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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

KAZAKHSTAN

DRAFT OPINION

ON THE ADMINISTRATIVE PROCEDURE AND JUSTICE CODE

on the basis of comments by

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A Table of Contents

I. Introduction

1. By a letter dated 26 June 2018, Mr M. Beketayev, the Minister of Justice of the Republic of Kazakhstan requested the opinion of the Venice Commission on the "Draft Code of Administrative Procedures" (CDL-REF(2018)037).

2. Ms T. Khabriyeva, Mr J. Hirschfeldt, Ms S. Banic and Mr G. Papuashvili acted as rapporteurs on behalf of the Venice Commission.

3. In August 2018 the Commission addressed to the authorities a list of issues which needed clarification. The replies to this questionnaire were taken into consideration during the preparation of the final version of the opinion. On 28-29 August 2018, Ms S. Banic, Mr G. Papuashvili and Mr S. Kouznetsov from the Secretariat of the Venice Commission visited Kazakhstan and had an opportunity to exchange with Mr M. Beketayev, Minister of Justice, Mr. Z. Asanov, Chairman of the Supreme Court, Mr T. Donakov, Chairman of the High Judicial Council, Ms A. Rakisheva, Deputy Head of the Presidential Administration and national experts involved in the process of drafting of the Code on these issues. The delegation is grateful to the Kazakh authorities for the excellent co-operation before and during the visit, as well as during the preparation of the text of the opinion.

4. This Opinion is based on the English translation of the draft law provided by the Kazakh authorities, which may not accurately reflect the original version on all points. Some of the issues raised may therefore find their cause in the translation rather than in the substance of the provisions concerned.

5. The present opinion of the Venice Commission, which was prepared on the basis of the comments submitted by the experts above, was subsequently adopted by the Venice Commission at its …Plenary Session (Venice, … 2018).

II. National context

6. In recent years the authorities of Kazakhstan engaged in a number of legal reforms aimed at modernising the procedural legislation. The law on administrative procedures which had been adopted in 2000[1] revealed a number of shortcomings that led to the preparation of the examined text.

7. The idea of creating a codified act, regulating the administrative proceedings, was expressed eight years ago in the Concept of legal policy of the Republic of Kazakhstan for the period from 2010 to 2020 adopted by the Decree of the President of the Republic of Kazakhstan on 24 August 2009.[2] In particular, the Concept noted that administrative proceedings should become a separate branch of justice, and the administrative procedure code will be "the most important piece in the development of administrative procedure law".

8. The examined draft "Administrative procedure and justice code" (hereinafter, the draft Code) has a broader subject of regulation than was intended by the 2009 Concept. It integrates administrative procedures, as well as administrative court proceedings on resolving disputes in the field of public relations. In addition, different levels and spheres of interaction between administration and individuals are regulated through a large variety of legal instruments. According to the Government Decree of 26 December 2002, N° 1378, "On the classification of legislation branches of the Republic of Kazakhstan" the issues of public

[1] In 2010, OSCE/ODIHR prepared an opinion of the 2010 version of the draft law on administrative procedure. http://www.legislationline.org/topics/country/21/topic/83.
[2] Decree N° 858. http://adilet.zan.kz/eng/docs/U090000858_ .

administration are referred to the legislation on the state and social order, and the legislation on administrative offenses is an independent branch.

9. Currently, proceedings on administrative offences are regulated by section 4 of the Code of the Republic of Kazakhstan on Administrative Offences adopted on 5 July 2014 (N° 235-V). According to the draft Code, it applies to "relations arising in the realisation of administrative procedures", with the exception of relations regulated ... by legislation on administrative offences" (par. 3 of article 3 of the draft). The establishment of administrative procedures to ensure the smooth functioning of state bodies, prompt management decision-making by public administration, respect for the rights and freedoms of citizens, protection of state interests, prevention of the use of public officials' powers for non-judicial purposes are also regulated by the Law of the Republic of Kazakhstan of 27 November 2000 (N° 107-P) "On Administrative Procedures".

10. The administrative reform was driven by the desire of the authorities to optimise and simplify the administrative procedures. The draft Code regulating various administrative actions and administrative complaints on the basis of a uniform procedure is part of this ambitious process. The 2017 constitutional reform gave an additional impulse to these reforms.[3]

11. According to the information received by the rapporteurs the text of the draft administrative code was made available for comments from national legal community and non-governmental entities. The drafters informed the representatives of the Commission that the text would be sent to parliament in December 2018.

III. Council of Europe standards and recommendations

12. The Republic of Kazakhstan is not a member of the Council of Europe. However the drafters of the Code tried to take into account the international standards in the field of administrative law and most provisions of the draft are consistent with the Council of Europe objectives and recommendations in the sphere of legal enforcement of the rights and freedoms of individuals in their relations with the state through effective public administration and administrative justice. General minimum standards for a proper administrative procedure, developed in the framework of the Council of Europe, are embodied in such documents as the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4.XI.1950), Recommendation No. R (87) 16 of the Committee of Ministers to Member States on administrative procedures affecting a large number of persons (adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies), the Council of Europe Convention on Access to Official Documents (CETS No.205), Recommendation No. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials (Adopted by the Committee of Ministers at its 106th Session on 11 May 2000), the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No.108) (Strasbourg, 28/01/1981), Recommendation Rec(2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties (Adopted by the Committee of Ministers on 5 September 2001 at the 762nd meeting of the Ministers' Deputies), Recommendation Rec(2003)16 of the Committee of Ministers to member states on the execution of administrative and judicial decisions in the field of administrative law (adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies), Recommendation Rec(2004)20 of the Committee of Ministers to

[3] In 2017 the Venice Commission has adopted an Opinion on the amendments to the Constitution of Kazakhstan CDL-AD(2017)010. https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)010-e .

member states on judicial review of administrative acts (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies), Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration.

