedings

Efficiency of the administrative proceeding is in the interest of both the participant and the administrative authority. The importance of speedy and efficient administrative proceedings in particular for the economic development of Ukraine to encourage investments must not be underestimated.

The basic provisions for this are article 14 "Timeliness and reasonable time limits" and article 15 "Efficiency". Examples to attain these objectives are the prescription of deadlines to the public body as well as to the party for numerous procedural steps to accelerate administrative proceedings. Of special importance is the general deadline for administrative proceedings (article 37 "Time limits for determination of". "Time limit" is the most frequently used legal term in the Draft LAP, almost 20 provisions are dealing with setting time limits binding not only the participants but also the administrative authority.

Of course the principle of speed and effectiveness does not exclude the existence of certain substantial procedural steps which might be more or less formal, when necessary to guarantee the lawfulness and the merits of the final action, in accordance with the administrative principles of the European administrative space. The rule of Law (c.f. article 5 of the Draft Law) is the predominant principle for all administrative actions. The commonly known rule "Quality matters more than speed" is valid also in this context.

10) Effective legal protection through legal remedies

Legal protection of citizens through legal control of administrative actions belongs not only to the administrative courts. Internal control by administrative bodies is also needed, not to substitute administrative disputes but to provide an additional system of protection.

However, administrative legal remedies, which means remedies lodged by the party and decided on by administrative bodies, are vital for the internal monitoring of internal decision-making standards. The public body which decided on the case and the supervisory body of the next instance, not only have the opportunity to realise possible legal errors and have to rectify the outcome of the particular case, but also have the possibility to guard against continuation of a systemic mistake and to improve the administrative practice in general concerning similar cases.

The scope of both the administrative legal remedies and the judicial control has to correspond to the scope of the Draft LAP, i.e. legal remedies are provided not only against administrative acts or omissions of administrative acts but also against any other administrative action. All administrative authorities are to conduct their tasks under the rule of law, no matter which form of action has been taken.

Therefore, the Draft LAP grants in article 80 paragraph 1 the right to legal remedy to a participant "if he/she believes that action or inaction of the administrative authority violate his/her rights". That means that a legal remedy is possible not only against administrative acts or omissions of administrative acts – the administrative act is mentioned separately in the last sentence of this paragraph – but also, and as a consequence of the scope of the Draft LAP as explained above, against any other administrative actions. In the way the Draft LAP makes available a complex system of internal control within the administrative authorities. This is of high importance to fully and effectively implement the rule of law.

II. Recommended for improvement

1) Relation between Draft LAP and the Law of Ukraine on Administrative Services and other current administrative legislation

The legal situation in Ukraine is characterised by the fact that so far general administrative procedure legislation has not existed, with the natural consequence that in the past numerous pieces of administrative legislation were adopted combining both substantive (material) and procedural rules. When the new LAP will come into effect, however, the question is to ascertain, which procedural regulation is applicable, when the concerned administrative case falls in the scope of both the new LAP as well as the relevant provisions of the substantive law.

This question is particularly relevant with regards to the relation between the Law of Ukraine on Administrative Services (hereinafter LAS) and the future LAP.

The LAS forms a remarkably innovative intention to implement the principle of citizen-orientation in every-day administrative practice. It comprises, besides various other systematic legal topics several procedural rules on the citizen-administrative authority-relation initiated by a request of the party.

In paragraph 2 of article 3 the Draft LAP addresses the problem of the relationship between the future LAP and the current version of the LAS. This provision in the Draft LAP must be

understood as reference to the "*lex specialis"* rule, with the result that when "administrative services" (in the words of the Draft LAP: to administrative actions) fall in the scope of both laws, the LAS as well as the LAP, the current LAS shall apply. On the other hand, according to paragraph 3 of article 3 the "principles" of the Draft LAP also apply to the services covered by the LAS.

Consequently, this will create overlaps with the new Draft LAP. Such overlapping between LAS and LAP would cause either duplication or contradiction with respect to their regulatory content. Both types of overlapping would impede the correct application of either piece of legislation. The mere duplication of identic regulatory content, although giving rise for confusion or misinterpretation of the legal text, might, exceptionally, be only just acceptable. But major problems will arise through provisions of the LAS, whose regulatory content is different from or even in contradiction to the legislative solutions of the LAP.

