Strasbourg, 13 March 2017 **CDL-AD(2017)008**

Opinion 871/2017 Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

KAZAKHSTAN

OPINION

ON THE DRAFT LAW OF THE REPUBLIC OF KAZAKHSTAN ON ADMINISTRATIVE PROCEDURES

Adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017)

On the basis of comments by

Ms Claire BAZY-MALAURIE (Member, France)
Ms Taliya KHABRIEVA (Member, Russia)
Mr Johan HIRSCHFELDT (Substitute Member, Sweden)

I. Introduction

1. By a letter dated 10 November 2016, Mr Donakov, Deputy Head of the Presidential Administration of the Republic of Kazakhstan requested the opinion of the Venice Commission on the "Draft law on administrative procedures" (CDL-REF(2017)009), hereinafter "the draft".

2. Ms C. Bazy-Malaurie, Ms T. Khabriyeva and Mr J. Hirschfeldt acted as rapporteurs on behalf of the Venice Commission.

3. The authorities provided the Commission with a specific document entitled "the concept of the draft law" (hereinafter "the concept note") which included the information on the reasons for adoption and the logic of the draft law. In February 2017 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. Representatives of the Venice Commission had an opportunity to exchange with the authorities on these issues during the visit to Astana on 21-22 February 2017. The delegation is grateful to the Kazakh authorities for the excellent co-operation before and during the visit.

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 rapporteurs and following the exchange of views with Mr Talgat Donakov, Chairman of the Council on Legal Policy under the President of the Republic of Kazakhstan, and was adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017).

II. Preliminary remarks

6. In recent years the authorities of Kazakhstan engaged in a number of legal reforms aimed at modernising the procedural legislation in the country. The new draft law regulating various administrative actions on the basis of a uniform procedure is part of this ambitious process. According to the concept note provided by the authorities 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 draft.

7. The 2016 draft law introduces a number of concepts for the operation of public administration as well as brings new procedures compared to the previous acts in this field. The need for ensuring legal certainty and a transparent legal framework for relations between individuals and public administration seem to be the main objectives of the draft. This text has an ambition to bring radical changes to the way the administrative bodies deal with individuals and private entities; however, the very short time limits introduced by this law for different administrative actions will certainly be challenging and put additional pressure on civil servants. On the other hand, and considering the detailed nature of the law, it is also

[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.

important that the reform does not create unnecessary bureaucratic procedures that would compromise the confidence of the population in the reform.

8. The Republic of Kazakhstan is not a member of the Council of Europe. However the concept, the subject and the main 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. 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 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.

9. The analysis of the draft suggests that there is a positive effort aimed at bringing the administrative procedure closer to the ones other procedures already used in the national legal system, taking into account, among other issues, the generally recognized standards used in the judiciary. This is reflected in the rules of evidence used in the administrative procedure, expert opinions, etc. Such an approach is positive and contributes to the development of common principles of procedural law in the Republic of Kazakhstan (while respecting the specific characteristics of each procedure). The detailed provisions of the draft law allow the effective practical application of these rules respecting the balance between rights and obligations of individuals and ensuring a fair settlement of different administrative cases.

10. The provisions of the draft law will be considered article by article, 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.

III. Specific comments on the provisions of the law

A. Concepts and terminology used in the draft

11. The list of the basic concepts set forth in Article 1 of the draft needs to be extended, in particular by including the definitions of the various types of applications filed by citizens. The draft does not provide a clear distinction between the procedure of consideration of

citizens' applications (in their various versions) and dealing with citizens' complaints in the special administrative procedures. This appears also in terminology used in different articles of the examined draft.

12. For example, in accordance with subparagraph 1 of par. 2 of Article 3 of the draft law, it will not cover the "appeals of individuals and legal entities, containing proposals, requests or comments". In order to avoid unjustified refusals on formal grounds, it would be useful to include clear definitions of "proposal", "request" and "comment". The same observation can be made in relation to paragraph 1 of Article 32 which makes a distinction between "application by natural or legal person" (par. 1) and "administrative complaint "(par. 3). It would be useful to include in Article 1 of the draft the definition of "application" and "administrative complaint", specifying the legal difference between them. The Law does not include the formal requirements on the registration of complaints. Detailed provisions on applications appear in Article 33 of the draft. However, subsequent articles 35, 36, 48 of the draft on different procedures deal only with applications of physical and legal entities without providing any important specific procedural rules for "complaints"[2].