13. In 2017 the Commission adopted an opinion on the draft law of the Republic of Kazakhstan on administrative procedures.[4] The text examined in this opinion integrates elements from this text and takes into account some of the recommendations made by the Commission last year. The joint OSCE/ODIHR and Venice Commission Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan (CDL-AD(2011)012) is also relevant for the purpose of the review of the draft Code.

14. During their work on the text of the opinion the rapporteurs also used other international standard-setting documents and recommendations of European and international organisations, notably the Charter of fundamental rights of the European Union,[5] UN Human Rights Committee General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial[6], OSCE/ODIHR Guidelines for monitoring administrative justice[7] and OSCE/ODIHR on the draft Law of the Republic of Kazakhstan on Administrative Procedures.[8]

15. Taking into consideration the complexity of the reviewed document, general issues of the structure and main approaches taken by the drafters will be examined first. Certain provisions of the draft will be considered article by article in a separate section of this opinion, providing where necessary references to other parts of the law and relevant legislation already in force. The detailed nature of some comments serves the only purpose of assisting the authorities in improving the provision of the draft using the positive experiences from other legal systems and international standards in the field of administrative procedure.

IV. General comments

16. The new Code takes a unified approach to the public administration and the administrative justice system by regulating the administrative procedures and administrative court proceedings together in one legal act. This is a completely new approach to law-drafting considering the legal history and tradition of Kazakhstan which had previously adopted separate laws on administrative procedures and judicial proceedings. It is rather unusual for countries of continental (civil law) legal tradition to regulate in a single act administrative procedural law with that of administrative court proceedings. In order to justify combining material and procedural legal norms in a single legislative act, solid argument should exist, which would illustrate not only the advantage of technical efficiency of bringing these provisions together, but also would emphasise the legitimate objective of administrative legal relations in this context.

17. The draft code provides a detailed description of the scope of the legal act at hand in articles 1-4. In particular, it lays down the rules of application of administrative provisions, also, the rules dealing with conflict between normative legal acts of equal force and the rules determining the application of legal analogy. It should be noted positively that such rules seem

[4] Doc. CDL-AD(2017)008, Opinion on the Draft Law of the Republic of Kazakhstan on Administrative Procedures.
[5] Charter of fundamental rights of the European Union, Article 41 – Right to good administration and Article 47 – right to an effective remedy and to a fair trial.
[6] See http://www.un.org/en/ga/search/view_doc.asp?symbol=CCPR/C/GC/32 .
[7] https://www.osce.org.
[8] Ibid. Opinion GEN – KAZ/170/2010 (AT).

to be clear and they will help to avoid potential conflicts between legal norms or if that happens, they are likely to provide a framework for resolving of any inconsistencies in the procedure.

18. However, this Code, if adopted, will require harmonisation with other already existing pieces of legislation. For example, there will be a need, among other issues, to make correlating changes to the Article 8 of Law of the Republic of Kazakhstan of April 6, 2016 N 480-V "On Legal Acts". This article establishes a closed list of public relations, the legal regulation of which is carried out in the form of the code. According to this article, the code can be used only to regulate public relations related to the imposition of administrative responsibility; the possibility of adopting a code to regulate administrative procedures is not specified.

19. According to Article 3 of the draft Code, it should establish the functions of state bodies. But the content of the Code does not define the functions of state bodies; Article 63 only lists their types. Moreover, as follows from article 5 of the draft Code, "the competence, powers, functions and tasks of the state body are established in the Constitution, laws and other normative legal acts adopted by the President, the Government, the higher central state body in relation to it". In addition, the principle of “clear competence” of state bodies, existing in the administrative law of Kazakhstan, suggests that "all the powers of state bodies should be defined in the legislation or in other regulations (in other words, any actions not expressly provided by law are prohibited). Thus, this principle assumes the most complete description of the powers of state bodies at the level of the law. *In this regard, the Commission believes that the functions of public authorities concerning the administrative procedures should be as detailed as possible in the text of the Code in accordance with the requirements of article 3*.

a) *The structure of the Code and main definitions used in its text*

20. The draft code envisages some of the key principles that are characteristic of administrative procedure and proceedings. In particular, the Commission welcomes the inclusion of the following principles: the principle of proportionality (Article 17), that of reliability (Article 21), observance of reasonable time (Article 11) etc. These principles would serve to establish common standards of application of administrative rules, which will help to ensure legal certainty.

21. Moreover, it should also be underlined that modern administrative law aims at fair and just procedure in the framework of good governance. This guarantee implies the right of an individual to access/petition an administrative body. Accordingly, while the Article 9 of the daft Code guarantees the right of access to court, it is also important to include in this context an individual right to petition administrative authorities, as a key element of a democratic state conceived in the rule of law. Furthermore, Article 16 of the daft code deals with the right to appeal court decisions. As it already was mentioned above, it is no less important to ensure guarantees for effective participation in the procedure before an administrative body. *The Commission recommends including in the text in a clear way the right of the individual concerned by an act or a decision of a public authority to challenge it through an effective administrative procedure*.

22. The outline and the provisions of the Code are in general comprehensive and mostly clear. The main principles are well presented and drawn thoroughly. The draft is however characterised by a legislative technic in which the provisions are written very exhaustively with a lot of reiterations instead of the use of cross-references between chapters and single provisions. In addition, some provisions in the general part (for example, see Article 10) go beyond the notion of legal principles and objectives and embrace concrete procedural rules which are later repeated in articles on concrete procedures. *The Venice Commission*

recommends to simplify the presentation of the legal principles and to place the procedural rules into respective articles of the Code. This approach could contribute to normative consistency, simplicity and transparency of the text.