The legal mechanism for the administrative and judicial practice to cope with such conflict-of-law situations is the application of the "*lex-posterior"*-rule (The latter norm precedes the former norm) and/or the "*lex-specialis"* rule (The special norm precedes the general norm.) However, very often both instruments cannot lead to clear answers to the question, which leads to one of the laws prevailing over the other. The systematic relation between the two pieces of legislation, the LAS and LAP is here particularly problematic, because it would not be completely unreasonable to come to the conclusion that both the LAP and the LAS are of general character, as far as their procedural rules are concerned. It cannot therefore be ruled out that the administrative or judicial decision-maker finds justifiable reasons to come to the conclusion that here the lex-posterior-rule applies. As the result, procedural rules of the older LAS (may be even all of them? This still remains to be scrutinised!) were overridden by the younger LAP, which, however, cannot be in the legislator's intention.

But even if it is accepted that a provision of the LAS is applicable as the preceding special norm, what is the legal consequence of paragraph 3 of article 3 of the Draft LAP? Does this mean that the principles (articles 4 to 20) of the Draft LAP overrule the LAS? If so, to what extent do they prevail? Will all procedural rules in the Draft LAP derived from these principles also apply?

Similarly problematic is the relation between the future LAP and other pieces of administrative legislation. Clarity, however, between the new LAP and colliding older administrative law can be achieved by the legislator only.

Recommendation: The legislator might take into consideration the following measures to be undertaken during the *"vacatio legis"* (we suggest 18 – 20 months) of the LAP:

- The executive power (Cabinet of Ministers of Ukraine) shall propose a list of administrative laws containing special procedural provisions that shall remain unchanged and valid after the LAP will have started to apply. Another list shall propose amendments of existing legislation in order to align it with the principles (Articles 4 to 20) of LAP. Both lists shall be submitted to Parliament within 12 months from the date of adoption of the LAP.
- Procedural rules in legislation that were not included in one of the lists of the Cabinet of Ministers of Ukraine shall cease to be valid on the day, when this law will apply.
- Special procedural norms, which will remain valid, shall be interpreted strictly in accordance with the principles (Articles 4 to 20) of the LAP. For procedural matters, which are not covered by these special laws, the relevant articles of this Law shall apply either directly or where necessary and appropriate mutatis mutandis.

2) Scope of the law

The Draft LAP opens in the second sentence of paragraph 1 of article 1 the scope of the law to "other activity of administrative authorities". It determines that "the principles of administrative procedures" also apply to administrative actions that do not fall under the definition of the traditional administrative act. However, in most of the procedural rules of the Draft LAP only the legal term administrative act is used, which means that this rule applies to other actions by exception only; and any exceptional application requires specific justification, which in turn leads to legal uncertainty.

Recommendation: Clarification for the administrative and judicial practice could be reached by changing the rule-exception relationship. For this the legislator might consider the following three measures:

- Replacing in all procedural provisions the legal term "administrative act" by "administrative action" apart of those provisions that are clearly applicable only for the administrative act.

- Including the following definition in article 2 of the Draft LAP:

  "Other administrative action is any unilateral form of activity of the administrative authority in the exercise of its tasks of public administration, which is primarily aimed at factual results and does not meet the criteria of an administrative act but can nevertheless bring legal effects on a subjective right or legitimate interest of a natural or legal person."

- Including the following article at the end of the Chapter V on Administrative Act:

  "Applicability of this Law to other administrative actions

  Provisions that according to their wording relate to the administrative act shall apply mutatis mutandis to other administrative actions such as public information, statements, record keeping, issuing certificates, enforcement actions and any other factual actions as defined in article 2 for the purpose of providing equal legal protection of the participant concerned."