13. In this context it should be observed that the Law of the Republic of Kazakhstan of 12 January 2007 № 221-III «On the order of consideration of applications of physical and legal persons (with changes and amendments as of December 4, 2015) provides that "a complaint" may also be considered according to the procedure established by the Law № 221-III. Thus, the scope of application of the examined draft and the Law № 221-III should be clearly defined.

14. There are two synonyms in par. 1 of article 3 of the Draft "the activities of administrative bodies" and "concrete actions of administrative bodies". There are no provisions in the draft establishing the distinction between them. In this regard, it is recommended to clarify the corresponding provisions of the draft.

Timeframe

15. In par. 2 of article 6 it could be useful to clarify if running of the time period of consideration of the case starts from the moment when the first administrative authority receives the case or from the moment when the case is transferred to the competent authority. This uncertainty seems to reappear in par. 2 of article 48 which stipulates that "the administrative procedure starts from the date of registration of the application in the administrative body or from the first action taken by the administrative authority". In addition par. 1 provides that "administrative procedures shall be conducted in thirty calendar days, unless otherwise provided by the legislation of the Republic of Kazakhstan". Thus the clarification of the moment when the actual administrative procedure begins (the start of the thirty days timeframe) would have real legal significance.

Interaction between different administrative bodies

16. Provisions of articles 8, 9 and 10 of the draft regulating the mutual assistance between the administrative authorities might need clarification as to an obligation of providing an answer to a request for mutual assistance within three days. It remains unclear when this timeframe starts and what are the consequences if the request is not answered.

[2] In their clarifications provided to the rapporteurs, the authorities insisted that the law would be covering all administrative procedures with the exception of:

1) administrative offences which fall under criminal or civil procedure legislation;
2) strategic, budget and economic planning regulated by specific laws of Kazakhstan;
3) drafting of different legal acts covered by specific legislation on legal acts.

17. The drafters could also consider, for a better understanding of the interaction between administrative bodies, to put articles 4, 6 and articles about mutual assistance (8 to 10) in a more coherent way.

Treatment of cases and applicable principles

18. Article 14 of the draft prohibits the administrative authority to take a) different resolutions for different cases with the same essential factual circumstances (part 3), and b) identical resolutions at different cases with different essential factual circumstances (part 4). On the one hand, this may contribute to the unity of the judicial practice in the country where the doctrine of judicial precedent is not applied. On the other hand, these provisions do not ensure compliance by the administrative authority with the principle of proportionality in the administrative procedure. The principle of equality of treatment could also be compromised. The burden of evaluation of the similarities or differences of the significant circumstances of the case should fall on the administrative body, however, neither legal doctrine nor legal act establish any criteria or methods for such assessment. Moreover, item 5 of article 14 of the draft empowers the administrative authority to reverse its earlier decisions in the case if there are new significant circumstances and to take other discretionary decision (i.e. sets the particular discretion). It would also be appropriate to deal in this article with the duty to present the findings and to add reference to the principle of transparency.

19. Par. 1 of article 15 of the draft allows to burden persons with obligations or to refuse to grant any right for the purpose of meeting the formal requirements only in cases "as the mandatory condition provided by law".

20. This clarification makes sense since the Law of the Republic of Kazakhstan No. 480-V "On legal acts" adopted on April 6, 2016 (article 1) makes a distinction between "law" and "legislation", specifying that the latter, in addition to the laws, also includes "the decree of the President of the Republic of Kazakhstan having the force of law, the resolution of the Parliament of the Republic of Kazakhstan, resolutions of the Senate and the Majilis of the Parliament of the Republic of Kazakhstan" and others[3].

21. An uncertain term "harm" included in part 2 of article 15 of the draft should also be specified. According to this article the failure by a person to follow formal requirements should not "be used to his/her harm ". The concept of "harm" is fairly clearly established in civil law, but it is hardly applicable in this case. This norm could be redrafted with the aim of achieving greater legal certainty.

22. Article 16 of the draft establishes the principle of the protection of the right to confidence. However, the term "confidence" and the content of this right are not disclosed in the article or in any other law. Therefore the protection of such unclear public relations by the law is questionable.

23. The wording of par. 1 of article 20 of the draft does not meet the principle of legal certainty (including the legality and predictability of action). According to this article "the administrative authorities may not require individuals to take such actions which they have already taken as part of other activities." It is advisable to clarify the meaning of "other activities".