23. There are three kinds of administrative procedure in the Code: the internal administrative procedure (Chapter 10 – Articles 58 – 68), administrative procedure (Chapters 11, 12 and 13, Articles 69 – 94) and simplified administrative procedure (Chapter 14, Articles 95 – 98). While the administrative procedure and simplified administrative procedure deal with „administrative cases concerning individuals"(the latter, though in specific manner), the internal administrative procedure regulates the internal relationship, communication and flow of documents among the administration, i.e. state and other respective bodies. In spite of the fact that similar provisions exist in the current Code on Administrative Procedure (adopted in 2000), this kind of procedure by its content, structure and form, should not be part of the Code. Due to its normative particularities it "breaks" the structure of the Administrative Procedure Code as it refers to situations and relations that are not directly connected to the concept of administrative procedure or court proceedings directly concerning individuals and other private parties. *The Venice Commission recommends to review the possibility to extract this part of the draft Code into separate legislative act. This approach, if accepted, would entail changes in the Article 5, which gives the main definitions of the draft Code.*

24. It is widely accepted that public administration should be transparent and easily accessible to the public. This implies the guarantee of an individual to be able to freely access information, documents kept by administrative bodies save for instances when such information may contain state, professional or commercial secrets. It is of utmost importance to determine the rules of access to information in administrative bodies in some detail with the guarantee that any denial by an administrative authority has to be motivated (*the principle of publicity (transparency)*.

b) *The role of the prosecutors*

25. Traditionally in Kazakhstan the prosecutors had a very strong procedural position, including in administrative procedure and court proceedings, also outside criminal procedure. Their powers to defend interests of individual persons resembled partly to the role of ombudsman. This was confusing and counterproductive in the sense of competences of these two bodies. The position of the prosecutor in the administrative procedure and/or proceedings could be the protection of the state interests and depending of the case, the public interest, like for example in extraordinary circumstances (protection of the rights of minors and individuals from certain particularly vulnerable groups).

26. The Venice Commission has always had a critical view on the public prosecutor competences outside the criminal procedure.[9] Several provisions of the draft Code give the prosecutors a number of powers within the administrative procedure (Articles 35, 36 or 99 par 2). It has to be noted that in the modern European administrative procedure legislation and practice, a prosecutor as part of administrative proceedings is largely unknown.

27. It is true that under the present draft Code, prosecutors are not empowered to be involved in administrative proceedings on their own initiative without judicial decision;

[9] See among other documents doc. CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, adopted by the Venice Commission - at its 85th plenary session (Venice, 17-18 December 2010).

however, *the Commission recommends to further reconsider whether prosecutors should play such a significant role on the side of citizens in administrative proceedings.*

c) *Administrative discretion*

28. ”Discretion” could be seen as a term that mainly describes the area, within specific frames/limits prescribed in the legal provisions, in which the courts and other decision-making powers have been delegated a mandate to perform their assessments in substance but in a way that it lives up to the principles of equality, objectivity and proportionality. Discretion within such frames and under these principles is an important and necessary tool for the development under rule of law. The term “administrative discretion“ is widely used throughout the draft Code with a rather peculiar legal meaning. Its meaning and application in the text of the draft Code should be further clarified. In the Article 5, par 1 sub paragraph 8 “administrative body's discretion“ is defined as a) the right to adopt or not to adopt an administrative act, possibility to choose the type of such an act and its content, and c) right to perform an administrative act(ion). As it can be seen, the definition is rather wide and general and if it is given in terms of the exercise of administrative discretionary power, it is not completely accurate in the text of the draft Code.

29. In that regard, the principle of uniform application of law in the Article 20 expressively refers on the exercise of the administrative discretion; in the Article 23 which defines administrative discretionary procedure, it is provided the obligation of administrative body to exercise administrative discretion within the limits established by the legislation of the Republic of Kazakhstan and that adoption of administrative acts and committing actions on the basis of administrative discretion must be consistent with the purpose of this authority; in the Article 135 the reconciliation is possible if the public body has administrative discretion while in the Articles 131 and 172 the court is obliged to check whether the limits of administrative discretion are exceeded or whether the exercise of the discretion corresponds to the purposes of this power.

30. Having in mind the sensitivity and complexity of this institute (in German theory „*Ermessen*“ and in French „*pouvoir discrétionnaire*“) and the stage of development of the administrative justice in the Republic of Kazakhstan, *the Venice Commission strongly recommends to pay particular attention to this issue, review and clarify the provisions which deal with it, all in order to avoid misinterpretation in future application of the Code.*

d) *Time limits*

31. Chapter 2 of the draft Code defines the main tasks and principles of legislation on administrative procedures and administrative proceedings, including the principle of observance of a reasonable time limits. According to Article 11, the legal and factual complexity of the administrative case, the conduct of the participants in the administrative process and the extent of the exercise of procedural rights and the performance of procedural duties, the procedural sufficiency and efficiency of the court's actions carried out for the prompt consideration of the administrative case, are taken into account in determining a reasonable time. The draft Code provides for the application of the category "reasonable time" in the following cases:

- judicial proceedings in the courts of first instance, appeal court, court of cassation shall be carried out within a reasonable time, unless otherwise established (Articles 11, 162, 165);
- if the application does not meet the established requirements, the administrative body or the official return the application to the applicant and indicate what requirements the application does not meet, set a reasonable period for making corrections and explain the legal consequences of non-compliance (Article 73);
- preparation for trial on the received claim is carried out by the judge within a reasonable time, unless otherwise specified (Article 154).