3) Administrative act

The administrative act is still the most characteristic instrument for the exercise of administrative functions in continental European administrative law. It differs from "other administrative actions" by its intended impact. The administrative act expresses the administrative authority's will (in other words: the body's intention or goal) to directly affect the legal position of the addressee, whilst other administrative actions are those, whose declaratory content does not aim at triggering an immediate legal consequence for the addressee but pursues a different purpose, such as providing information or advice, making recommendations, delivering warnings, issuing press releases, giving lessons at universities.

Essentially there are seven kinds of legal relationships that could be caused by the regulatory effect of an administrative act:

prohibition — administrative authority requires from the addressee an inaction (e.g. prohibition of continuing the operation of a factory, whose manufacturing process emits harmful gases, dust, and smoke)

order	administrative authority imposes an obligation to undertake an action (e.g. order to remove a car that blocks a fire rescue access)
granting a right	administrative authority grants permission or another advantageous legal position or gives the right to claim performance (e.g. issuance of a driving licence)
rejection	administrative authority denies to grant a right the address applied for (e.g. rejection of an applied construction permit)
modifying a right	administrative authority modifies an existing legal relationship, i.e. through revocation or repeal of a right (e.g. withdrawal of a pension entitlement that was issued on the basis of false data provided by the applicant)
declaratory act	administrative authority confirms with legally binding effect the existence of a legal situation (e.g. appointment or dismissal or retirement of a civil servant)
act in rem	administrative authority decides on the public-law status of a movable or immovable good (e.g. registration of a building as state protected document)

As a rule, an administrative act is addressed to one single natural or legal person. But it can also be addressed to a multitude of persons, whereas for this case the definition does not provide any limitation of the number of addressees. Decisive for the characterisation of an act as "individual" is that each addressee is "individually determined" or at least can be "individually determined on the basis of general characteristics", which in the latter case is called "collective administrative act"[4].

A measure, however, which is aimed at indeterminate persons with respect to indeterminate state of affairs (general-abstract measure) is not an administrative act but a legislative act (e.g. issuance of secondary legislation or bylaws).

In the Draft LAP the term administrative act is defined in article 2 under number 3). This definition is very short and incomplete and thus leaves space for misinterpretation and uncertainty.

A completion of the definition that includes also the "collective administrative act" and the "administrative act directed to the status of a thing" would significantly facilitate the implementation of the rules on this core element of administrative practice.

Recommendation: a complete and more precise definition of article 2 number 3) would read:

[4] Examples of a collective administrative act:

- The competent body issues an order asking the people, who find themselves in a certain area of the town, not to use a specific street because of danger of explosion.
- Cases of head lice have occurred in a school. Parents of children, who live in a definite residential area where the school is located and whose children are infected with lice, are from a definite date under an obligation not to send their children to school but undertake suitable measures for lice removal at their costs.
- The competent body prohibits the sale of a particular salad in a definite area where that salad has been the cause of an infection in that area.

"3) An administrative act shall be any order, decision or other expression of will of an administrative authority aimed at regulating a concrete legal relationship in the sphere of administrative law and which

a) is addressed to one or several individually determined natural or legal persons (individual administrative ac), or

b) is directed at a group of people defined or definable on the basis of general characteristics (collective administrative act), or

c) determines the status under administrative law of a movable or immovable thing, or its use by the public at large (administrative act in rem)."

4) Criteria for nullity and unlawfulness of administrative act

The current Draft LAP distinguishes between particularly serious legal defects of administrative acts that lead to nullity of the act (dealt with in article 79) and other "not so" unlawful administrative acts (not explicitly regulated in the Draft LAP) that enter into legal effectiveness but are voidable. In this way, the draft follows the traditional legal doctrine as it is also reflected in the respective national administrative legislation of some European countries. Both categories of defects have in common that they are subject to administrative legal remedies (appeal procedure) and judicial control.

The consequences of nullity are a legal fiction, in other words the law "deems" that an administrative act has not come into existence due to its major and obvious defects. A null act is no act. It is a complete nullity, a still-born act, which never comes into effect.

So, a null and void act may be completely ignored by the concerned participants or other administrative bodies. Anyone, at any time, and in any matter may assert the nullity of the act. That is, the absolute invalidity need not be asserted in any time-bound proceedings. Whenever the public body wants to enforce a void act, the addressee(s) or third parties can point out its nullity to the public body that has taken it.