24. Article 22 makes reference to “other applicable principles”. Some of them were referred to in the clarifications provided by the drafters – objectivity, impartiality of public

[3] The text of the law can be consulted on: http://online.zakon.kz/Document/?doc_id=37312788#pos=104;-153.

administration or protection of the right to private life. The text of the draft would benefit from more clarity on such applicable additional principles.

B. Main procedural provisions

Participation of minors

25. Par. 2 of Article 25 provides that "the administrative authority has the right to involve in such cases juveniles or individuals engaged in recognized partial capability". The UN Convention on the Rights of the Child[4] provides that:

> *Art. 3.1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
>
> *Art. 12*
> *1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
> *2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

26. It could be argued that the right for the administrative authority stipulated in article 25 rather should be provided for as an obligation.

Participation of the applicant in the procedure and representation

27. It would be advisable to add in article 26 (and perhaps also in article 39) to stipulate that the administrative authority has the right to demand the applicant etc. to be present in front of the authority.

28. Par. 1 of article 27 establishes a mandatory rule, imposing an obligation for a person without permanent residence in the Republic of Kazakhstan to appoint a representative "authorised" to receive documents related to the administrative procedure. The administrative authority is bound to send to this authorised person all documents concerning the person involved in the administrative procedure.

29. In this regard, it is possible that the establishment of mandatory rules and the wording "should appoint an authorised person" creates unequal conditions for persons permanently residing on the territory of the Republic of Kazakhstan and persons without a permanent place of residence. Meanwhile, according to part 4 of article 12 of the Constitution of the Republic of Kazakhstan "foreigners and stateless persons in the Republic shall enjoy rights and freedoms as well as bear responsibilities established for citizens unless otherwise stipulated by the Constitution, laws and international treaties".

30. For the purpose of the respect of constitutional principle of equality it would be better to use "*may*" instead of "*should*". On the one hand, such a change would allow a person

[4] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx

without permanent residence on the territory of the Republic of Kazakhstan to appoint an authorised representative to receive documents. On the other hand, it does not preclude such a person to defend his or her own interests and make a personal appeal to the administrative authorities for obtaining necessary documents (for example, during the period of temporary stay in the territory of Kazakhstan).

Information about the applicant and access to information concerning the application

31. The wording of par. 1 of article 33 says that the application «may» include related information. This wording is in the line with the recommendations of par. 1, 2 of article 4 of the Council of Europe Convention on access to official documents (CETS No. 25), according to which «An applicant for an official document shall not be obliged to give reasons for having access to the official document», «Parties may give applicants the right to remain anonymous except when disclosure of identity is essential in order to process the request». In those countries where such a right exists, it is considered unnecessary to require the applicant to reveal his/her identity in cases where the applicant is not obliged to specify the reasons for her/his request.

32. At the same time it is unclear how an administrative body may prepare a response to an application, if it does not include, for example, an address of the applicant, or a brief summary of his or her request. It would be useful to establish the list of basic information materials that an application must include in order to have his/her request processed.

33. Article 35 would be the main article dealing with registration. A paragraph could be added about evidence of dates of sending the application and/or required data. (See also article 58).

34. Article 39 does not provide any indications as to the proof confirming an administrative act adopted "*in the oral or tacit form*". The provision in the law about tacit acceptance of applications or appeals could be further clarified. The existing reference in article 58 does not seem to be sufficient.

35. Par. 5 of article 41 of the draft establishes the right of parties to administrative procedures to get copies of documents and other materials related to the case. It would be appropriate to indicate (at least in general terms) any situations when this right could be restricted (for example, in connection with the need to protect state secrets, commercial secrets, secrecy of private life of other individuals, etc.). Moreover, par. 4 of the same article provides for the possibility to refuse access to documents which include state secrets or other restricted information protected by law.

36. The list of grounds for restricting the access to official documents is provided in particular in par. 1 of article 3 of the Council of Europe Convention on access to official documents (CETS No. 25).

37. It would be advisable if the draft includes a more detailed and comprehensive (detailed) regulation of the following issues: a) the order of review the information classified as state secrets for persons with appropriate security clearance to this kind of information (according to the legislation of Kazakhstan state secrets are divided into state secret and official secret); b) clarify the phrase «other secret information protected by law ». This provision of the draft seems too uncertain. It will be better to include more detailed differentiation of provisions concerning the access of participants of the administrative procedures to specific types of restricted information.