32. The draft Code does not define the maximum length of the trial (which could be exceeded only in exceptional cases). Without denying the need to use the principle of "reasonable time", as well as the category of "reasonable time", however, *the Commission is of opinion that its wide use in the regulation of administrative procedures (especially in the absence of the maximum permissible legal duration of the trial) increases the risks of delaying the process and creates excessively broad discretionary powers*.

33. As noted by the OSCE/ODIHR Guidelines for monitoring administrative justice, "the provisions of the regulatory framework should be sufficiently clear and consistent when it comes to the calculation of terms in administrative proceedings".[10] Thus, the establishment of a certain time frame is the most obvious option for regulating the timing of administrative procedures.

34. The drafters might consider adopting the approach used in the Civil procedure code of the Republic of Kazakhstan of 31 October 2015 (N° 377-V), which clearly stipulates the specific terms of consideration and resolution of civil cases (Articles 121, 144, 183), and uses the category of "reasonable time" only in exceptional cases.

e) *Equality before the law*

35. The Venice Commission has always insisted on the application of the principle of equality before the law and the court, and its specification requires significant adjustments. Thus, equality before the courts is understood in the draft Code as a situation when "in the course of administrative proceedings none of the individuals, legal entities and state bodies may be given preference" (Article 13 par 2). However, the Code initially lays down the active role of the court in the administrative proceedings (Article 10) and implies active actions of the court to collect evidence regardless of the procedural activity of the parties. Thus, this type of administrative process acquires some features of investigation, when the search for objective truth prevails over the implementation of the principle of equality of the parties in the process. In addition, the administrative proceedings should take into account the actual inequality of the parties (public authority against the individual). This fact implies the court's efforts to establish equality of procedural rights and opportunities. As the Human Rights Committee rightly points out, *the equality of the parties before the court always implies "the right of equal access and equality of arms",*[11] *with differences of treatment being permissible if they are "provided for by law and can be justified on objective and reasonable grounds".*[12]

[10] OSCE/ODIHR. Guidelines for monitoring administrative justice. P. 89.

[11] Human Rights Committee-General Comments No. 32 - right to equality before the courts and tribunals and to a fair trial, Para 8.

[12] Ibid, Para 13.

f) *Definition of an administrative body*

36. Article 5, par 1. sp 10 „The definition of state body“ (defining functions and referring to regulation) goes beyond the usual definition in a legal act. In Article 30 paragraph 1 of the draft Code an administrative body is defined as “a public body, a local authority, as well as other organisations which are authorised under the laws of the Republic of Kazakhstan to perform activities in the sphere of state governance of aimed at ensuring the interests of state and public (public functions)”.In that regard, the attention has to be drawn to the Article 63 which also defines „State body functions“, however from a different point of view. *In order to avoid misinterpretation, the norms should be harmonised, supplemented or referred to each other respectively.*

37. It can be concluded from the Article 30 provision that its initial part provides an organisational definition of an administrative body (“a public body, a local authority”), whereas the second part encapsulates the functional notion of an administrative body (‘other organisations’). It is important to specify the second part of the definition due to the broad nature of other organisations that may, in certain circumstances, perform administrative functions. *It is advised to change the words of “other organisations” with “any other legal persons”. The latter would imply legal persons created under private law, which in accordance with existing legislation could be given (delegated) administrative functions.*

38. It is worth noting that in practice private entities are often delegated with public functions when special expertise is needed and the creation of extra public entity requires additional finances, when such functions are likely to be performed more efficiently by private bodies. Accordingly, it is hardly possible for a legal act to exhaustively define the list of such entities that would fall under the notion of administrative body. In this regard, the guiding factor should to be the functional notion of the administrative body, which would look at the entity (legal person) at hand in order to identify whether it performs public functions.

39. One of the possible ways to deal with the delegated administrative powers could be administrative agreements. In order to ensure public administration is more effective, administrative body is normally authorised to conclude administrative agreement. It should be noted that a major criterion to distinguish the nature of the administrative agreement is its objective, namely, whether it implies discharge of administrative functions. Hence, it is the subject matter of a given agreement that would distinguish the administrative agreement from other types of agreements. The administrative body utilises the administrative agreement to delegate administrative functions to the party – a private entity or an individual(s) – so that delegated functions are discharged in a more effective manner. Kazakhstan could consider this mechanism in the course of the reform of administrative legislation.

g) *Administrative action (inaction)*

40. Another term that is widely used is “administrative action (inaction)“ which is occasionally shortened to “action“ with, in the brackets set term, “inaction“. According to the Article 99, it seems that the only case when the administrative action can be appealed is “in an administrative pre-trial order“. The draft Code however does not contain detailed provisions on administrative pre-trial order.

41. The appeal procedure against administrative action to a large extent is the same as the appeal procedure against the administrative act, except for suspension effects of the complaint, which according to the Article 104 do not exist.

42. Review of the administrative court proceedings on the other hand, shows that there is a right to lodge a claim for the commission of an action (Article 150). Nevertheless, provisions which deal with this issue do not mention or refer to the administrative pre-trial order.

43. It is therefore recommended to take a closer approach to administrative pre-trial order since this "poor reference" or mentioning of it, in the appeal in the framework of an administrative procedure, and without proper determination in some more provisions, might cause misunderstanding on the rights of the participant related to the administrative action in general. Namely, there is an impression that all administrative actions are eligible for the claim in administrative court proceedings. This concern is well reflected in provisions which allow "other participants" in the administrative procedure to "lodge complaints against actions or inactions of administrative body pertaining to his or her rights and lawful interests".