This is, so far, the theoretic legal situation. However, even an absolutely invalid act, something that is legally not existing, is not in any case absolutely free of fatal practical consequences, for example when administrative authority and addressee have different legal opinions on the defectiveness of an administrative act. In such case, even forceful execution of a null and void act cannot be ruled out. Therefore, in order to avoid the risk implied in the different assessment of the nullity of an administrative act, the addressee of a null act or any other interested third person is always well advised to either appeal the act or request the declaration of nullity (as it is provided in article 79 paragraph 4 of this Draft LAP) and, if necessary in the latter case, appeal a public body's rejection to declare the invalidity.

Therefore, as nullity can cause serious legal disadvantages to the party and legal uncertainty in general, this consequence is justified only in very exceptional cases. Other "normal" defects make the act (only) unlawful, i.e. the act comes into legal effect but can be challenged by a legal remedy.

However, as explained the doctrine of nullity is not of practical relevance, apart from the factual risks for the party and the legal uncertainty. There is virtually no need for such a provision. Instead, it would be better to abolish article 79 or at least add to the existing version of article 79 an article on unlawfulness for the purpose of ensuring more clarity of the matter.

<u>Recommendations:</u>

1. An article on providing a list of cases of unlawfulness of an administrative act should be included that could read:

> "An administrative act is unlawful when:
> 1) the issuing public organ acted without having the competence;
> 2) it came into being through the infringement of provisions regulating the proceeding;
> 3) it contradicts the provisions regulating the form or the statutory elements of the act;
> 4) it violates substantive law;
> 5.) discretion was not lawfully exercised, or
> 6) it does not comply with the principle of proportionality. "

2. As a consequence of this amendment of the Draft LAP the article 80 shall refer to this new provision when determining the scope of the appeal by using the legal term "unlawful".

5) Decision on appeal according to Art. 87

Article 87 provides in paragraph 1 under number 3) the possibility that the reviewing appeal authority returns the administrative act obliging the first-instance administrative authority "to issue an appropriate act or review the case again". This solution should be avoided as far as possible , because it allows the misuse of the extremely unsatisfactory so called "ping-pong-system", with its negative impact not only on the individual rights and interests of the citizen but also on the public interest in effective and efficient procedure. Therefore, as a rule the second instance authority shall ~~always able and~~ be obliged to conclude the administrative proceeding by taking the final decision and only in exceptional cases.

However, instead of conducting the investigations by itself the entity reviewing an appeal should be entitled to mandate the administrative authority to carry out the investigations needed. This is to disburden the superior authority because conducting investigations takes often a high amount of time and effort. Moreover, the competent body may have a better expertise to search for evidence. On the other hand, the superior authority shall conduct the investigation by itself if there are doubts whether the competent body will carry out the mandated investigation properly and in an open minded way.

If the superior body will mandate the competent body it has to describe the questions which are to answer and to determine the ways and means of investigation precisely. The superior body is not entitled to transfer the case back to the competent body in order to achieve additional evidence in general.

If the competent body has carried out the mandate to conduct the investigation it has to notify the superior body of the result of its efforts. That means the competent authority must draw a report on the investigation describing the ways and means and the result. The superior body is entitled to claim additional explanations even to claim a verbal report of the persons conducting the investigation.

In exceptional cases, when the second instance authority for lack of legal competence of for other legal reasons is not in the position to take the final decision on the case, it shall obligate the administrative authority to issue an appropriate decision or review the case again.

Recommendation: Number 3 in paragraph 1 of article 87 should be amended as follows:

"3) if necessary, conducts additional investigations or, it shall order the competent authority to conduct additional investigations and notify the entity reviewing the appeal on them; if for legal reasons a final decision of the entity is precluded, it obligates the administrative authority to issue an appropriate decision or review the case again."

6) Hearing

The right of hearing is a paramount element of citizens' fundamental rights, deriving directly from the fundamental principles of human dignity and the rule of law and the key stone of participation in administrative procedure. It is an essential precondition for a trustful relationship between citizen and state as it is necessary in a democratic state.