38. Par. 2 of article 44 requires an administrative body to request evidence and to make it available for the case if the person involved in the administrative procedure has no

possibility to obtain such information (as stated in a specific petition). It would be useful to consider possible exceptions to this rule, since it is not clear, how an administrative body (which is not a court) could perform such action, for example, in respect of the property of other citizens or documents of legal entities which might include commercial secrets.

Length of procedure

39. The first article in the draft that refers to judicial proceedings is article 50. It stipulates that if the administrative authority does not adopt an administrative act (during a fixed period of the administrative proceedings) initiated on the basis of an application, the person can apply directly to the court. The draft provides maximum 90 days, including two possible renewals, for the duration of administrative procedures (see par. 1 and 3 of article 48). Does this wording mean that prior to the expiration of the 90-day period the applicant cannot go to court? This rule could be interpreted as limitation to the right to access to a court of law.

40. Recommendation Rec (2001) 9 of the Committee of Ministers of the Council of Europe 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) authorises the use of alternative ways (such as the "internal review") as necessary condition for the start of the proceedings (see par. 78 of the Recommendation). This is seen as a way to reduce the workload of the court and bring the administration closer to individuals.

41. It appears that the period for completing the administrative procedure preventing a person to go to court, should not be excessively long. For example, the above mentioned Recommendation explicitly states that «*the choice between litigation and alternative procedure is compensated by... recommendation that national legislation prescribes a rigid and reasonable time of completion of the alternative procedures in order to provide the widest possible access to the courts in accordance with the European Convention on Human Rights*».

42. Various Member States of the Council of Europe use different procedural timeframes before there is an opportunity to appeal to the court. The explanatory memorandum to Recommendation (2004) 20 of the Committee of Ministers of the Council of Europe to Member States on judicial review of administrative acts states that «applicants are usually granted a period of 30 days in Albania, Azerbaijan, Finland, Hungary, Romania and Switzerland, 60 days in Belgium and Italy, 6 months in Malta and Norway and 6 weeks in Austria and the Netherlands». Thus, there is certain discretion in the choice of options of legal regulation by the legislator.

43. As regards administrative and judicial proceedings, the draft law would clearly benefit from provisions (in addition to articles 50, 63, 70 and 72) explaining the link between administrative appeal and litigation proceedings.

Different forms of an administrative act

44. The norm of part 1 of article 53 requires further clarification. This provision allows adopting the administrative act in a conclusive form[5] – in the form of light, sound signals and signs, pictures and «other». Such edition includes a significant opportunity for legal uncertainty. In addition, under part 4 of article 58 of the Draft the conclusive administrative act declares by bringing it to the attention of the person by making this act of visible nature or « made available for perception by another way». This uncertain rule could contribute to

[5] In the meaning "*konkludent*" in German or «*конклюдентная форма*» in Russian.

its subjective interpretation by law enforcement officials. So it seems necessary to stipulate the methods of bringing the accepted conclusive administrative act to the attention of the persons concerned more clearly. The law should be very precise and should avoid such formulations as «other ways» or «otherwise», especially in the field of conclusive management action.

Complaints and appeals against administrative acts

45. Article 60 would have to include a provision concerning the suspension of the execution of an administrative act for the period prior to the adoption of a decision by a competent administrative authority or court in case of appeal by the person concerned.

46. It seems the second sentence of par. 5 of article 62 could be put in a separate paragraph or even in a separate article of the draft because of its significance for the interests of the participants of administrative procedure.

47. Article 74 of the draft would benefit from more clear and detailed provision on the procedure and conditions of implementation of monetary and direct enforcement using the financial and direct coercion in the execution of administrative acts.

IV. Conclusions

48. The new law on administrative procedures represents an important step in establishing clear rules in the field of administrative law. The reform is well prepared and the draft is of good quality. Such an act may become an important tool for the executive and local self-government bodies of the Republic of Kazakhstan.

49. 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 and providing additional guarantees in the field of administrative law.

50. However, the draft could be further improved through a number of adjustments, clarification of terminology used and additional references to other legal acts applicable in the field of administrative procedures. It could also be useful to complete the text with a clearer link to the existing legal framework on judicial proceedings on administrative matters.

51. The Venice Commission remains at the disposal of the authorities of Kazakhstan for any further co-operation in this field.