44. There are some additional issues which could be important for the respect of the rights of the applicant unaddressed by the draft Code. For example, does a higher ranking official has the power to give instructions to the subordinate official on the way he/she should decide in a given case, overrule his or her decision or transfer the case to another official. The second question is whether a higher ranking official can take a decision which normally is part of the attributions of a lower level official.

45. Another important issue concerns the absence of any indication of the timeframe for consideration of an administrative complaint within different levels of public administration. *The Code should include provisions on the timeframe for this kind of review procedures.*

h) *Initiating the administrative procedure*

46. Article 5 providing a definition of terms "*recommendation, proposal, response"* combined with "*message*" from the Article 70, establishes the grounds for initiation of an administrative procedure. These actions are dealt with in the framework of a simplified administrative procedure. Although in their essence they resemble more to "civic actions", Article 98 assimilates them to the administrative case. Decisions by which they are solved are: "explanations on the substance of the appeal"; "taking to the notion" and "discontinuation of the simplified administrative procedure".

47. Simplified administrative procedure is usually foreseen for the cases which do not demand an oral hearing, which could be solved on the basis of generally known facts to the administrative body or which, according to the data available, are to be in favour of the applicant. This is confirmed partly in the provisions for administrative court proceedings which foresees that kind of court proceedings. The only explanation for such approach might relate to the invalidation of the Law "On the Procedure for Consideration of Appeals from Individuals and Legal Entities'' (No. 221, 2007).

48. *It is recommended to review whether these so-called actions and their solutions should be considered as an "administrative case" (since they do not correspond to its meaning from the Article 5), denying thus the possibility to provide the simplified administrative procedure for the situations which deserve easy and economical solution*.

49. The draft Code expressively refers (Article 2 p. 2) to the application of Civil Procedure Code's provisions and the large part of administrative court proceedings provisions directly

refers to the application of provisions of this Code. Still, the rest of the provisions that are regulated as administrative procedural ones, resemble to civil proceedings rules and are structured to form the impression that administrative dispute is conducted as two party legal relations with large freedom in disposition with procedural rights. The representatives of the authorities explained this approach by the fact that administrative justice is a quite new institute in Kazakhstan's legal order and that adaptation to the new circumstances is bridged by this reference. Also, it was said that one part of judges who will be in charge with conduct of proceedings will stem from judges specialised in civil proceedings.

50. As much as this approach should facilitate the adaptation and will for sure enable the development of administrative justice, there is a strong impression that the core of administrative court proceedings - *the review of administrative act and its legality* came into second plan and that „dynamics“ of civil proceedings took over the administrative one in too large extent. This can be well seen from the provisions which regulate burden of proof, collection of evidence, pre-trial hearing etc. As it has been pointed out in paragraph 36 of this opinion equality of the parties before the court *always implies "the right of equal access and equality of arms", with differences of treatment being permissible if they are "provided for by law and can be justified on objective and reasonable grounds"*.

i) *The jurisdiction of administrative courts*

51. One of the most important aspects of administrative procedure is a clear determination of jurisdiction, which concerns not only territorial and judicial jurisdiction, as regulated by the present draft, but also jurisdiction based on subject matter.

52. The draft Code could specify in more detail which forms of administrative action fall within the scope of judicial review by administrative courts. Provided the forms of administrative actions as it is under the present draft remain, it would seem that administrative courts should be entitled to hear cases with respect to the legality of administrative – both general and individual- acts, conclusion, termination and consideration of administrative agreements, the obligation of administrative authorities to reimburse/undo damages, adoption/issuance of administrative acts or performance of other actions pertinent to administrative functions.

53. A specific provision concerning jurisdictional matters could include the rule according to which administrative courts will be entitled to consider cases that emanate from administrative legislation. This could help to ensure clarity as to delimitation of civil, criminal and administrative disputes. It is further advised in this context that separate provisions are included in the draft Code with respect to judicial review of the legality of each forms of administrative action. Correspondingly, different types of administrative claims should be addressed in different articles of the draft Code, and while the present draft differentiates between various types of claims in different articles, these provisions should also include admissibility criteria for each type of claim. Moreover, *the specific time limit should be introduced for the court to check the admissibility of a case, as well as respective procedures to consider a claim in this regard should be put in hand.*

V. Specific comments on the provisions of the draft Code

54. **Article 2, par 1** stating on the supremacy of the provisions of the Constitution as the basic and highest legal act within the legal order of the Republic of Kazakhstan does not allow neither conflict with ordinary legislation nor it brings into question the prevalence of its norms with it. *Therefore it is recommended to omit the second sentence of par 1 which reads*

„In case of conflict between the provisions of this Code and the Constitution of the Republic of Kazakhstan, the Constitution provisions will prevail".

55. **Article 15 par 5** provides that "judicial acts shall be sent by the court to the participants of the administrative process within three working days from the date of final production". In this regard, the Venice Commission noted that the time of preparing a judicial act depends on the technical capabilities and workload of the court, thus, the wording proposed by the Code, allows varying significantly the time of the beginning of the period - three days. *It is proposed to provide for a reasonable period of time, which begins from the moment of the final decision on the administrative case or from another precisely defined date*.