The article 68, however, lists in its paragraph 3 only two cases, when the protection of the rights and interests of a participant does not require the conduct of a hearing.

Recommendation: As a third exemption to the rule should be included in the article addressing the situation when the administrative authority intends to issue a decision that will fully satisfy the application of the participant or be completely in line with his/her statements made in the course of the proceeding.

7) Notification

Notification is not only an obligation of an administrative body. It is a central requirement of any administrative procedure because an administrative action comes into existence no earlier than in the moment when at least one of the parties of the procedure has been notified. Until then the activities of the public body are no more than a merely internal matter.

Notification ensures legal protection of the party, transparency of public administration, legal certainty, supervision and legal control of administrative actions and effectiveness and efficiency of administrative behaviour.

Article 41 of the European Charter of Fundamental Rights (EUCHFR) grants the right to good administration. This includes the right to be notified of every decision that affects the citizen's rights or interests, as is made clear by article 20 of the European Code of Good Administrative Behaviour (ECGAB), which regulates that the public official "shall ensure that persons whose rights or interests are effected by a decision are informed of that decision ……" before it is communicated elsewhere. Article 297 para. 2 of the Treaty of the EU (TEU) regulates that "… decisions which specify to whom they are addressed, shall be notified to those to whom they are addressed…". Also article 18 of the ECGAB demands the personal notification of individual decisions, if possible.

Without notification an administrative action does not come into legal effect. The notification of the administrative act defines the relevant date for the calculation of the deadline for the administrative appeal against the administrative act and is a necessary precondition for the administrative act to be executable

An example of an elaborated regulatory framework for notification is annexed to this report. It was developed and taken into consideration by some South Eastern European countries who recently adopted a new Law on General Administrative procedures with the support of OECD/SIGMA. It might inspire also the responsible authorities in Government and Parliament during the upcoming legislative process.

8) Implementation

The challenge of putting adopted legislation on general administrative procedures into practice is bigger than drafting and adopting the law. Experience in other countries has shown that a *vacatio legis* of at least 18 to 20 months should be allowed between an adoption of the law and its application in order to prepare implementation. Monitoring the implementation for a period of up to 5 years may also be necessary.

It might be useful to set up a standing advisory committee (of experts and civil servants) to which the various services implementing the law can refer in order to clarify their administrative practice and seek solutions. This committee could also monitor and evaluate annually the implementation progress. This will allow enough time until courts come to examine relevant cases and make their contribution to the implementation of the general law, by applying, interpreting, and completing the legislative provisions.

A budget will be necessary for the training of civil servants and judges and for informing citizens and businesses, in order to make the implementation of the law as effective as possible. Training of civil servants is an essential part of smooth and correct implementation. This may involve a manual or legal commentary, to which they may refer in everyday practice.

It goes without saying that administrative courts should equally be prepared for handling cases of this nature. Training of judges will offer a common starting point for the consideration of procedural disputes.

Co-operation with law faculties may help not only in the training of civil servants but also in terms of introducing good administration procedural requirements in the education of future judges, lawyers and administrative employees.

In parallel to the training of practitioners, it is essential to undertake actions for raising citizens' awareness of their rights and strengthen their trust in effective legal protection. Again, public promotion campaigns, leaflets, modern communication tools (social networks, twitter) and co-operation with NGOs and the media are some ways to achieve this. A higher level of citizens' awareness would allow them to monitor, scrutinise, and critique the operation of public administration institutions with a view to improving it. And finally, a transparent and well-functioning administrative procedure on the one hand and on the other a citizen, who is well informed about her/his position and rights towards the administrative authorities. These are the two basic prerequisites for a public administration invulnerable to systemic corruption.

EXAMPLE OF A CHAPTER ON NOTIFICATION

Annex to the Assessment report on the Draft LAP

(version of 01. December 2018)

Chapter I
General rules of notification

Article A
The principle of appropriate way of notification

1. The notification is the intentional utterance of an administrative act or procedural action by the administrative authority to participants of the administrative proceeding.