56. **Article 16** of the draft Code establishes the principle of freedom of appeal against judicial acts. At the same time, the draft Code does not mention the freedom to appeal an administrative act in court. According to Article 99, the participants of the administrative procedure have the right to appeal the administrative act, refusal to adopt an administrative act, administrative actions in the administrative (pre-trial) order. *It is recommended to include freedom of appeal against administrative acts in this article of the Code.* Although "the right of access to a court or tribunal is not absolute and may be subject to lawful restrictions".[13] The OSCE/ODIHR 2000 opinion on the draft Law of the Republic of Kazakhstan on Administrative Procedures stressed that "almost all administrative acts, including discretionary ones, should be open to judicial review".[14] *The Venice Commission fully shares this position.*

57. **Article 18** declares the principle of prohibition of abuse of formal requirements i.e. abuse of procedural rights. However, no further provision of the draft Code deals with the abuse of formal requirements. This principle remains purely declarative. The OSCE 2000 opinion on the draft Law of the Republic of Kazakhstan "On administrative procedures" pointed to the need to discuss and clarify the goals and principles provided for in the law",[15] so that they do not remain just statements that do not have legal force." This position remains relevant for the text of the draft Code. Thus, in order to ensure the practical implementation of the principle enshrined in Article 18, one should include in the Code specific provisions concerning the meaning of "abuse of formal requirements", the allocation of typical cases of such abuses, as well as the development of a mechanism to respond to them.

58. **Article 20, par 1** of the draft Code prohibits the administrative authority to adopt: (a) different resolutions in different cases with the same substantive factual circumstances (par. 1); and (b) identical resolutions in different cases with different substantive factual circumstances (par 2). The Venice Commission, in its 2017 opinion on the draft law on administrative procedures of the Republic of Kazakhstan,[16] has already expressed its position on these provisions: "on the one hand, it can contribute to the unity of judicial practice in a country where the doctrine of judicial precedent is not applied. On the other hand, these provisions do not ensure compliance by the administrative body with the principle of proportionality in the administrative procedure. The principle of equal treatment

[13] In this case, the term "appeal" means the right to appeal administrative decisions to the court. See: OSCE/ODIHR. Guidelines for monitoring administrative justice. P. 59.

[14] OSCE ODIHR Opinion GEN – KAZ/170/2010 (AT) on the draft Law of the Republic of Kazakhstan on Administrative Procedures. Para 97.

[15] Ibid, para 27.

[16] Opinion CDL-AD(2017)008 on the Draft Law of the Republic of Kazakhstan on Administrative Procedures.

could also be endangered. The burden of assessing the similarity or differences of the substantive circumstances of the case should lie with the administrative authority, but neither the legal doctrine nor the legal act establishes any criteria or methods for such assessment".[17] Any mandate delegated to courts and other decision-making powers within specific frames/limits prescribed in the legal provisions to perform their assessments in substance should respect the principles of equality, objectivity and proportionality. In its 2017 opinion the Venice Commission stressed the need to repeal or amend a similar provision in Draft Law of the Republic of Kazakhstan on Administrative Procedures. *This recommendation remains valid for the text of the draft Code*.

59. **Article 22** refers to the fundamental principle that "all unrecoverable doubts, contradictions and ambiguities arising during the administrative procedure shall be interpreted in favour of the applicant". However, the addition: "if it does not affect the interests of other participants in the administrative procedure", introduces uncertainty in the implementation of this fundamental right. The article should focus on the issue of how the administrative procedure should be carried out the interests of other participants in the administrative procedure might be affected. *This provision could be redrafted in a more clear and unambiguous way.*

60. **Article 24** of the draft Code, which defines the language of administrative procedures and administrative proceedings, does not provide for free translation in administrative proceedings. It is proposed to consider the possibility of free translation services for certain categories of applicants, for example, in a difficult situation and are unable to pay for such services. The draft Law on administrative procedures of 2010 provided for the right of all persons who do not have sufficient knowledge of the state language to free translation services.[18] *The Venice Commission supports the renewal of this legal guarantee in the practice of administrative procedures.*

61. In addition, the draft Code provides for the right of the translator to refuse to participate in an administrative case, if he does not possess the knowledge required for translation; in case of a deliberately wrong translation in the administrative process, the translator shall bear criminal liability (Article 46). Taking into account the possible negative consequences of incorrect translation, it seems that the refusal to participate in the administrative case in the absence of the necessary knowledge for the translation should be regulated not only as a right, but also as an obligation of the translator.

62. According to **article 27** of the draft Code, administrative cases in the court of cassation are heard by at least three judges, usually chaired by the Chairman of the Collegium. In the Supreme Court of the Republic of Kazakhstan, in cases provided for by the Code, administrative cases are considered under the rules of the court of first instance consisting of at least three judges, under the chairmanship, as a rule, of the Chairman of the Collegium. Thus, a general rule is established, according to which the Chairman of the Collegium is the Chairman of the cassation instance. *The objective criteria for dealing with (and allocation of) cases could be presented in a more clear way in par 5.*[19]

[17] Ibid, para 18.
[18] Ibid, para 41.
[19] For example, paragraph 27 of the Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011) recommends the following: “Case assignment to the judges of the court should not be at the discretion of the Chairperson, but should be decided according to clear and pre-determined criteria. The removal of individual influence on the distribution of cases is in practice a very important issue and key to guaranteeing to every

63. **Article 28, par 1** provides that "all judges shall enjoy equal rights in the consideration and resolution of cases before a collegial court". It is proposed to consider a different wording of this provision, for example, pointing to the equality of procedural status or powers of the judges taking part except for the specific tasks of the chairman, since the concept of "equality of rights", "equality" might not be quite correct to apply to judges.

64. **Article 29** - While the Article 36 makes a thorough reference to the position of minors in the administrative proceedings, the Article 29 is silent about it. *It is therefore advised to harmonise the approach regarding the legal and dispositive capacity of persons with lack or with limited legal capacity both in administrative procedure and in court proceedings*.