2. Unless otherwise stipulated by law, the administrative authority is free to determine the appropriate way of notifying administrative actions. The burden of proof of the notification including the time of its receipt is on the administrative authority.

3. The method of notification is determined by taking into consideration the legal protection that the participant is entitled to, as well as transparency and cost-effectiveness.

Article B
Forms of notification

1. The notification to a participant present can be done orally or in any other appropriate form of communication.

2. A written document can be notified by sending by post, electronically, by fax, or by formal notification.

3. Exceptionally, short and urgent notifications may also be done by phone.

Article C
Addressee of notification

1. The participant shall be notified personally, unless it has informed the administrative authority of the authorisation of a representative or a special notification agent, in which case the notifications shall be addressed to the latter.

2. A notification addressed to the representative or to the agent is considered as having been performed to the participant personally.

Article D
Joint representative

1. Whenever appropriate, the administrative authority shall advise a group of participants that participate in a proceeding with identical claims and without a joint representative, to nominate a joint agent for notifications.

2. In case a group of more than 10 participants participating in a proceeding with identical claims do not have a joint representative, the participants are obliged to appoint a joint agent for notifications within a deadline set by the administrative authority. If no joint notification agent is appointed within the set deadline, the administrative authority shall, ex officio, appoint a joint agent for notifications, and shall notify the participants thereof.

3. The act of notification to the joint agent shall indicate all participants to whom the notification is addressed.

Article E
Site of notification

1. The site of notification may be:

1.1. the place where the recipient is present,

1.2. its place of residence or domicile,

1.3. its main office, if the recipient is a legal person, or any place where it exercises the activity;

1.4. place of work;

1.5. place where the activity is exercised or the office of recipient;

1.6. any other appropriate place chosen by the participant and communicated to the competent organ.

Article F
Notification to a professional representative or agent

Notification to a representative of a participant or to an agent for notification who exercises this task as a profession, may also be done by handing over to any employee in the office of the above mentioned.

Article G
Notification in special cases

1. Notification to foreign countries, international organisations and persons enjoying diplomatic immunity shall be done through the Ministry of Foreign Affairs, unless otherwise provided in the law.

2. Delivery of documents to the nationals of the Ukraine residing abroad can be done directly or indirectly through diplomatic and consular missions of the Ukraine.

3. Delivery of documents to military personnel, police officers, may also be done through their command.

4. Delivery of documents to persons deprived of their liberty is carried through the correctional facility where they are held under custody.

Article H
Mistakes in notification

If due to a mistake made by the administrative authority in sending a notification, the legal situation of the receiving participant is deteriorated, the notification is deemed to have been accomplished on the day which is proved it was received by the recipient.

Chapter II
Notification by post and electronic notification

Article J
Notification by post

1. Notification by post is done through common or certified mail.

2. A written document sent by regular or certified mail for the effect of this Law, shall be deemed notified on the third day after posting the document, for addresses within the Ukraine, and on the fifth day, for addresses abroad.

3. The legal assumption in ~~p~~aragraph 2 of this article shall not be considered proof of receipt, if the recipient credibly assures that the document was not received or was received at a laterdate.

Article K
Notification by electronic means

1. The notification may only be carried out by electronic means or by fax after the recipient has agreed to this method of communication. Recipients may restrict their consent to specific senders, proceedings and formats.

2. A document sent electronically shall be considered to have been received in accordance with provisions of the law on electronic document.

3. If the electronic document is illegible, the recipient may request the administrative authority to resend the notification in another more appropriate format.

Chapter III
Formal notification

Article L
Formal notification

1. The notification of a written act or document has to be done by formal notification if this is stipulated by law or if the administrative authority decides so, because this is justified for evidentiary purposes.

2. The formal notification is done by delivery in person or through a third person or public delivery, as well as by electronic or official publication, in accordance with this Law.

3. The notification by certified mail shall be also considered as formal notification.

Article M
Delivery in person

1. The delivery in person shall be done by an administrative authority official, handing over the document to the recipient in one of the notification places provided in this Law. The delivery is reflected in the delivery slip which is signed by both the recipient and the official.