65. **Article 31** - Since the par 3 assumes submission of appeal and the action of the official, the concern is raised in relation both to the form of resolving the appeal and its legal effect as they can trigger an administrative procedure and an adoption of an administrative act. *Therefore it is advised to consider the essence of this provision in relation to these concerns*.

66. **Article 33 par 3 sp 2** - It is recommended to supplement this provision with reference to the Article 83 which provides the cases when the applicant does not ought to or cannot be heard.

67. **Article 35** - In defining the participants of the administrative court proceedings (Article 36-61), the position of the public prosecutor is not elaborated, i.e. defined. The opinion on the role of the prosecutor has been given in general remarks*. It is advised to precisely define in which situations and to what extent the prosecutor could be a participant in the proceedings*. This recommendation is also valid for Article 36 paragraphs 5 and 6 (rights and liberties of minors).

68. **Article 36 par 3, 4 and 5** - These three paragraphs allow the minors to exercise their procedural rights. In par 3 it is in the case of „emancipation on grounds provided for by the law", in par 4 it is „in cases specified in the law in matters arising from public legal relations" and in par 5 it is *in the authority of the court* „to involve such minors ...themselves in the court proceedings". From the quotes it can be seen that there is no precise and predictable rule on the involvement of the minor in the proceedings. Reference to other laws is vague and the authority (discretional) of a judge to involve them on his/her own initiative could be against the best interest of minor.

69. **Article 43 par 3 sp 6** - According to this provision a witness is entitled to lodge complaints against actions or inactions of the administrative body pertaining to his or her rights and lawful interests. *This provision should be reviewed and clarified in order to avoid possible misunderstanding on the limited role of the witness in the procedure or proceedings which is to deliver the knowledge of the facts that are to be determined about in the respective case*.

70. **Article 44 par 2 sp 7** - By this provision the expert has the right to appeal against actions of individuals-parties to the procedure – this is here regarded as a violation of the

person the right to an impartial judge. Random and neutral case distribution can be performed in a number of different ways (by drawing lots, by alphabetical order etc.) as long as the criteria are pre-established, clear and transparent. […] This does not exclude the possibility of assigning particular types of cases to specialised judges or panels of judges in appropriate cases."

procedural rights in the process of expert examination. It should however be noted that the expert has no procedural rights whatsoever in the administrative procedure and is a neutral participant. In that regard, the same like by the witness, this possibility of experts should be reconsidered and clarified. *If an expert is hindered in his or her work, the separate procedure could be foreseen and instituted for the protection of the neutrality of the expert, however not in relation of the respective administrative case*.

71. **Article 45 par 2 sp 7 and Article 46 par 2 sp 4** - These provisions refer to Specialist and Interpreter and the concerns expressed for the witness and experts related to submission of complaints or appeals are the same with respect to these two categories of participants in the administrative procedure or proceedings.

72. **Article 48 par 1**: According to this provision, "participants in the administrative proceedings are eligible to conduct their cases in court personally or via representatives". For the purpose of clarity and exclusion of any possible misinterpretation, *the Commission recommends to use the terminology from the Article 35 or refer to it, in order to avoid the opinion that even other participants, i.e. witnesses, experts, etc. could be represented via representatives*.

73. **Article 48 par 7**: The Venice Commission recommends to review the provision on the involvement of the prosecutor in the administrative proceedings on the side of the plaintiff. A very strong and quite independent position of the prosecutor on the side of the plaintiff raises the concern of both judicial and prosecutorial discretion which departs from the draft Code established principles. The judicial discretion is recognised and limited in the possibility of the court to "impose" prosecutor as the plaintiff's representative.

74. **Articles 50 – 57**: It is recommended to change or supplement the titles of these different articles by using the terminology of administrative procedure and administrative court proceedings. Namely, the title of Article 50 refers to "participation in administrative case" while it concerns the administrative procedure. So, it is recommended to change its title to "participation in administrative procedure". The title of Article 52 should be referring to administrative court proceedings in order to distinguish it from the articles which refer to administrative procedure. It is also recommended *to include experts as participants whose participation can be precluded due to the given reasons in Article 50*.

75. While the articles related to the challenge in the administrative court proceedings are elaborated in a clear manner, provisions providing the rules on application for challenge (Article 55), procedure or ruling on application, the challenge in the administrative procedure do not contain the rules on application for challenge. In that regard, it is recommended to supplement the respective articles on the challenge for administrative procedure as well.

76. **Article 72** - The requirement in subparagraph 8 of par 1, i.e. "any other information prescribed by law" is vague and it may produce indefinite return of application for correction or result with a rejection of the application.

77. **Article 73 par 9** - This provision allows the applicant to withdraw the application before a decision on the administrative matter is made. However, the Article 76 par 1 sp 3 provides that the administrative procedure will be terminated if the administrative body or the official have accepted the withdrawal of the application. It is recommended to review this discrepancy since the latter provision (Article 76 par 1 sp 3) implies *deciding* of the administrative body to accept withdrawal or not.

78. **Article 82 par 1** seems to be a repetition of the Article 33 par 3 sp 3.

79. **Article 83**: The minutes of the administrative procedure session should also contain the notion of presence of all documents submitted for the resolution of the administrative case. Also, it is recommended to review par 2 sp 6 which foresees that minutes of the session contain "decision made as a result of the session" since this phrase may be understood from "decision to postpone the session" up to "decision which is the solution of the case, i.e. administrative act". It is also recommended *to complete the provision with verification of the minutes of the session by the signatures of the participants in order to avoid any future misinterpretation or doubt on its content*.