2. If the recipient is not found at the place of notification, the official makes a second attempt to deliver in person, not earlier than 24 hours and not later than 72 hours after the first attempt.

3. If the recipient is not found on the second attempt or in case he refuses to receive, the administrative authority official takes appropriate note and, when possible, certifies such situation with the signatures of two witnesses present at the site.

4. In the case referred to under paragraph 3 of this article, the administrative authority official displays a notice at the place of notification, specifying the recipient and the place where the document can be received. The note shall also specify the date and hour when the notice was left, and the date that will be considered date of delivery in accordance with paragraph 5 of this article. The display and notice information are also reflected in the delivery note which is certified with the signatures of two present witnesses.

5. The delivery, under paragraph 3 of this article, shall be considered done after three days from taking over the delivery.

6. If the recipient is illiterate or cannot sign, the deliverer, in the presence of two witnesses who sign the receipt, will mark his name and date of delivery and make note as to why the recipient has not put his signature.

7. The delivery shall be done only during the working days and between 7:00 to 19:00.

8. The administrative authority whose document must be delivered, for particularly important reasons can determine that the delivery is to be done on non-working days, national holidays and other holidays, even after 20:00, if this is needed without delay.

9. Delivery of document to a person authorised for representation or a person authorised for receiving the document is considered as a delivery to the participant. Delivery to a lawyer representing the participant can be performed so that the document can be delivered to an employee at that lawyer's office.

Article N
Indirect Delivery

1. In cases where delivery in person is not obligatory and the addressee has not been found at the place of delivery, the document may be handed over through third persons that accept to deliver it to the recipient in the following order of preference:

1.1. to any adult member of the family of the addressee, or neighbours in case of article 112, subparagraph 1.2 of this Law, or

1.2. to an employee or the doorman in case of article E subparagraph 1.3 – 1.5 of this Law.

2. No indirect delivery, pursuant to paragraph 1 of this article, shall be done to a person participating in the same proceeding with an adverse interest.

3. The person who receives the notification shall sign the delivery report undertaking the commitment to deliver it to the addressee. In the delivery record the official must also note

the relationship of that third person with the addressee, the date of handing over to third person and data for identification of document to be delivered.

4. In case the third person does not accept to receive the notification, the document shall be left in the letterbox of the addressee. In this case, the delivery time and date and legal consequences as stipulated under paragraph 5 of this article, shall be noted on the envelope and also reflected in the delivery record.

5. Delivery shall be considered completed upon the expiry of 3 days after the day of receipt from the third person or from the moment the document was left in the letterbox.

Article O
Notification by electronic retrieval

1. The notification of an electronic document can be done by downloading from a server closed to the public, only when the addressee has guaranteed access through authenticated electronic means and is preliminarily notified about the date or period of stockage in that server.

2. The notification of a document in accordance with paragraph 1 of this article shall be deemed completed at the moment of its download from the server. If the document is not downloaded in the specified date or period, the administrative authority shall send a second notice to the participant. If the document is not downloaded in the date or period specified in the second notice, it will be notified for the decision by other appropriate means.

Article P
Public Announcement

1. Public announcement shall be done when:

1.1. place of notification cannot be identified;

1.2. any other form of notification is impossible or inappropriate, or

1.3. in any other cases explicitly stipulated by law.

2. The public announcement is done by displaying the document on the notice board of the administrative authority and in its branches or local offices, or in another place according to the local customs, and where it is considered that the recipient can be notified.

3. The public announcement shall be considered to have been completed after 10 days from the date of the publication on the notice board. For valid reasons, such deadline may be extended by the administrative authority. Date of announcement and of removal of notification is defined in the document posted in places defined in paragraph 2 of this article.

4. In addition to the public announcement of the document in places stipulated in paragraph 2 of this article, administrative authority shall publish it on its website and may also publish it on daily press.

5. In case of notification for an administrative act, the text of publication shall contain all mandatory elements as provided by this Law with the exception of descriptive-reasoning section and shall include information about the place, office and way how people may know about the descriptive-reasoning part.