80. **Article 99 par 2**: It is not quite clear what is meant by the consideration of complaints by the prosecution. The Code provides that complaints forwarded to the prosecutor will be considered according to the Law „On Prosecutor's office". *This raises the issue of the role of the prosecutor as suggested in the general remarks and should be further clarified*.

81. **Article 100 par 1** provides that "the complaint may be filed with the body considering the complaint within thirty calendar days from the day when the participant of the administrative procedure became aware of the adoption of an administrative act, the refusal to adopt an administrative act, the commission of an administrative action." *The Commission recommends to adjust the terminology for filing the complaint with provisions which regulate entry into force of the administrative act (Article 91) and omit the notion „become aware of...*".

82. **Article 100 par 2** - The recommendation is the same as for the Article 26 par 3.

83. **Article 103 par 3** - Submission of the complaint is usually subjected to a rather strict condition of time limit within which it can be exercised. While the complaint because of return could be justified to certain extent, the right of appellant to reinstitute appealing process in the case of previous withdrawal does not contribute to administrative discipline, weakens the appealing process as such and allows misuse of procedural rights.

84. **Article 104 par 1** sets forth that the filing of a complaint in effect entails the suspension of the operation of an administrative act pending the adoption of an appropriate decision, which is an important guarantee for individual rights. However, there can be exceptional cases when an administrative act cannot be suspended. In order to ensure the said provision is clearer it is advised to specify what is meant under 'appropriate decision', namely, if the suspension continues until the decision of the court of first instance (trial court) or until the final decision of the case at hand (with effects of *res judicata*). *It might be appropriate to include a more detailed provision on such suspension of an impugned administrative act pending a final decision.*

85. **Article 105 par 1 second sentence** - It would appear as incompatible with the essence of the principle of the right to legal recourse to foresee that official who participated in the issuance of the administrative act could be in situation to consider the complaint against it regardless of the alleged reasons (even as a member of an administrative board).

86. **Article 110** stipulates that an administrative act shall be obligatory for execution within 5 working days. The draft Code does not deal with instances when an administrative act is not executed. There are plenty of examples in practice when administrative acts are

not followed voluntarily, which mandates the coercive measure from the state. *Therefore, it is desirable for the present draft Code to determine the authority and extent of state action in this regard*.

87. In the last sentence of the Article 133 it is provided that "within administrative procedure, private interim orders cannot be made". It is recommended to review this sentence since the notion "private interim order" is a quite unclear and vague term.

88. **Article 134** - This article overlaps partly with the Article 15 which provides the obligatory nature of judicial acts. It should be reviewed whether it is necessary to have it here or the respective provisions could be added to the Article 15.

89. **Article 145 par 1** - The subject of the administrative court proceedings is an adopted (issued) administrative act. It is therefore quite burdensome for the plaintiff to "*prove the time when he became aware of a violation of his rights, freedoms and legitimate interests*". It is advised to reconsider this provision.

90. **Article 147 par 2 subpar 3** - According to the Article 38, the defendant is an administrative body or an official, to whom the claim is brought in court. In that regard, it is recommended to omit this part of the requirements for claim, since "the full name of the defendant, location, bank details, business identification number or subscriber's number of cellular communication and the electronic address of the defendant" are not necessary for public body and probably do not exist.

VI. Conclusions

91. The Code on administrative procedures and process will replace a number of laws in the field of administrative procedures and administrative justice, notably the current law on administrative procedures (adopted in 2000, with changes and amendments as to April 2016). It represents an important step in establishing clear rules in the field of administrative procedures and administrative justice. The reform is well prepared and the draft Code is of good quality. The text integrates a wide range of legal provisions filling a number of existing gaps in national legislation and introducing new mechanisms and procedures introducing positive international examples. The text if adopted, could give an important impulse to further reforms in the administrative field.

92. The drafters decided to integrate in a single Code both the administrative procedures and administrative court proceedings which is a completely new approach in the legal tradition of Kazakhstan. This represents a major challenge since the text has to provide a solid and sensible legal background for regulating the relations between individuals and public administration and dispute resolution mechanisms in line with the Constitution of Kazakhstan and international standards.

93. However, the draft could be further improved through a number of adjustments and changes. The Venice Commission's main recommendations are as follows:

1) The Code gives an extensive list of definitions and principles applicable in administrative procedures and judicial proceedings, however in some provisions there is a clear confusion between principles and procedural rules. Venice Commission recommends to simplify the principles and to place the procedural rules into respective articles of the Code. This approach could contribute to normative consistency, simplicity and transparency of the text.

2) The functions of public authorities concerning the administrative procedures should be as detailed as possible in the text of the Code in accordance with the requirements of Article 3.
3) The role of the prosecutors in the administrative procedures and process could be further reconsidered, limiting their intervention to exceptional cases clearly indicated in specific articles of the Code. Current provisions lack clarity.
4) Provisions on administrative discretion should be reviewed and clarified in order to avoid misinterpretation in future application of the Code.
5) The code should provide clear time frames for administrative procedures and give clear timeframes for judicial proceedings instead of a general notion of "reasonable time".
6) The role and procedural status of witnesses and experts in administrative procedures could be further developed in the text of the draft.
7) Provisions on the suspension of an administrative act pending the adoption of an appropriate decision should be clarified.

95. The Venice Commission would like to thank the Ministry of Justice of Kazakhstan, the Supreme Court and other institutions for the excellent co-operation during the preparation of this opinion and remains at the disposal of the authorities of Kazakhstan for any further co-operation in this field.